



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 23-067

**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 Bellmore-Merrick Central High School District**

### **Appearances:**

Law Offices of Susan Deedy & Associates, attorneys for petitioner, by Richard F. Corrao, Esq.

Ingerman Smith, LLP, attorneys for respondent, by Susan M. Gibson, Esq.

## **DECISION**

### **I. Introduction**

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from the decision of an impartial hearing officer (IHO) which determined that the educational program respondent's (the district's) Committee on Special Education (CSE) had recommended for her son for the 2020-21 and 2021-22 school years was appropriate, and which denied her request to be reimbursed for her son's tuition costs at the Fusion Academy (Fusion) for the 2021-22 school year. The appeal must be dismissed.

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

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

§§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[l]).

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

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

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

The student received a diagnosis of autism spectrum disorder (level one) at age three (Tr. p. 1094). He was found eligible for preschool special education and received special education itinerant teacher (SEIT) services, occupational therapy (OT), and physical therapy (PT) in accordance with an IEP (see Tr. pp. 1094-95; Dist. Ex. 8 at p. 3). The student attended elementary school in the North Merrick Union Free School District (North Merrick) through the conclusion of the 2019-20 school year (sixth grade) (see Parent Ex. F at p. 1). In elementary school the student performed well academically but struggled both socially and emotionally (see Tr. pp. 1099-1100). He received diagnoses of generalized anxiety disorder and attention deficit hyperactivity disorder

(Tr. p. 1094). Prior to and during the 2017-18 school year (fourth grade), the parent obtained private services for the student from a clinical social worker (private social worker) to address his limited frustration tolerance, episodic crying, and outbursts that had been reported by the student's then-current school (Parent Exs. A at p. 3; H at p. 1).<sup>1</sup> For the 2018-19 school year (fifth grade), the student attended a general education class at North Merrick where he received counseling and the support of an aide throughout the school day (Parent Exs. D at p. 1; H at p. 1). His anxiety increased, and he began to refuse to enter both his classroom and the school building (Tr. pp. 1101; Parent Exs. F at pp. 1, 3; I at p. 1). The student received at least some of his instruction at home by a tutor (Tr. pp. 1107-08).

In or around January 2019 the parent referred the student to the private social worker for a "comprehensive multidisciplinary assessment" based on her continued concerns about the student's overall development as well as concerns expressed by prior evaluators regarding the student's social/emotional development (Parent Ex. D at p. 1). The privately retained social worker administered the Autism Diagnostic Observation Schedule, Second Edition (ADOS-2) and the Childhood Autism Rating Scale, Second Edition (CARS2) to the student (Parent Ex. D at pp. 2, 5).<sup>2</sup> The student's scores on Module 3 of the ADOS-2 demonstrated a profile of social and communicative functioning indicative of an autism spectrum disorder (id.).

The private social worker noted that providing the student with an adapted school day "seem[ed] to be working" and recommended that "home instruction and intensive counseling" continue to be considered to help the student "gain back control" in order to return to full school days (Parent Ex. H at p. 1). The private social worker also opined that "[r]egardless of current interventions in place, [the student] continue[d] to demonstrate difficulties in his current school environment, [and] given the lack of progress with the current plan in place, a transition to a higher and more specialized environment may be warranted" (id.).

Around this same time North Merrick conducted psychological and educational evaluations of the student (Parent Exs. E; F). The psychologist who evaluated the student concluded that his overall intellectual ability was in the average range but that he had some difficulty attending to class lessons and adapting to changes in routine, as well as with social pragmatics (Parent Ex. F at p. 4). The special education teacher who conducted the educational evaluation of the student indicated that the student's scores on a standardized measure of academic achievement fell within the average to above average range (Dist. Ex. E at p. 1).<sup>3</sup> The special education teacher noted that the student demonstrated "unbelievable decoding and comprehension skills" and that he read effortlessly and quickly, with complete understanding (id. at p. 2).<sup>4</sup>

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<sup>1</sup> According to the February 24, 2022 due process complaint notice, at around the age of three, the student began attending a social skills group through the social worker who conducted the January 16, 2019 private diagnostic evaluation (Parent Ex. A at p. 3).

<sup>2</sup> The privately retained social worker administered Module 3 of the ADOS-2 based on the student's age, fluid speech and ability to use complex speech (id. at p. 3).

<sup>3</sup> The January 22, 2019 educational evaluation consisted of a psychoeducational evaluation, a CSE teacher form and a district guideline for requesting an aide form (Parent Ex. E at pp. 1-7).

