



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 22-001

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

### **Appearances:**

Cara M. Briggs, Esq., attorney for petitioner

Ferrara Fiorenza, PC, attorneys for respondent, by Susan T. Johns, Esq.

## **DECISION**

### **I. Introduction**

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from a decision of an impartial hearing officer (IHO) which determined that the educational program and services the respondent's (the district's) Committee on Special Education (CSE) had recommended for her son for the 2020-21 school year was appropriate. The appeal must be sustained.

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

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

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

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

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

This appeal arises from a decision of an IHO that was issued after remand (see Application of a Student with a Disability, Appeal No. 21-103).

The student has received diagnoses of an autism spectrum disorder, a learning disability in reading (dyslexia), writing, and mathematics (dyscalculia), an attention deficit hyperactivity disorder combined type (ADHD), and a developmental speech or communication disorder, and has demonstrated challenges with anxiety, sensory processing/modulation, executive functioning, and pragmatic language (Dist. Exs. 3 at pp. 1, 25-27; 8 at pp. 1, 3; 9 at p. 1; 10 at p. 8). The student received services through the Early Intervention Program (EIP) and the Committee on Preschool Special Education (CPSE) and remained in preschool for an extra year (Dist. Ex. 8 at p. 1). The student was declassified prior to entering kindergarten but was later found eligible for special

education services during first grade as a student with autism (id.). The student was recommended for and received consultant teacher services in the public school up until the 2019-20 school year (seventh grade) (id.). While attending school in the district, the student also received academic intervention services (AIS) in math, reading, and writing (Dist. Exs. 3 at pp. 6-13; 8 at p. 1).

The CSE convened on June 13, 2019 to develop the student's IEP in preparation for the 2019-20 school year (see Dist. Ex. 4). Based on its review of teacher reports and classroom functioning, parent information, and committee discussion, the CSE recommended that the student receive integrated co-teaching (ICT) services five times a week for 45 minutes each in English language arts (ELA), math, science, and social studies (id. at p. 15). The CSE also recommended that the student be provided with two 20-minute sessions of small group speech-language therapy per week, access to a word processor, a speech-language consultation for five hours per year, an autism consultation for 10 hours per year, a 30-minute quarterly team meeting which would include the parents, and an occupational therapy (OT) consultation for four hours per year (id. at pp. 15-16). The parents unilaterally placed the student at a State-approved nonpublic school, the Norman Howard School (Norman Howard), for the 2019-20 school year (Dist. Ex. 14 at p. 33).

An individualized education services program (IESP) was created on October 28, 2019, to be implemented while the student was enrolled at Norman Howard for the 2019-20 school year (see Dist. Ex. 7; see Tr. p. 85).<sup>1</sup> The IESP provided for one 45-minute session of small group speech-language therapy, as well as an autism consultation for 10 hours yearly and an OT consultation for four hours yearly (Dist. Ex. 7 at pp. 3, 14).

In December 2019, the district sought and obtained consent from the parents for a reevaluation of the student consisting of a psychological evaluation, social history, and a speech-language evaluation (Dist. Exs. 11 at p.1; 12). The CSE convened on January 21, 2020, to consider the results of the reevaluation (Dist. Exs. 16 at p. 1; 17). The evaluations reviewed by the CSE indicated that the student had average abilities but that his academic skills were delayed (Dist. Ex. 17 at p. 2). In addition, the student's receptive and expressive language skills were within the average range, and he was showing improvement in his social skills class (id.). The student's teachers reported an increase in the student's pacing in the classroom and noted that it was difficult to get the student to engage in unpreferred activities (id.). The CSE recommended that the duration of the student's small group therapy sessions be increased from 20 to 45 minutes (compare Dist. Ex. 4 at p. 15, with Dist. Ex. 17 at p. 13).

The 2019-20 school year was the subject of a prior impartial hearing, culminating in an IHO decision dated January 3, 2020 (Dist. Ex. 14 at p. 50). The IHO in that matter found that the district offered the student a FAPE because the proposed ICT services offered an appropriate placement within the least restrictive environment (LRE) (id. at p. 43). The IHO held that the ICT services and the 10 hours of autism consultation would address the student's central need to remain focused and noted evidence showing that the student would receive additional services of learning lab and AIS services (id. at p. 44).

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<sup>1</sup> The October 2019 document is labeled an IEP but is identified both as an IESP and an IEP in the hearing record to be implemented at Norman Howard (Tr. pp. 5, 85, 162).

On May 19, 2020, the CSE convened to develop the student's IESP for the 2020-21 school year (see Dist. Ex. 22). Attendees at the May 2020 CSE included the CSE chairperson/district representative, the student's parents, the student, the parents' attorney, and staff from Norman Howard including a special education teacher, speech-language pathologist, and school principal (Dist. Exs. 21 at pp. 1, 3; 22 at p. 1).<sup>2</sup> The participants from Norman Howard and the parents opined that the student should be placed at Norman Howard for the 2020-21 school year; however, the district representative indicated that the district did not believe that Norman Howard was the student's LRE (Parent Ex. A at p. 13-17; Dist. Ex. 21 at p. 2). The May 2020 IESP recommended two 45-minute sessions of speech-language therapy per week and four hours of OT consultation yearly (Dist. Ex. 22 at pp. 11-12).

Because the district personnel did not believe the student should be placed in a nonpublic school if the school was selected by the district (versus a parentally selected school under an IESP), the district sent a CSE meeting notice dated June 10, 2020, that identified three district staff members who would attend a CSE meeting to develop an IEP (Dist. Ex. 23 at p. 2, see Tr. p. 228). The CSE convened on June 18, 2020, in order to create an IEP for the 2020-21 school year (see Dist. Ex. 25). The attendees at the June 2020 meeting included the CSE chairperson/district representative, two regular education teachers, two special education teachers, a school psychologist, a speech-language pathologist, a school counselor, and the parents (Dist. Ex. 23 at p. 6). The June 2020 CSE recommended that the student receive ICT services five times per week in four classes (ELA, math, science, and social studies) for 40 minutes each (Dist. Ex. 25 at p. 12). In the June 2020 IEP, the CSE also recommended six 30-minute sessions of speech-language therapy per month, three hours of autism consultation per year, five hours of speech-language consultation per year, and four hours of OT consultation per year (*id.* at pp. 12-13). The IEP also identified supports for the student's management needs and accommodations for the student, including clearly stated expectations for behavior and academics, predictable routines and warning of changes to schedule, extended time to complete writing tasks, cues and checklists for writing and editing, tasks chunked into smaller more manageable pieces, preferential seating so that the student was able to move freely, cues to focus during directions, longer directions broken down into smaller steps, frequent checks for understanding, gentle verbal and nonverbal cues to return attention to task, gentle cues to move past when perseverating, praise and encouragement, use of sensory based materials as advocated for by the student, opportunities to stand when working, and visual aids (*id.* at pp. 10-11).

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

By due process complaint dated August 7, 2020, the parent asserted that the district denied the student a free appropriate public education (FAPE) for the 2020-21 school year (Dist. Ex. 1 at p. 1).

In addition to a narrative containing allegations—which is summarized more fully in the SRO decision remanding this matter—the parent set forth a list of bulleted claims regarding the

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<sup>2</sup> The May 12, 2020 CSE meeting notice and the meeting information section of the May 19, 2020 IEP indicate that a speech-language therapist attended the CSE meeting (Dist. Exs. 21 at p.1; 22 at p. 1). The individual who attended the meeting in that capacity testified that she was certified as a speech-language pathologist (Tr. pp. 466-67).

IEP created for the 2020-21 school year (Dist. Ex. 1 at pp. 6-7). The parent asserted that the "CSE failed to develop an IEP to meet the Student's unique academic, speech-language, physical and social/emotional needs to enable him to make meaningful progress in his educational program"; the IEP did not adequately describe the student and his needs; the CSE failed to appropriately consider parent concerns and failed to adequately include parent concerns in the IEP; the IEP failed to include necessary specialized programming and services to meet the student's reading, spelling, writing, math and executive functioning needs; the IEP failed to provide appropriate OT services to meet the student's sensory, fine motor, visual perception and writing needs; the IEP failed to provide appropriate programming and services to meet the student's social communication needs; the IEP failed to provide appropriate programming and services to meet the student's social/emotional needs; and that the IEP did not include parent counseling and training as an IEP service (*id.*). Further, the parent listed several other alleged procedural violations, failures to implement by the district and defects in the development of the IEP on the part of the CSE, including : that the CSE delayed the fall 2019 meeting resulting in a delay in the development of an IESP and delay in the commencement of IEP-mandated speech-language services; neither the OT consult services nor the autism consultation services were delivered per the IEP; the parent was not provided with the present levels of performance information that other CSE members were using to make their decisions; the parent's ability to participate in her child's education was significantly impeded because the outcome of the CSE meeting was predetermined or determined solely by the CSE chairperson, rather than the committee; the parent's ability to participate in her child's education was significantly impeded by the defective CSE meeting notice and the inclusion of the five additional CSE participants; the CSE excluded the student's special education teachers and/or special education providers from participating in the CSE; the CSE failed to consider or recommend direct OT services and failed to consider or recommend any OT goals; the OT consultant from the 2019-20 school year neither participated in nor provided a written report to the CSE; the CSE failed to consider or make a determination regarding whether the student needed 12-month services; the CSE failed to consider or make a recommendation regarding the student's need for assistive technology devices and/or services; and the CSE failed to consider recommending parent counseling and training (*id.* at pp. 7-8). The parent argued that the procedural violations individually and collectively substantively deprived the student of a FAPE (*id.* at p. 8).

For relief, the parent requested that the IHO order the CSE to reconvene within 10 days and develop an IEP that placed the student at Norman Howard with all appropriate related services including OT, and an order directing additional services for the district's failure to provide the student with a FAPE in an amount, type and scope to be determined by the IHO (Dist. Ex. 1 at p. 9).

## **B. Impartial Hearing Officer and State Review Officer Decision**

An impartial hearing convened on October 29, 2020 and concluded on December 15, 2020, after four hearing dates. In a decision dated March 29, 2021, the IHO found that the district offered the student a FAPE for the 2020-21 school year (IHO Decision I at p. 23).

The IHO reviewed the student's educational history and the CSE's decision to intensify the student's proposed services in the IEP for seventh grade (IHO Decision I at pp. 4-5). The IHO explained that the issue was whether the 2020-21 CSE drafted an IEP that was reasonably designed to confer educational benefit (*id.* at p. 13). The IHO found that the findings from a prior

unappealed IHO decision concerning the 2019-20 school year were clear and unambiguous (*id.*). The IHO disagreed with the parent's argument that the findings regarding the 2019-20 school year had no bearing and found that "[e]very subsequent year builds on the year previously and the District is under an inherent obligation to review the previous plan in addition to the student's current function in order to craft next year's educational plan" (*id.* at p. 14). The IHO stated that "[i]dentifying the interventions and services that worked last year, modifying or changing the ones that didn't is an essential step in the formation of a subsequent IEP" (*id.*). The IHO concluded that he must review the 2020-21 school year within the framework of the prior unappealed IHO decision (*id.*).

Turning to the 2020-21 school year, the IHO held that there was no dispute in the due process complaint notice that the IEP did not contain an accurate description of the student's present levels of performance or needs, and "no evidence, data, or other information" presented to either the May or June 2020 CSE that indicated the student's special education needs had increased since the previous IEP developed in June 2019 (IHO Decision I at pp. 15-16). The IHO found that there was no objective evidence leading to a conclusion that the student must be placed in either a special class or in a private school (*id.*). The IHO determined that the district was obligated to place the student in the LRE and that the CSE recommendation of an ICT program was significantly less restrictive on the continuum of services compared to an approved private school for students with disabilities (*id.* at pp. 16-17).

Next, the IHO discussed parental concerns and held that the parents were active participants in the June 2020 CSE meeting, even if they disagreed with the outcome (IHO Decision I at p. 17). The IHO then turned to specific procedural violations alleged by the parent, holding that the procedural violations alone were insufficient to warrant finding against the district (*id.* at p. 18). The IHO held that the parent's argument that the Norman Howard staff should have attended the June 2020 CSE meeting was without merit because the district did not have authority over the private school personnel and there is no statutory requirement that they be included, noting that, while the district did not invite them, they were not prohibited from attending at the request of the parent (*id.*). The IHO determined that the district failed to provide notice of the additional June 2020 CSE participants but found that it was a procedural violation that did not result in a denial of a FAPE (*id.*). The IHO noted that the parents did not object or request an adjournment at the June 2020 meeting and the presence of additional attendees at the meeting did not significantly impede the parents' opportunity to participate (*id.* at pp. 18-19). The IHO found that the record did not establish that the district predetermined the outcome of the CSE meeting, the district did not ignore or minimize data that would have suggested a more appropriate placement, and that the parties had differing views of the most appropriate placement for the student (*id.* at p. 19).

The IHO concluded that the parent's allegations regarding procedural violations did not satisfy the additional requirements needed to constitute a denial of a FAPE (IHO Decision I at p. 19). The IHO ruled that "the CSE and the majority of the participants crafted an IEP that was reasonably calculated to confer educational benefit" and that the CSE considered the previous year's proposed placement, which had been found to confer a FAPE to the student (*id.*). According to the IHO, the CSE "reviewed the student's current function against that of last year and determined, correctly, that the improvement exhibited by the student at the parental placement did not warrant continued placement" at that school (*id.* at pp. 19-20). The IHO explained that the parent was proceeding from a position of "if it is not broken, don't fix it" but that the district is

charged with a greater responsibility that considers the LRE (*id.*). The IHO noted that, although the student saw great success at the parental placement, it was not the district's responsibility "to mirror that success," and, instead, the district was required to provide the student the most appropriate placement based on his "strengths, deficits, and in an environment that affords them the opportunity to remain among . . . similarly aged peers with a variety of different levels of functioning and backgrounds" (*id.* at p. 20). The IHO held that the district met its obligation (*id.*).

Next, the IHO turned to an analysis of the appropriateness of the unilateral placement, explaining that, although it was not necessary, it would be included due to "consideration of the reader and any appellate scrutiny" (IHO Decision at p. 20). The IHO held that the student's needs were met at Norman Howard and that the student found success within its programs and clearly benefitted from the small, specialized instruction (*id.*). However, the IHO noted that "the placement c[ould] be arguably considered an optimal placement for the [s]tudent" but indicated that this was "neither the standard nor the requirement within the context of the IDEA" (*id.*). Still, the IHO found that the parent would have succeeded in her burden to prove that Norman Howard was an appropriate placement for the student if the district did not offer the student a FAPE (*id.* at p. 21). With regard to equitable considerations, the IHO found that while the parents participated in the CSE meetings, actively discussed matters and did not thwart the district, they also remained "singularly focused on maintaining the [s]tudent's placement at the parental placement (*id.* at p. 22). The IHO found that the parent also failed to acknowledge that other placements might exist that could confer educational benefit upon the student (*id.*). Although making factual findings, the IHO did not rule on whether equitable considerations weighed in favor of a particular outcome because the district prevailed by offering the student a FAPE (*id.*).

In a decision dated June 9, 2021, an SRO sustained the parent's appeal in part and remanded the matter to the IHO for further proceedings (Application of a Student with a Disability, Appeal No. 21-103). The SRO found that the IHO had largely based his determination that the student had been offered a FAPE for the 2020-21 school year on a prior unappealed IHO decision. The SRO noted that such a practice came "perilously close to ratifying a specific type of predetermination by the district." The SRO warned that "[t]here is a danger, therefore, when the student's program has gained the stamp of approval of an IHO in a prior proceeding, that the IHO's decision will overdetermine the subsequent recommendations of the CSE to the detriment of the comprehensive review the CSE is required to undertake based on the information before it at the time of the annual review." The SRO found that, due to the large number of due process complaint notice claims that were left unaddressed, it appeared that the IHO had improperly relied on the unappealed IHO decision as the main framework of analysis for the 2020-21 school year, which resulted in errors and oversights that required remand.

With respect to the issues to be considered on remand, the SRO directed that the hearing record be further developed on the issue of whether or not AIS and learning lab constituted specially designed instruction required to be included on the student's IEP. In addition, the SRO directed the IHO to clarify whether or not he considered the provision of AIS and learning lab in finding that the student was offered a FAPE. The SRO also set forth specific issues that had not been addressed at all by the IHO, which included but were not limited to (1) whether the listed needs and present levels of performance were appropriate, (2) whether the district sufficiently evaluated the student to identify the student's educational needs, (3) whether the CSE considered the evaluative information that was available, (4) whether the CSE should have considered offering the student 12-month services, and (5) whether the alleged failure to include OT services, assistive

technology services, and parent counseling and training in the June 2020 IEP resulted in a denial of a FAPE (see Dist. Ex. 1).<sup>3</sup> The SRO also noted that the parent raised claims regarding implementation of services under the IESP in the due process complaint notice, which were not addressed by the IHO and should be upon remand (id. at pp. 7-8).

The SRO then affirmed the IHO's determinations related to certain procedural violations that the IHO found did not rise to the level of a denial of FAPE. Specifically, the SRO agreed that the district's failure to provide notice of the CSE participants was a procedural violation but found that the presence of additional attendees at the June 2020 CSE meeting whose attendance was not anticipated by the parent did not significantly impede her opportunity to participate in the CSE process. In addition, the SRO found that the failure to include staff from Norman Howard during the second CSE meeting in June 2020 was not a procedural violation, as the parent was free to invite them. The SRO also agreed with the IHO that there was no evidence that this failure denied the parent the ability to participate, and the information provided by Norman Howard staff and providers in May 2020 was incorporated into the June 2020 IEP as the June 2020 CSE adopted the present levels of performance created by the Norman Howard staff. The SRO further found that the hearing record supported the IHO's determination that the June 2020 CSE did not predetermine the student's program and placement. The SRO directed that on remand the IHO should address any other procedural violations asserted by the parent in the due process complaint notice that were not addressed in his decision.

In conclusion, the SRO noted that to the extent the IHO's factual findings were a precursor to a finding that equitable considerations did not favor the parent, those findings on the record evidence presented thus far, even if accurate, were not sufficient to support a reduction or denial of reimbursement. Rather, the SRO indicated that the IHO's findings that the parent was a full and active participant in the CSEs would tend to support reimbursement, and the SRO left the final determination of equitable considerations to the IHO upon the fully developed hearing record.