<sup>4</sup> According to the resultant evaluation report, the student's subtest scores fell between the 37th and 99th percentile

However, she also noted that the student had some difficulties with math applications, math computation, and writing (Parent Ex. E at pp. 2-3). In April 2019 a behavior consultant for North Merrick conducted a functional behavioral assessment and identified school refusal as the targeted behavior (Parent Ex. I).

The student was homeschooled for the majority of the 2019-20 school year (sixth grade) (Dist. Ex. 4 at pp. 1, 2).

The district convened a CSE on February 25, 2020 to develop an IEP to be implemented on July 1, 2020 when the student was scheduled to transition from North Merrick to the district for seventh grade (Dist. Ex. 4 at p. 1). At the time of the February 2020 CSE, the district noted that the student was being homeschooled and received daily resource room services pursuant to an individualized education services program (IESP) (id. at pp. 1, 2).<sup>5</sup> According to the February 2020 CSE meeting information summary the student continued to meet the criteria to be classified as a student with autism and the CSE recommended that for the 2020-21 school year he continue to receive special education services "as indicated on the enclosed IEP" (id. at p. 1).<sup>6</sup> For the 12-month, summer portion of the 2020-21 school year beginning on July 1, 2020, the CSE recommended individual parent counseling and training four times per year for one hour in the student's home, and individual behavior intervention services seven times per year for one hour in a flexible location (Dist. Ex. 4 at pp. 1, 2-3, 8-9). For the 10-month portion of the academic school year beginning on September 8, 2020, the CSE recommended integrated co-teaching (ICT) services in English language arts (ELA), math, science and social studies each for one period per day for 41 minutes, and individual behavior intervention services 15 times per year for one hour at school (id. at pp. 1, 2, 7-8). The CSE also recommended individual counseling one time per six-day cycle for 30 minutes and individual parent counseling and training ten times per year for one hour in the home, with these services beginning September 15, 2020 (id. at pp. 1, 2, 8). The meeting information summary indicated that the CSE received reports from the "home schooling service staff" on the student's present levels of performance, and considered the reports and evaluations listed in the IEP (id. at p. 2). The meeting information summary further reflected that the CSE discussed the difficulties the student faced attending school (id.).

By prior written notice dated February 25, 2020, the district summarized the recommendations of the February 2020 CSE, which was consistent with the meeting information summary on the IEP (compare Dist. Ex. 4 at pp. 11-12, with Dist. Ex. 4 at pp. 1-3).

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and his performance on all of the administered subtests was judged to be average to above average (Parent Ex. E at p. 1).

<sup>5</sup> Education Law § 3602-c allows parents to home school their children under an individualized home instruction plan that the superintendent determines is in compliance with the requirements of 8 NYCRR 100.10 as a parental placement and then seek dual enrollment services for eligible students with disabilities under an IESP (see "New Requirements for the Provision of Special Education Services to Home-Instructioned ('Home-Schooled') Students" available at <https://www.p12.nysed.gov/specialed/publications/policy/HomeInstructionGuidance708.pdf>).

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

For the 2020-21 school year, the student transitioned to the district middle school for seventh grade (see Tr. p. 73). In August 2020 a mental health counselor began providing individual behavior intervention services to the student and home-based individual parent counseling and training (Tr. p. 589; Dist. Ex. 31 at pp. 1-38). The focus of the sessions was the student's return to school and transition to a new school (Dist. Ex. 31 at pp. 1-5). The student also received school-based individual behavior intervention services beginning in September 2020 from a Board Certified Behavior Analyst (BCBA) contracted by the district (Dist. Ex. 13 at p. 1).

From mid-December 2020 through the end of January 2021 the student attended school remotely (Tr. pp. 1124-26, 1130; Dist. Ex. 31 at pp. 26, 28, 32-33). A CSE convened on March 24, 2021 to develop the student's IEP for the 12-month 2021-22 school year (eighth grade) (Dist. Ex. 5 at p. 1). According to the meeting information summary, the student continued to meet the criteria to be classified as a student with autism and the CSE recommended that he continue to receive special education services "through Integrated Classes through the Collaborative Program" (*id.*). More specifically, for the 12-month, summer portion of the 2021-22 school year beginning on July 1, 2021, the CSE recommended individual parent counseling and training four times per year for one hour in the student's home, and individual behavior intervention services five times per year for one hour in a flexible location (Dist. Ex. 5 at pp. 1-2, 8). For the 10-month portion of academic school year beginning on September 1, 2021, the CSE recommended ICT services in ELA, math, science and social studies each for one period per day for 41 minutes, and individual behavior intervention services ten times per year for one hour at school (*id.* at pp. 1, 2, 7-8). The CSE also recommended individual counseling one time per six-day cycle for 30 minutes and individual parent counseling and training ten times per year for one hour in the home, with these services beginning September 14, 2021 (*id.* at pp. 1-2, 7).