### **C. Impartial Hearing Officer Decision After Remand**

Following remand, the parties convened for a prehearing conference on August 24, 2021 (Aug. 24, 2021 Tr. pp. 1-29).<sup>4, 5</sup> The parties discussed the lists of issues each had prepared at the request of the IHO to be determined during the proceeding (Aug. 24, 2021 Tr. pp. 4-11; IHO Exs. III; IV). The parties and the IHO next discussed whether or not the hearing record needed to be expanded by calling additional witnesses and/or with the presentation of additional evidence (Aug.

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<sup>3</sup> The SRO noted that the parent had asserted that the IHO failed to consider her claims regarding the student's need for specially designed physical education but found that the claim was not raised in her due process complaint notice. The SRO left the determination as to whether that issue was ripe for review after remand to the IHO.

<sup>4</sup> The transcript of proceedings that took place after remand was not paginated consecutively with the transcripts of the proceedings before remand. To the extent it is necessary to reference the proceedings after remand, citations to the transcript will be preceded by the date of the proceedings.

<sup>5</sup> The transcript from the August 24, 2021 prehearing conference indicates that another prehearing conference was held on an earlier date but was not recorded, and that a portion of the August 24, 2021 prehearing conference was not recorded (Tr. p. 4). During the first prehearing conference, the parties were instructed to communicate with each other and identify the issues to be determined by the IHO after remand (id.).



24, 2021 Tr. pp. 12-13). Following the discussion, the parties agreed and the IHO determined that he would close the fact-finding portion of the proceeding and allow the parties to argue the merits of the identified issues in a brief and that the IHO would base his determination on those briefs (Aug. 24, 2021 Tr. pp. 13-22; see IHO Exs. V; VI). The IHO indicated that the list of issues presented by the parties would be admitted as IHO exhibits and that the "prior record [wa]s already in the record" and did not need to be "restate[d]" (Aug. 24, 2021 Tr. p. 26).

In a decision dated November 24, 2021, the IHO found that the district offered the student a FAPE for the 2020-21 school year (IHO Decision II at pp. 27, 28, 30). The IHO reiterated that during the second prehearing conference the parties agreed with the IHO's determination that it was not necessary to enlarge the hearing record (id. at p. 3). The parties further stated that they were afforded ample opportunity to present their cases and that no further witness testimony was necessary (id.). The IHO indicated that the decision would be structured to address the "individual issues that were present at the time" of the June 2020 CSE meeting (id. at p. 13).

Initially, the IHO addressed the SRO's finding that he had overly relied on the prior unappealed IHO decision relative to the 2019-20 school year in finding the student was offered a FAPE for the 2020-21 school year (IHO Decision II at p. 13). The IHO stated that the 2019-20 IEP was only relevant to the 2020-21 school year to the extent that it was found to offer FAPE and the June 2020 CSE could rely on the prior IEP as a starting point in its review for the programmatic requirements of the student for the 2020-21 school year (id. at p. 15).

Next the IHO addressed whether or not AIS and learning lab were required to be included on the student's IEP (IHO Decision II at p. 15). The IHO determined that the provision of AIS and learning lab did not qualify as specially designed instruction and neither service was considered in his determination that the student was offered a FAPE for the 2020-21 school year (id. at pp. 16-17). Concerning the student's present levels of educational performance and needs, the IHO reiterated that this information was provided by the staff of Norman Howard and that there was no suggestion that additional information was required to determine the student's needs (id. at pp. 17-19). The IHO further noted that the parent was in agreement with the present levels of performance as outlined by the student's providers at Norman Howard (id. at p. 19). The IHO also found that the district correctly relied on the present levels of performance reported by the staff of Norman Howard because "the CSE did not independently determine additional evaluations were necessary" and that the hearing record did not indicate a need for further evaluation (id.). In conclusion, the IHO determined that the present levels of performance were well-developed and based on the student's then-current functioning as identified and delineated by the staff of Norman Howard and were consistent with the student's progress reports (id. at p. 20).

With regard to OT and assistive technology, the IHO first noted that the June 2020 CSE recommended four hours of OT consultation as a support for school personnel based on the student's ability to produce writing using assistive technology, his age-appropriate gross motor skills, his response to physical movement to regulate himself, and further that the student responded well to scheduled breaks, sensory items, and the ability to stand and move while working (IHO Decision II at p. 20). For those reasons, the IHO found "the CSE was correct in considering if an ICoT class was appropriate for this student" (id.). Next, the IHO found that "the CSE determined that accessing and utilizing technology was a strength" and "[t]herefore assistive technology may be needed but a service to assist, support, and identify what technologies would

be helpful [wa]s not required" (id.). On that basis, the IHO determined that the CSE "was correct to consider that assistive technology as a service may not be needed" (id.).

With respect to parent counseling and training, the IHO found that "the inclusion of any service . . . should not be automatically included (or excluded) unless there [are] unique factual circumstances of the case suggest that its inclusion or exclusion is warranted" (IHO Decision II at p. 21). The IHO then stated that he did "not interpret the regulations to mandate that all parents undergo Parent Counseling and Training" (id.). Next, the IHO stated that even if parent counseling and training was required by State regulation, he did not find "its absence to be a defacto deprivation of the Student's right to a FAPE therefore alleviating the need to make a determination that the IEP as a whole was reasonably calculated to enable the student to receive educational benefit" (id.). The IHO found that the hearing record was "devoid as to any need for parental counseling and in fact . . . suggest[ed] the parent[] [was] well aware of [her] child's deficits and ha[d] taken a proactive role in his education" (id.).

The IHO next addressed the district's failure to recommend resource room services for the student (IHO Decision II at p. 21). While acknowledging that, at the time of the June 2020 CSE meeting, the district did not offer resource room services, the IHO credited the testimony of the district's director of special education that resource room services would have been made available to the student if he required resource room services to receive a FAPE (id. at pp. 21-22).

Concerning the failure to recommend 12-month services, the IHO found that the hearing record did not suggest that the CSE had reasonable cause to consider 12-month services and, even if it had, there was no evidence in the hearing record to suggest that the student's deficits placed him at risk for substantial regression (IHO Decision II at p. 22). With regard to parent participation, the IHO determined that both of the student's parents were active participants in the June 2020 CSE meeting (id.). The IHO further found that the June 2020 CSE was responsive to the parents' concerns but did not recommend the parents' preferred placement at Norman Howard (id. at p. 23).

With respect to an LRE analysis, the IHO found that a prolonged analysis was not required because the student was recommended to attend an ICT classroom in a regular education setting and that the parent's preferred placement was "objectively more restrictive" (IHO Decision II at p. 24). The IHO further stated that the parent's argument that an ICT classroom failed to address the concerns that the placement would overwhelm the student with sensory input and provide social challenges "must be viewed within the larger context of whether the ICoT program [wa]s appropriate at all" (id.). Regarding remote instruction as a result of Covid-19, the IHO determined that the pandemic had no impact on the recommendations made by the June 2020 CSE and to the extent the implementation of the June 2020 IEP included remote instruction, this did not result in a denial of a FAPE (id. at p. 25). The IHO found that "remote measures served as a reasonable alternative given the broader context of the COVID-19 pandemic" (id.).

Next, the IHO addressed the overall appropriateness of the June 2020 CSE's recommendations (IHO Decision II at pp. 25-27). The IHO determined that the student's deficits were identified at the June 2020 CSE meeting, the student had demonstrated improvement year after year, and the evidence indicated that the district was able to provide the core programmatic functions of the Norman Howard program in a regular education environment, and that, taking into account that "the 2019-20 proposed IEP provisioned a FAPE[,] a fair preponderance of the

evidence supports the conclusion that the ICoT program [wa]s reasonably calculated to enable the Student to receive educational progress" (*id.* at pp. 26-27). With regard to the procedural violations alleged by the parent, the IHO found that they did "not satisfy the additional requirements required to find a denial of FAPE" and that the June 2020 IEP was reasonable calculated to confer educational benefit (*id.* at p. 27).

After determining that the district had offered the student a FAPE for the 2020-21 school year, the IHO found that Norman Howard was an appropriate unilateral placement and that equitable considerations would not have warranted a reduction in an award of tuition reimbursement (IHO Decision at pp. 27-29).

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

The parent appeals and asserts that the IHO erred in finding that the student was offered a FAPE for the 2020-21 school year. The parent argues that the IHO gave undue weight to the unimplemented 2019-20 IEP and the prior unappealed IHO decision, which found that the 2019-20 IEP offered the student a FAPE, "instead of confining his consideration to whether" the 2020-21 IEP offered a FAPE based on all of the information available to the CSE at the time it made its decision (Req. for Rev. ¶ 2). The parent argues that, in finding that there was no indication that the student's special education needs had increased in intensity or changed in type or quality from the prior school year, the IHO improperly restricted his consideration to evidence of an "increase in the type or intensity" of the student's needs and improperly ignored the evidence of the student's needs as of the May and June 2020 CSEs (*id.* ¶ 3). According to the parent, the IHO ignored evidence that the information available to the May and June 2020 CSEs demonstrated the student would not progress in a classroom with ICT services and improperly accorded greater weight to district CSE participants that did not have personal knowledge of the student. The parent indicates that information available to the CSEs included evaluations and input provided by the Norman Howard staff that the ICT program was unlikely to produce progress and that placement in that setting would be detrimental. The parent argues that the OT IEE and input of Norman Howard staff demonstrated that the student required a smaller, quieter, more structured learning environment with a decreased instructional pace. The parent also contends that the IHO erred as a matter of law in finding that the recommended ICT classroom was the student's LRE and in his LRE analysis overall.

Next the parent alleges that the IHO's finding that the district was able to provide the core programmatic functions of the student's program at Norman Howard in a regular education setting was contrary to the evidence in the hearing record and that the IHO mischaracterized the testimony of district witnesses. The parent further argues that the IHO's findings underscore his failure to consider the material evidence that shows the disparity between the special education supports that produced progress for the student at Norman Howard and the inappropriate IEP program. In addition, the parent asserts that the IHO's decision does not account for the district's failure to consider the program and supports provided by Norman Howard that produced progress during the 2019-20 school year in making its recommendations for the June 2020 IEP. Specifically, the parent contends that the June 2020 IEP did not address the student's sensory needs, social communication needs, social/emotional needs, need for small group instruction, daily 1:1 specially designed multisensory reading instruction, daily writing instruction, common reading and writing strategies across content areas, specially designed math instruction, direct instruction and built-in

supports and strategies throughout the school day to address the student's executive functioning needs.

The parent also asserts that the IHO erred in finding the June 2020 recommendation for four hours of OT consultation would meet the student's needs and alleges that the CSE failed to consider the OT IEE when making the recommendation.<sup>6</sup> The parent alleges that the IHO failed to hold the district to its burden to demonstrate that an OT consultation would address the student's needs and argues that the student required direct OT services. The parent also argues that the IHO failed to address the parent's claims related to special transportation. The parent also contends that the IHO failed to address her claim that the district did not timely and appropriately evaluate the student in all areas of suspected need and erred in finding that the district relied on adequate evaluative information.

With respect to assistive technology, the parent alleges that the IHO failed to hold the district to its burden to demonstrate that the student did not require assistive technology and that the CSE failed to consider the student's assistive technology needs in all settings and failed to recommend assistive technology. The parent contends the IHO erred in finding that the CSE was correct to consider that assistive technology as a service may not be needed.

Next the parent argues that the IHO failed to hold the district to its burden to demonstrate that the student did not require 12-month services and that the IHO ignored evidence that the student was at risk of substantial regression.

Regarding parent counseling and training, the parent alleges that the IHO erred in finding that the June CSE's failure to consider and recommend parent counseling and training was not a procedural violation. The parent also argues that the IHO erred in his determinations related to resource room services. The parent asserts that the reason the CSE did not recommend resource room services was because the district does not offer resource room services.

In conclusion, the parent asserts that the IHO erred in failing to find that cumulative procedural violations committed by the district rose to the level of a denial of a FAPE and requests that the IHO's determinations be reversed and that the district be required to reimburse the parent for the cost of the student's attendance at Norman Howard for the 2020-21 school year.

In an answer, the district denies the parent's material allegations and requests that the parent's request for review be dismissed.

## **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.

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<sup>6</sup> The parent, apparently referring to implementation of the student's IEP during the 2019-20 school year, also alleges that the OT consultation was limited and not implemented after in-person learning ended on March 13, 2020.

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 Andrew F., 137 S. Ct. at 1001 [holding that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"]; Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the 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>7</sup>

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

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

## **VI. Discussion – FAPE, ICT Services and Building-Level Services**

On remand, the IHO was directed to develop the hearing record on the issue of whether or not building-level services that were available to all students in the form of AIS and learning lab constituted specially designed instruction required to be included on the student's IEP. The IHO was further directed to clarify whether or not he considered the provision of AIS and learning lab in finding that the student was offered a FAPE. The parties stipulated that further development of the hearing record was not required, and the IHO clarified that he did not consider the provision of AIS and learning lab to the student in finding that the district's recommendations for an ICT classroom, speech-language therapy, speech-language consultation, autism consultation, and OT

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<sup>7</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" (Andrew F., 137 S. Ct. at 1000).

consultation offered the student a FAPE. The hearing record does not support the IHO's determination. Rather, the hearing record supports the parent's contention that the student required specially designed instruction in reading to receive educational benefit. The June 2020 IEP did not include a recommendation for specially designed reading instruction. Moreover, the district's reading teacher acknowledged at the June 2020 CSE meeting that the student would not receive reading instruction as a special education service, but instead would receive small group reading instruction in an AIS class (Parent Ex. B at pp. 4-5). Relatedly, learning lab was contemplated by the CSE as an additional support to the specialized instruction provided to the student by the special education teacher in the ICT classroom (Parent Ex. B at p. 15; Tr. pp. 100-01, 131-132, 134-35). Accordingly, as discussed below, the student's special education needs, and the CSE's explicit reliance on the building-level services of AIS and learning lab to address his needs with specialized instruction as an adjunct to the ICT services recommended in the IEP, necessitate that such services should have been included in the student's IEP and, absent such inclusion, the ICT and related services recommended for the student were not supportive enough to offer the student a FAPE.

Although not in dispute, a review of the student's needs as reflected in the June 2020 IEP provides useful context with respect to determining whether the program recommended by the CSE addressed the student's needs without reference to the building-level supports it was contemplated that the student would receive in the form of AIS and learning lab. According to the IEP, in determining the student's needs, the June 2020 CSE considered an October 25, 2019 Level I Vocational Assessment, a March 5, 2020 speech-language progress summary, and the student's May 6, 2020 Norman Howard report card (Dist. Exs. 25 at pp. 4, 16; see Dist. Exs. 6; 19; 26.). The June 2020 IEP present levels of performance were taken from the May 2020 IESP which were inputted by the student's providers at Norman Howard and are reflective of the student's performance in a 12:1+1 special class of five to eight students (Tr. pp. 93, 97-98, 408, 419; compare Dist. Ex. 24 at pp. 7-10 with Dist. Ex. 25 at pp. 7-10).<sup>8</sup>

With respect to the student's academic needs, the June 2020 IEP indicated that the student presented with challenges in reading, writing, and mathematics in addition to pragmatic language skills, social regulation, and flexible thinking (Dist. Ex. 25 at pp. 7-10). The June 2020 IEP indicated that, with regard to speech-language development, the student had made consistent progress in his social competencies, had developed an increased sense of social self-awareness, and had engaged in self-reflection as it related to his own learning (Dist. Ex. 25 at p. 7). The student could identify strengths, weaknesses, as well as "unthinkables," that affected his learning (id.). The IEP described "unthinkables" as roadblocks that could be encountered that made learning difficult or sent students into "stuck thinking" (id.). The June 2020 IEP indicated that the student was starting to adopt "flex strategies" for flexible thinking as well as strategies to manage and control his "mind magnets," which was a term used by the Norman Howard staff to refer to a preferred topic (Dist. Ex. 25 at p. 7; see Tr. p. 479). The June 2020 IEP further indicated that, while the student had made significant progress in his ability to "think with eyes," he often still needed verbal cues to do so in both 1:1 and small group interactions (Dist. Ex. 25 at p. 7). The student continued to require reminders related to keeping his body in the group (id.). The student was reportedly able to maintain expected body positions approximately 70 percent of the time

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<sup>8</sup> The Norman Howard director of education/co-head of school (Norman Howard director) testified that the student attended a 12:1+1 special class at the school, however, during the 2019-20 school year, the student's class size ranged from five to eight students with 1:1 reading provided daily (Tr. pp. 406, 408, 463).

given reminders as needed (id.). The June 2020 IEP noted that the student was making progress in his ability to think about others and to ask social wonder questions (id.). The student's conversational skills were reported to have improved, but further instruction in this area was indicated at that time (id.). According to the IEP, the student was able to initiate communication with peers and adults in an expected way approximately 60 percent of the time (id.). It noted that if the student had a question or needed the attention of a teacher, he typically required cues to "wait" before approaching again (id.). The student also required cues to "check in" with communication partners frequently "(via thinking with eyes)" to gauge whether or not the communication partner was still interested or attending to him (id.). The student continued to require explicit instruction in the hidden rules of social interaction (id.).