According to the student's IEP progress report from seventh grade through June 25, 2021, the student had achieved goals related to identifying his positive qualities and how they impacted his successful accomplishment of tasks and adapting to changes in his environment (Dist. Ex. 22 at p. 1; see Dist. Ex. 4). In addition, the progress report indicated that the student was progressing satisfactorily toward a goal related to school attendance but noted that the student had difficulty around transition periods such as "Mondays after weekends, breaks, end of year" (*id.*). The student's 2020-21 record of attendance indicated that he missed a total of 16.5 full school days over the course of the school year (Dist. Ex. 27 at p. 6; see Tr. p. 225).

According to the student's 2020-21 seventh grade report card, the student's final grades were as follows: ELA 88, math 92, science 95, and social studies 96 (Dist. Ex. 24 at pp. 3-4).<sup>7</sup> The student's final grades in all other subjects ranged from 74 in his foreign language class to 100 in physical education (*id.*).

In accordance with the student's March 2021 IEP, the student's home-based parent counseling and training provider for the 2021-22 school year met with the parent for four sessions between August 2, 2021 and August 30, 2021 (Dist. Ex. 30 at pp. 1, 5, 7, 9). The same provider also met with the student for nine "flexible" behavior intervention services sessions between August 4, 2021 and October 13, 2021 (*id.* at pp. 2-4, 6, 8, 10-13). The provider's September 2021

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<sup>7</sup> District exhibit 24 was a two-page document that was marked as "24-3" and "24-4" (Tr. pp. 36-37).

session notes indicated that the student continued to experience chest pain and anxiety in the school setting (*id.* at pp. 9-11).

In email correspondence dated October 14, 2021, the parent asked the school psychologist if the student could leave classes early so he could walk in empty hallways (Parent Ex. K at p. 2). The school psychologist responded approximately 30 minutes later after speaking to the student and advised the parent that the student had stated that being in crowded hallways was something that he hated, rather than something that made him nervous (*id.* at p. 1). She further advised the parent that the student's affect matched his statement and that she was "hesitant to go backwards and remove 'unwanted' things that he c[ould] tolerate as this w[ould] build more avoidance" (*id.*). The school psychologist also indicated that the student was fine and had returned to class (*id.*). Approximately one hour later, the parent replied to the school psychologist and stated that she had just asked the student "why"; he replied that he now realized why he hated school and it was because of "people and crowds" and that "[i]t makes him nervous" (*id.*).

By email dated October 18, 2021, the parent wrote to the school psychologist stating that the student was "resting after his meltdown th[at] morning" (Parent Ex. L at p. 2). Approximately 30 minutes later, the school psychologist responded asking whether the student would be coming to school and what had happened (*id.* at p. 1). Approximately 20 minutes later, the parent replied detailing a conversation about self harm that she had with the student and indicating that he would not attend school that day (*id.*). The parent stated that "going forward" the student's "day w[ould] be shortened and he w[ould] walk the halls empty to lessen his stress" and indicated that if these accommodations could not be made the district could send the student to a private school (*id.*). On October 19, 2021, while attending school, the student "contemplated and had the impulse to throw himself down a school staircase," and the student was thereafter evaluated at a hospital and released later that day (Parent Ex. A at p. 9; Tr. pp. 255-56). In response to this incident, a school team meeting was held on October 21, 2021 (Dist. Ex. 6 at p. 2). The team determined that the student would follow a truncated class schedule and that a CSE meeting would be held to reflect the program changes needed (*id.*).

In an email dated October 26, 2021, the parent wrote to the student's school team stating that she was "signing up" the student at Fusion "on the 3rd so he won't be coming in anymore" and asked to be notified if an already scheduled CSE meeting was still necessary (Parent Ex. B at p. 2). In a later email exchange dated October 26, 2021, the CSE chairperson advised the parent that the meeting would still be held on October 27, 2021 and the parent indicated that she would attend via video conference (*id.* at pp. 1-2).

The CSE reconvened on October 27, 2021 to conduct a program review (Dist. Ex. 6 at p. 1). The October 2021 CSE discussed the student's "anxiety to return to the school building due to recent social-emotional distress" and recommended that the student receive "additional behavioral intervention services for a total of 15 hours for the year, implemented with a flexible setting to provide home hours if needed" (*id.* at p. 1, 7). The CSE also recommended that the management needs section of the IEP be amended to "reflect the social-emotional supports available to [the student] in the building" (*id.* at pp. 1, 5-6). Lastly, the CSE recommended that the student be provided "extra time needed to go between classes" and that the student be allowed to "transfer from class to class in the hallways with smaller crowds" (*id.* at pp. 1-2, 8).

On November 11, 2021, the parent entered into an enrollment contract with Fusion that included an estimated start date for the student of November 15, 2021 (Parent Ex. N at pp. 1, 3). By ten-day written notice letter dated November 17, 2021, the parent disagreed and/or rejected the district's recommended program and placement for the 2020-21 and 2021-22 school years and advised the district of her intention to unilaterally enroll the student at Fusion for the remainder of the 2021-22 school year and seek public funding (Parent Ex. C at p. 1).

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

By due process complaint notice dated February 24, 2022, the parent contended that the district had failed to offer the student a free appropriate public education (FAPE) for the 2020-21 and 2021-22 school years (Parent Ex. A at p. 3). The parent asserted facts related to preceding school years from preschool through sixth grade when the student attended North Merrick (*id.* at pp. 3-6). After transitioning to middle school, the parent asserted that the student had struggled with attendance and participation in middle school and had sought emotional support in the school environment (*id.* at p. 3). The parent argued that the support provided by the district was insufficient to address the student's significant needs and that the IEPs recommended by the district and the student's placement at a district school were not designed to provide the social/emotional support the student required (*id.*). The parent further claimed that the student was unable to tolerate the environment at the district school and was unable to attend (*id.*).

The parent set forth further factual allegations from seventh and eighth grades when the student attended the district up until the time the parent unilaterally placed the student at Fusion (Parent Ex. A at pp. 6-11.) With respect to seventh and eighth grades, the parent was of the opinion that the student required a small, structured school environment where his social/emotional needs could be addressed throughout the day (Parent Ex. A at p. 3). Specifically, the parent alleged that for the 2020-21 and 2021-22 school years, the district failed to appropriately consider evaluative data, failed to recommend an FBA and failed to develop a BIP, failed to recommend and implement adequate instruction, supports and services, failed to offer a program tailored to the student's individual needs, failed to offer sufficient social skills interventions, and failed to develop appropriate goals and objectives (*id.* at pp. 11-12). The parent did not allege any other specific violations, instead indicating that "[t]o the extent the foregoing violations of law and regulation are procedural in nature," they denied the student a FAPE for the 2020-21 and 2021-22 school years (*id.* at p. 12). Next, the parent argued that Fusion was tailored to address the student's individualized academic and social/emotional needs, was an appropriate unilateral placement and that equitable considerations favored full reimbursement for the 2021-22 school year (*id.* at pp. 3, 12).<sup>8</sup> As relief, the parent requested a finding that the student was denied a FAPE for the 2020-21 and 2021-22 school years, tuition reimbursement and/or direct payment of tuition and related expenses for the student's attendance at Fusion for the 2021-22 school year, reimbursement for private transportation to and from Fusion, and an unspecified amount of compensatory educational services (*id.* at pp. 12-13).

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

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

A prehearing conference was held on April 11, 2022 (Apr. 11, 2022 Tr. pp. 1-13). The parties reconvened for an impartial hearing on June 6, 2022, which concluded on November 11, 2022, after eight hearing dates (Tr. pp. 1-1210).<sup>9</sup>

By decision dated March 16, 2023, the IHO found that the district offered the student a FAPE for the 2020-21 and 2021-22 school years (IHO Decision at pp. 16-31). Specifically, the IHO determined that the district's recommendation of ICT services, counseling, in-school behavior intervention services, home-based behavior intervention services, and home-based parent counseling and training addressed the student's social/emotional needs and interfering behaviors (id. at pp. 16-28, 30-31). The IHO further determined that the district was not required to conduct an FBA/BIP (id. at pp. 28-30). Having found that the district offered the student a FAPE for the 2020-21 and 2021-22 school years, the IHO did not consider the appropriateness of the parent's unilateral placement at Fusion or whether or not equitable considerations favored reimbursement (id. at p. 30).