Next, the June 2020 IEP indicated that the student was assessed using the Woodcock Reading Mastery Test-Third Edition (WRMT-III) in August 2019 to determine his then-present reading levels and assist in placement (Dist. Exs. 5; 25 at p. 7). The student received a standard score of 73, placing him in the fourth percentile in word identification, a standard score of 63, placing him in the first percentile in word attack, and a standard score of 67, placing him in the first percentile on the basic skills cluster; a standard score of 85, placing him in the 16th percentile in word comprehension, a standard score of 84, placing him in the 14th percentile in passage comprehension, and a standard score of 83, placing him in the 13th percentile on reading comprehension cluster; and a standard score of 92, placing him in the 30th percentile in listening comprehension, a standard score of 75, placing him in the fifth percentile in oral reading fluency, and a standard score of 72, placing him in the third percentile for total reading (Dist. Exs. 5 at p. 4; 25 at p. 7). The student was also administered the Wilson Assessment of Decoding and Encoding (WADE) in September 2019 (id.). The IEP indicated that the student received mastery scores of 38 percent in sounds, 33 percent in reading, and 9 percent in spelling (id.). The student's accuracy was characterized as "good" for one syllable words, but the IEP noted that he "clearly lacked strategies for decoding longer multi-syllabic words" (id.). The June 2020 IEP indicated that reading testing had not been updated due to the COVID-19 school closure (id.). It further noted that the student had been working in the Wilson Reading System since September 2019 and had begun work in "Step 8, r-controlled vowels" (id.). According to the IEP, the student needed phonetic concepts illustrated with sound cards along with consistent repetition and practice to become more automatic with decoding and encoding (id. at pp. 7-8). The student's charting average had steadily improved over the course of the school year with the student's scores reported as 86 percent for the first quarter, 88 percent for the second quarter, 90 percent for the third quarter, and 94 percent as of the fifth week of the fourth quarter (id. at p. 8). The June 2020 IEP indicated that the student required teacher prompting to apply his decoding skills and did best when he was able to physically mark-up words (id.). Using this technique helped the student see syllable divisions and improved his accuracy (id.). The IEP noted that when reading controlled sentences and passages, the student's application was somewhat better because he was able to use context clues to aid in phonetic retrieval (id.). The IEP noted that encoding was more problematic for the student (id.). The IEP also stated that the student had great difficulty segmenting syllables and identifying correct spelling options for sounds, even at the recognition level (id.). According to the IEP, the student was reading 5.6 grade level passages for fluency practice (id.). On the passages to date, the student reportedly read an average of 88 words correct per minute (wcpm) on the first trial and 131 wcpm with practice over a one-week period (id.). The student's phrasing was noted to improve with each practice and indicated that he was able to read with good expression for the "hot timing" at the end of the week (id.). As passages increased in complexity, the student had



been able to correctly identify the main idea and compose short answer questions that required inferencing and summarization (*id.*). The student demonstrated more difficulty identifying vocabulary definitions, synonyms, antonyms and sequencing of story details (*id.*). The June 2020 IEP indicated that the student would not meet his current reading goal of "reading controlled word lists, sentences and short passages consisting of closed, v-e, open, -le and r-syllables with 90 percent accuracy," given that he had just recently begun working with r-[controlled] vowels (*id.*). The student reportedly needed to continue to work on building his decoding and encoding skills (*id.*).

The June 2020 IEP indicated that the parent reported that reading was one of the student's major challenges in learning (Dist. Ex. 25 at p. 8). When asked about how he liked reading, the student stated "so-so," and indicated that he liked to read Wings of Fire and Dragon Ballz manga books (*id.*). The student also reported that when he did not recognize a word immediately, he tried to figure it out or just skipped it (*id.*).

Although the student was scheduled to enter eighth grade, the June 2020 IEP noted that he needed a multisensory reading program to continue to work on building his encoding and decoding skills (Dist. Ex. 25 at pp. 8, 9). The Norman Howard 2019-20 report card indicated that according to the WADE testing results the student continued to need instruction regarding spelling and reading nonsense words, teacher assistance to accurately determine vocabulary meaning and to sequence story details, and daily repetition and practice (Dist. Ex. 26 at p. 1).<sup>9, 10</sup>

In the area of study skills, the June 2020 IEP indicated that the student was most successful when provided with clear and concise directions along with frequent and gentle prompts to maintain attention to task (Dist. Ex. 25 at p. 8). The June 2020 IEP reflected that following along during whole group instruction could be challenging for the student as he tended to lose focus easily (*id.*). The student reported that he needed directions repeated and additional time to process them before initiating a task (*id.*). The IEP noted that the student needed to be seated at the rear of the classroom so that he was able to get out of his seat to pace or move freely (*id.*). According to the IEP, the parent reported that behavior, focus, and "stims," were the biggest difficulties the student faced in the classroom (*id.*). The student was reportedly beginning to be able to work independently for slightly longer periods of time and was most successful when provided with frequent check-ins to ensure that he was being productive and on track (*id.*). The student responded well to positive reinforcement, as well as repeated exposure to a given strategy (*id.*). The IEP noted that the student preferred working on tasks and projects using his Chromebook and was comfortable using the "myNHS" and "Google Classroom" sites to manage his assignments (*id.*). The student used his advisory period at the end of the day "to stay on top of his work and to seek

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<sup>9</sup> The Norman Howard director testified that the student had significant difficulty with decoding and received intervention using the Wilson Reading Program, which she described as an evidence-based multisensory program that provided explicit instruction and was designed for students who struggled with basic skills related to reading (Tr. p. 411).

<sup>10</sup> The May 2020 CSE meeting information summary indicated that the May 2020 CSE, and by extension the June 2020 CSE, was made aware that the student received instruction in reading by way of the Wilson Reading Program to address the student's decoding and encoding needs (Parent Ex. A at p. 5). In addition, the district reading specialist noted the student's reading level in the Wilson reading program during the June 2020 CSE meeting (Parent Ex. B at p. 5).

extra help from content teachers as needed" (*id.*). According to the IEP, the student reported that he had trouble with tests and quizzes (*id.*). It was noted that when preparing for upcoming tests, the student did best when reminded to use teacher prepared review materials (*id.*). During times when the student was unfocused, it was necessary to redirect him back to task using both verbal and nonverbal cues (*id.*). The June 2020 IEP also indicated that throughout the day, the student tended to exhibit self-stimulatory movements (e.g., pacing, quietly hopping, flapping arms, etc.) and responded very positively to scheduled breaks, sensory items, and the freedom to stand and move while working (*id.*). The student required adult support, directions and tasks chunked to meet his specific needs (*id.*). The student also had difficulty independently revisiting work, particularly writing, and could demonstrate frustration when being asked to do so (*id.*). The IEP indicated that the student reported difficulty with writing and ELA because he had the same teacher for both subjects in the same room (*id.*). As noted by the IEP, the parent reported that the student did best with reminders to complete tasks (*id.*). According to the district representative, the student had difficulty acquiring reading and writing skills and generalizing them to the general curriculum, as well as difficulty reading and following directions in a large group, difficulty with executive functions and difficulty with social/emotional cuing, which impacted him throughout the day (Tr. pp. 82, 192; Dist. Ex. 25 at p. 9). She also testified that the June 2020 CSE discussed a specialized reading program for the student and noted he had previously received Wilson intervention (Tr. pp. 131-33). However, she acknowledged that specially designed reading instruction was not put on the June 2020 IEP (Tr. pp. 133-34).

The June 2020 IEP further indicated that, at the time it was developed, the student was in a seventh grade level math class (Dist. Ex. 25 at p. 8). The student reportedly had a good understanding of fractions, rates, proportions, and one-step equations (*id.*). The student needed some teacher support when working with exponents and radicals (*id.*). The student understood material when it was presented to him; however, he needed teacher support to relate it to previously learned material (*id.*). The IEP also indicated the student needed to determine the correct operation when solving word problems (*id.*). The student became easily frustrated when he was having difficulty with a problem and needed teacher support to relieve his frustration (*id.*). The June 2020 IEP further indicated that the student needed teacher prompts to stay on task and needed physical breaks during a 45-minute class (*id.*). The student needed to advocate appropriately prior to becoming frustrated and shutting down (*id.*). The IEP further noted that the student needed modeling, repetition, regular routine, multi-step problems broken down into manageable chunks, and explicit instruction (*id.*). The student's Norman Howard report card indicated that, in mathematics, he struggled with working independently (Dist. Ex. 26 at p. 1).

In writing, the June 2020 IEP reported that the student had been using the "Thinking Maps" program to organize his thoughts, which had helped him prepare for his writing tasks (Dist. Ex. 25 at p. 8). The student was able to effectively use the program but needed teacher cues to apply the "Thinking Map" to his essay writing (*id.*). The student was using the "EmPOWER" writing strategy to plan his essays and to ensure that he was answering the prompt fully (*id.*). The IEP noted that the student needed to use spelling and grammar check to improve his application of writing conventions and spelling skills, as well as implicit instruction of writing conventions (*id.*).<sup>11</sup> The student was able to compose lengthy responses to prompts but needed significant

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<sup>11</sup> Although the June 2020 IEP indicated the student needed implicit instruction in writing, the Norman Howard director testified that the student needed daily explicit instruction in the writing process with a consistent set of

assistance to edit and revise his writing, which he was reluctant to do (id.). According to the teacher, the student had effectively self-advocated for breaks when overwhelmed by the writing task and was able to quickly return back to the task (id. at p. 9). The student had reportedly improved in his ability to sustain a writing task as the year had progressed (id.). The parent further indicated that writing was an area of difficulty (id.). His 2019-20 Norman Howard report card indicated that the student presented with difficulty expanding his responses and providing sufficient supporting evidence from text sources (Dist. Ex. 26 at p. 2).

The June 2020 IEP reflected that the student continued to be a kind and caring student who wanted to do well in school and please both peers and adults (Dist. Ex. 25 at p. 9). The parent reported that using technology was a relative strength for the student (id.). According to the IEP, the student saw himself as a visual, auditory and hands-on learner (id.). The student enjoyed math and science class because he thought they were fun (id.). The June 2020 IEP also indicated that the student enjoyed the Dungeons and Dragons club and the running club at school (id.). The student was described as an analytical thinker who enjoyed participating in class (id.). The IEP noted that the student would often add relevant and specific information to classroom discussions (id.). The student enjoyed discussing video games and fantasy with both adults and peers (id.). The June 2020 IEP included information shared by the parent that the student enjoyed Logo creations and was very inventive (id.). The parent also mentioned that the student had an interest in law enforcement; however, the student had little knowledge about the skills and requirements for the workplace (id.). The parent also reported that the student had a good memory and enjoyed building things and hands-on learning (id.). The student reportedly enjoyed activities in his spare time such as, playing video games, Legos, going on hikes and walking, going to the movies, playing kickball and going swimming (id.). The student was described as a team player and often praised others for a job well done (id. at p. 10). The student reported that he learned best when he was able to work with others and talk about things (id.).

The June 2020 IEP highlighted the academic, developmental and functional needs of the student, indicating that he needed to continue working in a multi-sensory reading program to build decoding and encoding skills; use "Thinking Maps" and "EmPOWER" in the writing process; and determine the correct operation when solving a word problem (Dist. Ex. 25 at p. 9). The June 2020 IEP reflected that the student's parents were in agreement with those areas of concern and stated that the student's biggest challenge tended to be maintaining focus for those topics that were not of interest (id.). According to the IEP, the parents reported that the student struggled with reading, math facts, understanding and interpreting social cues and body language and following a conversation, especially conversations involving non-preferred topics (id.). The parents also stated that the student had difficulty engaging in and staying involved in conversations with his peers and being open to new things and experiences (id.). The parents further reported that the student struggled with maintaining focus and attention, had a hard time reading and following directions, especially in large groups, and opined that the small class sizes at Norman Howard had really helped the student in that area (id.).

With respect to social development, the IEP stated that the student had developed friendships in the classroom and through participation in afterschool clubs during the school year (Dist. Ex. 25 at p. 9). The student enjoyed working with other students and had done well working

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strategies to produce his writing (Tr. p. 427).

with peers on assignments in class and during advisory period (id.). The student was genuine and extremely polite, kind and engaging (id.). According to the IEP, the parents described the student as honest, kind, creative and friendly (id.). The IEP noted that the student would often compliment others on their successes (id.). In contrast, the student could occasionally be short and abrasive with peers who repeated frustrating behaviors or noises during instruction but did well with reminders of appropriate social skills strategies for perspective taking and learning differences to apply instead (id.). The student reported that he enjoyed seeing friends, and liked to "hang out," but had trouble with forgiving people (id.). The student loved to tell stories and make connections whenever appropriate (id.). The June 2020 IEP also indicated that the student could be highly focused on topics of interest to him and tended to steer conversations towards topics of his choosing (id.). When focused, it was noted that the student could and would offer insightful ideas to help stimulate discussions (id.). The student reportedly enjoyed school but could be critical of his own performance (id.). During these times, it was reported that he may shut down or make critical statements (id.). According to the IEP, the parents reported that patience was an area of difficulty for the student (id.). The parents further reported that the student had difficulty listening to others before speaking and working with others to resolve disagreements (id.). The student tended to lack the stamina for lengthy tasks and needed assignments and assessments chunked and or completed over several sessions (id.). The June 2020 IEP reflected the social development needs of the student, which consisted of using learned strategies for social self-regulation and flexible thinking in the classroom; and explaining two or more perspectives on a given event and further explaining how each perspective affected the event (id.). The June 2020 IEP also indicated that the student's parents were in agreement with those areas of concern with regard to social development (id. at p. 10).

With respect to the student's physical development, the June 2020 IEP included an April 2020 OT note stating that the student had been able to demonstrate use of assistive technology (voice typing and word prediction) to produce writing (Dist. Ex. 25 at p. 10). The student also reportedly could access the keyboard to type (id.). The student was able to express his individual sensory preferences and had been able to self-advocate in the school setting(id.). The IEP described the student as an active young man who enjoyed physical education and was frequently "on the go both inside and outside the classroom" (id.). According to the IEP, the parents reported that the student enjoyed running, walking, and riding his bike (id.). The student described himself as a hands-on learner who preferred to learn by doing things (id.). Student strengths in the area of physical development included "skill in accessing technology to produce writing," and the student's age-appropriate gross motor skills within the school setting (id.). The student reportedly responded to physical movement throughout the day to help him self-regulate his sensory system and to stay in a calm, alert state (id.). The June 2020 IEP further reflected that the student had no physical needs at the time of the CSE meeting and that the parents were in agreement (id.).

With regard to the student's management needs, the June 2020 IEP indicated that the student needed clearly stated expectations for behavior and academics; predictable routines and warning of changes to schedule; extended time to complete writing tasks; cues and checklists for writing and editing; tasks chunked into smaller more manageable pieces; preferential seating so that the student was able to move freely; cues to focus during directions; longer directions broken down into smaller steps; frequent checks for understanding; gentle verbal and nonverbal cues to return attention to task; gentle cues to move past when perseverating; praise and encouragement; use of sensory-based materials as advocated for by student; opportunities to stand when working;

and visual aids (Dist. Ex. 25 at pp. 10-11). With regard to the effect of the student's needs on his involvement and progress in the general education curriculum, the IEP stated that the student exhibited delays in pragmatic language, socialization, and fine motor skills, which negatively impacted his progress in the general education program (id. at p. 11).

The June 2020 IEP included annual goals that addressed the student's weaknesses relative to reading, writing, mathematics, and speech-language development (Dist. Ex. 25 at pp. 11-12). More specifically, the annual goals targeted the student's ability to read controlled word lists, sentences and short passages consisting of closed, v-e, open, -le and r-syllables and to spell selected step words (reading); to use the "EmPOWER" editing checklist along with online spelling and grammar checks to edit his writing (writing); to determine the correct operation when solving a word problem (mathematics); to use learned strategies for social self-regulation and flexible thinking in the classroom, and to accurately explain two or more perspectives on a given event and further explain how each perspective affected and/or contributed to the event (speech-language) (id.).

The June 2020 CSE recommended that the student attend a 10-month school year program consisting of ICT services for ELA, math, science and social studies one time daily for 40 minutes each, and the related service of small group speech-language therapy six times per month for 30 minutes per session, pushed into the general education classroom (Dist. Ex. 25 at p. 12). The June 2020 CSE did not recommend supplementary aids and services, program modifications, or accommodations and did not recommend assistive technology devices or services (id. at pp. 12-13). For supports for school personnel on behalf of the student, the June 2020 CSE recommended an autism consultation three times per year for one hour per session in the general education classroom, a speech-language consultation five times per year for one hour per session in an unspecified classroom, and an OT consultation for four hours per year to be delivered throughout the school year and in the school setting (id. at p. 13). For testing accommodations, the June 2020 CSE recommended on-task prompts for all tests, tests administered in a location with minimal distractions for all tests, extended time for all tests, use of manipulatives for math tests, use of a computer or word processor to record responses for tests of one paragraph or longer, and speech-to-text for all tests (id. at pp. 13-14). The June 2020 IEP further indicated that the student would participate in the same State and district-wide assessments as those administered to regular education students (id. at p. 14). The June 2020 CSE did not recommend special transportation (id. at p. 15). The June 2020 IEP included a placement recommendation of home public school district (id.).

The June 18, 2020 IEP indicated that CSE meeting participants included the district CSE chairperson/district representative, a special education teacher and the district school psychologist (Dist. Ex. 25 at p. 1). However, the transcript of the June 18, 2020 CSE meeting indicated that there were additional participants and the meeting was attended by both of the student's parents, the district's director of special education who served as the CSE chairperson and district representative (district representative), a district speech-language pathologist, a district reading teacher, a district seventh grade math teacher, the district autism specialist, a district seventh grade special education teacher, the district's eighth grade counselor and a district school psychologist (Parent Ex. B at p. 3; see Dist. Ex. 25 at p. 1). The transcript of the meeting also indicates that the district's attorney briefly attended the CSE meeting until it became apparent that the parents' attorney would not be attending, and the district's attorney subsequently left the meeting (Dist. Ex. 25 at p. 2; see Tr. p. 97).

According to the transcript of the June 2020 CSE meeting, the seventh-grade special education teacher who participated in the meeting stated that, in addition to special education ICT services, the student "would also receive learning lab every other day, which would be to . . . mak[e] sure the[] [student was] reviewing for upcoming tests and quizzes, previewing and reviewing vocabulary" (Parent Ex. B at p. 4). The seventh-grade special education teacher further stated that the focus of learning lab in eighth grade would likely be on earth science, and in "starting to try to get kids to have more ownership over their own learning " (id.).

The district school psychologist who participated in the June 2020 CSE meeting indicated that the student would also be eligible for AIS that were not part of the special education program, "specifically reading, and then we also have the mathematics service . . . that would be every day or every other day additional small group classes, though not related to the IEP" (Parent Ex. B at p. 4).

The district's reading teacher who participated in the June 2020 CSE stated that the student would receive small group reading instruction in a separately scheduled AIS class (Parent Ex. B at p. 5). The reading teacher stated that AIS groups varied in size, but the student would likely be in a small group due to his then-current Wilson level as reported by the student's providers at Norman Howard (Parent Ex. B at p. 5; see Parent Ex. A at p. 5; Dist. Ex. 25 at p.7). The reading teacher noted that the student was at level eight and working with r-controlled vowels and stated that the district reading teachers were very familiar with the Wilson materials (Parent Ex. B at p. 5). The reading teacher also indicated that small group could be three students or as small as 1:1, "depending on their level of severity" (id.). The reading teacher stated that in reading AIS, the teacher would work with the student "on that word study, which it looks like is his primary need" (id.). The reading teacher further stated that a reading paraprofessional was also present in the classroom who assisted with students if the reading teacher was working with other students (id.).

The district's seventh grade math regular education teacher described the ICT classroom as having two teachers and often at least one paraprofessional to support the students (Parent Ex. B at p. 5). The math teacher stated that the teachers "kind of tag team the teaching process, which allow[ed] one teacher to be available to give kids extra support as direct instruction [wa]s occurring" (id.). The math teacher also described that, when the class broke into smaller groups or individual groups, the paraprofessionals were present so there were enough adults to "be supporting all of the kids that need it at a time" (id.). Additionally, the math teacher noted that with the paraprofessionals present, this allowed for "extra time for modeling, taking breaks for kids that need their breaks, if they just need to step out in the hall to go get a drink or take a quick walk" (id.). The math teacher further indicated that the ICT classroom "normally start[ed] as a whole class where the kids [would] get something to start on and [the teachers would] walk around and help," as well as " introduce the new material and then . . . put them into groups" (id. at p. 10). The math teacher stated that the structure changed throughout the course of the year, and sometimes the class would break into heterogeneous groupings, or homogeneous groupings, "depending on the material that [was] being covered and the confidence level of some of the kids and their different levels of where they [we]re" (id.). The math teacher noted that the size of the small groups typically ranged from two to four students (id.).

The district's autism consultant who participated in the June 2020 CSE meeting described the autism consult model as consisting of hours of consultation available to the student's team of providers (Parent Ex. B at p. 5). The autism consultant recommended that she provide the student

with three hours for his initial transition during the first twelve weeks, "but then provide, just as an overall management need, access to the autism consultant as needed throughout the year to, again, really just hone in on any situations that might arise through the year" (*id.*). The autism consultant described possible uses of her services as helping the team of providers address the student's engagement with the academic content, navigating social interactions, utilization of coping strategies, helping to increase the student's independence, his ability to self-monitor, and self-reflect, with the flexibility to make changes as needed throughout the day (*id.* at pp. 5-6). Later on in the meeting, the student's father asked the autism consultant if she could describe any difference she had seen in the student, having worked with him in sixth grade and observing him in seventh grade at Norman Howard (*id.* at p. 12). The autism consultant reported that the main difference was that the student was in a much smaller class at Norman Howard, noting that the number of students in the student's class in sixth grade "was significantly higher" (*id.*). The autism consultant also stated that the student engaged more with the teacher at Norman Howard, the student required less prompting and was able to self-initiate asking and answering questions as well as raising his hand (*id.* at p. 13). The autism consultant also indicated that the student demonstrated an increased ability to accept feedback at Norman Howard (*id.*). The autism consultant reported that the student was able to utilize a coping strategy of taking a short break when he was getting frustrated, and he was able to remain engaged for a longer period of time at Norman Howard (*id.* at pp. 13, 14). The student's father also indicated that the student's school anxiety that had been significantly reduced at Norman Howard presumably due to the very small class size (*id.* at pp. 16-18). The parent further articulated his apprehension regarding the large school and ICT class of 22-26 students believing it would increase the student's anxiety which impacted his ability to "ingest and digest the material and be able to grow and learn" (*id.* at pp. 16-17).

At the impartial hearing, the district representative testified that the district's ICT<sup>12</sup> model was comprised of a regular education teacher and special education teacher in a classroom with up to 20 students, for 40-minute periods for the four core classes (ELA, mathematics, science, social studies) (Tr. pp. 104-05, 114-15, 271).<sup>13</sup> The district representative explained that the regular education teacher served as the content specialist, and the special education teacher acted as the student specialist, both of whom delivered content, but the special education teacher's job was to understand the students (Tr. p. 105). The special education teacher was described as understanding how the students learned best and then providing specially designed instruction, scaffolding, and anything else that would be required throughout the day such as a sensory piece (Tr. p. 105). The district representative stated that with regard to the recommendation that the student attend the district's junior high school the autism consultation was put in place to address the student's sensory needs (Tr. pp. 105-06). She also testified that the student's goals and management needs as identified in the June 2020 IEP were typically addressed in the ICT setting (Tr. pp. 108-110, 117).

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<sup>12</sup> State regulation describes ICT services within the continuum of services as the "provision of specially designed instruction and academic instruction provided to a group of students with disabilities and nondisabled students" (8 NYCRR 200.6[g]). According to State regulation, ICT services minimally require the assignment of a special education teacher and a regular education teacher (8 NYCRR 200.6[g]2).

<sup>13</sup> The district representative indicated that the district tried to keep the number of students with IEPs in an ICT class to a maximum of eight students or less (Tr. p. 115). The June 2020 CSE minutes reflected that the ICT class typically ranged from 22 to 26 students with the possibility of a paraprofessional present in the larger classes (Parent Ex. B at p. 10).

She indicated that within the ICT classroom the student could receive support for writing, revision of written work, spelling and grammar checks, as well as implicit instruction for writing conventions (Tr. pp. 110-111).<sup>14</sup> She indicated that the student's needs regarding his ability to maintain focus could be addressed through small-group instruction, pre-teaching, and reteaching (Tr. p. 112). Further, she indicated that the student's difficulty with interpreting social cues and body language could be addressed by the special education teacher and that the district had a full mental health team who could help the student if he were struggling with a particular student or area through individual or group counseling that was available to any student at any time (Tr. pp. 112-14). Nevertheless, counseling was not recommended as a related service on the student's June 2020 IEP (see Dist. Ex. 25 at pp.12-13). The district representative testified that the student's need to use learned strategies for social self-regulation and flexible thinking would be addressed by the special education teacher or autism consultant (Tr. p. 116).

The district autism consultant testified that the ICT, with two teachers, could provide "differentiation modification" as needed to support the student's needs and provide the opportunity for small group and independent work with the autism consultant social thinking (Tr. pp. 357-58). She also felt that the social thinking support provided to the student at Norman Howard could be continued through her role and the supports that were in place such as direct concrete breaking out of tasks, pacing, and changing pacing of the instruction, could be provided in the ICT classroom program (Tr. pp. 357-58).<sup>15</sup>

The district ICT special education teacher testified that she planned with the regular education teacher and modified assignments as needed and, with respect to live teaching, they broke the students into groups, and she sometimes pulled students aside to work on specific skills or sometimes the lessons were taught together so the students got both perspectives and methods on how they taught (Tr. p. 251). She noted that small group breakout sessions generally consisted of four to five students and could consist of the students with special needs or may be regular education students that could benefit from her help (Tr. p. 252). The ICT special education teacher testified that to address student's reading difficulties she recorded print material so students could follow along independently, have independent practice, and read to themselves while hearing her read along with them (Tr. p. 254; see Tr. pp. 251-52). She stated that in terms of tracking specific reading goals she would create a paragraph or take a text from a content area and have a student read it aloud to practice fluency and decoding while also practicing content knowledge (Tr. p. 255). Regarding the student's reading goal, the ICT special education teacher stated that she would create a paragraph or line of text that included the types of words found in the student's goal but was also related to course content so that the student practiced the goal while practicing content knowledge (Tr. p. 261). She confirmed that she would provide instruction directly toward the goal in the context of content (id.). The special education teacher indicated that social pragmatic skills were addressed with "teachable moments" and that if something were to arise, they addressed it as a whole class (Tr. p. 255). In addition, the special education teacher reported that social pragmatic

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<sup>14</sup> The district representative indicated that in the ICT setting they were able to use "Thinking Maps" in the writing process although she was not informed on what the EmPOWER program entailed (Tr. p. 111).

<sup>15</sup> Although the autism consultant testified regarding the level of support she could provide the student with respect to social thinking, the June 2020 IEP only provided for three hours per year of autism consultation services (Dist. Ex. 25 at p. 13).



skills were addressed through modeling and practice and also discussed in learning lab (Tr. p. 261). In terms of AIS services and how they were implemented, she indicated that the special education teachers were "constantly in contact with the AIS teacher so we know what they're working on in AIS and how to provide that same or repetition and practice in the classroom" (Tr. p. 258). The special education teacher testified that the student's writing goal could be worked on in the ICT class in a manner would allow him to make progress (Tr. p. 262). She explained that EmPOWER was an acronym for a planning process for writing and if the acronym helped the student she would use it (*id.*). She further explained that for writing assignments in earth science the student's created CERs, which stood for claim, evidence, reasoning and that the teachers created graphic organizers to help students create their CER (*id.*). Students wrote their responses and were able to edit and revise them through Google Docs (*id.*). The teachers allowed peer review where students worked with a partner who would prereview and edit their work (*id.*). Regarding the student's needs for editing, she stated that the students read their work aloud to pinpoint mistakes and during 1:1 instruction she found students more willing to do the work because they knew they would get help (Tr. p. 267). With respect to mathematics, the special education teacher indicated that word problems were worked on daily (Tr. p. 263). The special education teacher testified that the strategies to address the student's management needs as stated on the June 2020 IEP were strategies that she was able to implement or had already implemented in the ICT classroom (Tr. pp. 265-67).

Although the district asserts that the student generally would receive specially designed instruction in an ICT class, the hearing record in this matter reflects that with respect to instruction focused on the student's specific reading needs, the student would receive small group reading instruction in a general education AIS class and preteaching, reteaching and executive functioning support in a regular education learning lab (Tr. pp. 81-82, 100, 112, 114, 128-29, 130, 131, 133-35, 193-94, 221, 252-53, 306).

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

State regulations define AIS—which are available to both disabled and nondisabled students—as "additional instruction which supplements the instruction provided in the general curriculum" (8 NYCRR 100.1[g]; see 8 NYCRR 100.2[ee]). State regulation specifically contemplates that AIS be made "available to students with disabilities" provided that such services are provided in a manner consistent with the student's IEP (8 NYCRR 100.1[g]). According to State guidance, AIS are provided in addition to, and must not supplant, special education services (see "Academic Intervention Services: Questions and Answers," at p. 5, Office of P-12 Mem. [Jan.

2000] [emphasis added], available at <http://www.nysed.gov/common/nysed/files/programs/curriculum-instruction/academic-intervention-services-qa.pdf>).

As noted in the SRO's decision remanding this matter, certain additional instructional or supportive services may be available to special education students and non-disabled students alike (e.g., AIS or "building-level services"), and according to the State Education Department, such general services should not be listed on a student's IEP ("Academic Intervention Services: Questions and Answers," at pp. 5, 20; Application of a Student with a Disability, Appeal No. 21-103). But if a component of the AIS is provided to a student with a disability and that aspect of the service meets the definition of "specially designed instruction" under IDEA, the United States Department of Education's Office of Special Education Programs has clarified that services that clearly fall into the realm of special education are required to be listed on an IEP, stating in particular that "[t]he IEP Team is responsible for determining what special education and related services are needed to address the unique needs of the individual child with a disability. The fact that some of those services may also be considered 'best teaching practices' or 'part of the district's regular education program' does not preclude those services from meeting the definition of 'special education' or 'related services' and being included in the child's IEP" (Letter to Chambers, 59 IDELR 170 [OSEP 2012]; see Bd. of Educ. of Uniondale Union Free Sch. Dist. v. J.P., 2019 WL 4315975, at \*12 (E.D.N.Y. Aug. 23, 2019), adopted at, 2019 WL 4933576 [E.D.N.Y. Oct. 7, 2019]; Urbandale Community Sch. Dist., 70 IDELR 243 [SEA Iowa 2017] [noting that "[i]nstruction becomes special education when it is designed or selected to meet the disability-related needs of an individual student and is necessary for that student to maintain or improve educational performance"]).

Here, the hearing record indicates that the student's specialized reading program would be provided as an academic intervention service, rather than a special education service mandated by the student's IEP. The district representative indicated that the AIS reading instruction would be provided in a 1:1 or 1:2 reading group every day or every other day as an additional class, separate from the regular education content classes (Tr. pp. 132-33, Parent Ex. B at p. 4). Although the CSE discussed the student's potential eligibility for AIS for math, the hearing record includes little information regarding how the service would address the student's math needs (Tr. p. 106, 127-28, 257-59, 285-85; Parent Ex. B at pp. 4, 11).<sup>16</sup> At the June 2020 CSE meeting the parents were informed that the student's reading needs would be addressed through AIS in a small group setting of three students, "sometime one-to-one," where they would work on the Wilson program and "word study," his primary need (Parent Ex. B at p. 5). The district representative conceded that, although she described AIS as specialized instruction it was not included on the IEP but could be if the CSE decided it was what the student needed (Tr. pp. 133-34). The district representative indicated that the AIS teachers were in contact with the special education teachers to communicate what the focus of AIS was and how to provide the same repetition or practice in the classroom such as decoding or making inferences suggesting that the student's AIS was addressing the

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<sup>16</sup> The district representative testified that with both learning lab and AIS in his schedule the student's access to electives may be limited and the team would have to evaluate priorities (Tr. pp. 128-30). She also indicated that learning lab could provide the AIS structure (Tr. p. 130). According to the June 2020 CSE minutes the team discussed that the student's access to electives would be limited and contemplated if the student were eligible for foreign language exemption to free up a block for electives (Parent Ex. B at pp. 10-12).

student's reading and mathematics needs with respect to specialized instruction rather than it being provided in the ICT classroom (Tr. pp. 258-59).

Additionally, at the June 2020 CSE meeting, the parents were informed that the student would be scheduled for learning lab every other day to work on organizational skills, reviewing for upcoming assessments, executive functioning skills, pre-teaching and re-teaching (Parent Ex. B at p. 15). The special education teacher explained that the learning lab was staffed by two teachers—one for ELA/social studies and one for mathematics/science—so they were able to address all the core subject areas between them (*id.*). The special education teacher further explained that learning lab was in lieu of resource room services because it offered the district more flexibility, included two teachers instead of one, and could address students' needs specifically (*id.*). The hearing record described the learning lab as a small group opportunity for students to work with a special education teacher (Tr. pp. 81-82, 100). Typically, the group consisted of no more than eight to ten students with two teachers and a paraprofessional (Tr. pp. 82, 100, 250). The district representative testified that the learning lab would address executive functioning skills and could provide pre-teaching, reteaching, and help the student with facilitating conversations, working on vocabulary, reading strategies, unpacking problems, social cuing, study strategies, use of notes, organization, and planning skills (Tr. pp. 100-01, 134-35, 221, 250, 252, 306).<sup>17</sup> The hearing record indicated that learning lab would be part of the student's program every other day and was reportedly designed to supplement classroom instruction and work on goals specific to the student through the benefit of special education teachers (Tr. pp. 100-01, 131-132, 134-35; Parent Ex. B at p. 15).

While the June 2020 IEP provided for numerous management strategies and testing accommodations there is sparse evidence to demonstrate that the student would receive explicit instruction in reading in the ICT classroom to address his needs as presented in the hearing record. According to the student's academic, developmental and functional needs as set forth on the June 2020 IEP, the student needed to "continue working in a multi-sensory reading program to build decoding and encoding skills" (Dist. Ex. 25 at p. 9). However, the district provided no additional evidence of how the student would be provided multisensory reading instruction within the ICT class. Despite having an opportunity on remand to provide evidence that the student's needs could be met in an ICT class without consideration of AIS and learning lab regular education supports, the district declined to do so. The district's attorney continues to argue that the student was offered a FAPE without consideration of AIS and learning lab, while the evidence presented demonstrated that the district intended to meet its FAPE obligations to the student through the provision of AIS and learning lab. That being the case, the district was required to include these services on the student's IEP. The June 2020 CSE's stated intention to fill any gaps in the student's special education programming with supports not included on the IEP is precisely the approach rejected by the holding in *R.E.* (see 694 F. 3d at 184-88 [explaining that with the exception of amendments made during the resolution period, the adequacy of an IEP must be examined prospectively as of the time of its drafting and that "retrospective testimony" regarding services not listed in the IEP may not be considered]). In so holding, the Court further explained that "[t]his rule recognize[d] the critical nature of the IEP as the centerpiece of the system, ensure[d] that parents w[ould] have sufficient information on which to base a decision about unilateral placement, and put[] school

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<sup>17</sup> The district representative testified that the learning lab was generally eight to ten students but there was no maximum capacity (Tr. p. 100).

districts on notice that they must include all of the services they intend to provide in the written plan" (R.E., 694 F. 3d at 188). Consequently, the IHO erred in finding that the district offered the student a FAPE for the 2020-21 school year. Given this determination, there is no need to address the parent's additional claims as alternative bases for concluding that the district failed to offer the student a FAPE.

## **VII. Conclusion**

In summary, the evidence in the impartial hearing record supports a finding that the district failed to offer the student a FAPE for the 2020-21 school year. Further, in Application of a Student with a Disability, Appeal No. 21-103, neither party appealed the IHO's determination that Norman Howard was an appropriate unilateral placement for the student and that finding became final and binding on the parties at the time of that appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at \*6-\*7, \*10 [S.D.N.Y. Mar. 21, 2013]). In this appeal, the district did not cross-appeal the IHO's determination that equitable considerations favored full reimbursement, therefore the necessary inquiry is at an end.<sup>18</sup>

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

### **THE APPEAL IS SUSTAINED.**

**IT IS ORDERED** that the IHO's decision dated November 24, 2021 is modified by reversing those portions which determined that the district offered the student a FAPE for the 2020-21 school years; and

**IT IS FURTHER ORDERED** that the district shall reimburse the parent for the costs of the student's attendance at Norman Howard for the 2020-21 school year.

**Dated:**            **Albany, New York**  
                         **February 17, 2022**

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**CAROL H. HAUGE**  
**STATE REVIEW OFFICER**

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<sup>18</sup> State regulations governing practice before the Office of State Review require that parties set forth in their pleadings "a clear and concise statement of the issues presented for review and the grounds for reversal or modification to be advanced, with each issue numbered and set forth separately," and further specify that "any issue not identified in a party's request for review, answer, or answer with cross-appeal shall be deemed abandoned and will not be addressed by a State Review Officer" (8 NYCRR 279.8[c][2], [4]) see M.C. v. Mamaroneck Union Free Sch. Dist., 2018 WL 4997516, at \*23 [S.D.N.Y. Sept. 28, 2018] [upholding dismissal of allegations set forth in an appeal to an SRO for "failure to identify the precise rulings presented for review and [failure] to cite to the pertinent portions of the record on appeal, as required in order to raise an issue" for review on appeal]).