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

The parent appeals and initially argues that the IHO's decision contains "material errors and omissions" which resulted in an erroneous decision. The parent asserts that the student as well as the program offered by the district were inaccurately described in the IHO's decision, and that the IHO repeatedly mischaracterized evidence in his decision. The parent alleges that the IHO erred in finding that ICT services were appropriate to meet the student's academic and social/emotional needs during the 2020-21 and 2021-22 school years. Specifically, the parent asserts that the district failed to meet its burden that the recommendation for ICT services was supported by available data and was appropriate to meet the student's needs. In addition, the parent argues that the "IHO erred in failing to consider the [d]istrict's improper change in and failure to document [the student]'s December 2020 remote placement outside the CSE" (Req. for Rev. ¶21).<sup>10</sup> The parent further asserts that the IHO failed to consider the district's failure to implement ICT services during the 2020-21 school year and failed to consider compensatory services.

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<sup>9</sup> The transcript for the first day of the impartial hearing was not paginated consecutively with the transcript for the prehearing conference. To the extent it is necessary to cite to the transcript for the April 11, 2022 prehearing conference, it will be cited by date and corresponding page number. All other transcript citations in this decision cite to the impartial hearing and begin with the June 6, 2022 transcript of the first day of the impartial hearing.

<sup>10</sup> This claim was not raised in the parent's February 24, 2022 due process complaint notice and is therefore not properly the subject of this appeal (Parent Ex. A at p. 7). Furthermore, to the extent that the claim implicates a systemic policy of the district, I cannot rule on a systemic challenge regarding whether the school district should have, as a general policy, continued to provide remote learning options to students as the State began the process of recovering from the effects of the COVID-19 pandemic. As it relates to remote instruction, the parent takes offense to the IHO's statement that "[f]rom December 2020 through January 29, 2021 the student participated in remote/virtual instruction full-time due, in part, to rising COVID rates". A review of the transcript pages cited by the IHO generally support the IHO's assertion. The school psychologist reported that the parent "elected for [the student] to go remote because of the rise in COVID rate" (Tr. p. 227), the student's teacher reported that "[t]here was a spike and mom wanted [the student] to be at home" (Tr. p. 508), and the mental health counselor confirmed that she wrote in her December 2020 session note that there was a spike in COVID and the parent reported that if it continued she was going to pull the student from school (Tr. p. 644; Dist. Ex. 31 at p. 26). The



The parent next alleges that the IHO erred in finding that the student's social/emotional needs were appropriately addressed. The parent argues that she "asked for and was repeatedly denied more support, that the [d]istrict failed to adequately evaluate and address his myriad sensory needs, never provided [the student] with an appropriate social skills group or curriculum, and never conducted the FBA/BIP it said it would conduct starting in the [s]tudent's February 2020 IEP" (Req. for Rev. ¶23). The parent contends that the district's recommendation for counseling was insufficient to address the student's needs. The parent alleges that the student never achieved his attendance goal and continued to regress despite receiving counseling and building-level supports. The parent further contends that the district did not evaluate or address the student's sensory needs. The parent also alleges that the IHO incorrectly found that the district supported its decision not to conduct an FBA/BIP.

According to the parent, the IHO erred in not considering the appropriateness of the parent's unilateral placement at Fusion, and further erred by finding the parent's remaining claims were without merit. As relief, the parent requests reversal of the IHO's decision, a finding that the student was denied a FAPE for the 2020-21 and 2021-22 school years, a finding that Fusion was an appropriate unilateral placement for the 2021-22 school year, and a finding that equitable considerations favor full reimbursement. In addition, the parent seeks by reference all requested relief asserted in the parent's post-hearing brief but specifically requests tuition reimbursement and reimbursement for the student's transportation costs.<sup>11</sup>

In an answer the district denies all of the parent's allegations and argues that the IHO's decision should be affirmed in its entirety. The district asserts that the IHO correctly determined that the recommended ICT services were appropriate to meet the student's academic and social/emotional needs during the 2020-21 and 2021-22 school years. The IHO also correctly determined that the district provided the student with appropriate services to address his social/emotional and sensory needs, social skills deficits and interfering behaviors from summer 2020 through fall 2021. Next, the district argues that the IHO correctly found that the district had sufficient evidence to support its decision that an FBA was not necessary. The district further contends that the IHO correctly found that the district had offered the student a FAPE for the 2020-

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mental health counselor's session notes further indicated that when asked what her reason for pulling the student from school would be the parent reported that the student "was not going to sit in class with 6 kids because they are all getting covid on weekends" (Dist. Ex. 31 at p. 26). In contrast to district staff, the parent asserted that the student needed to take a break following an incident in school in which the student was found lying on the floor crying (Tr. pp. 1125-26). The parent testified that the mental health counselor, school psychologist, and parent decided the student was to stay home and take a break because of his meltdowns (Tr. p. 1130; see Dist. Ex. 19 at pp. 1-2). Thus, the evidence in the hearing record overall confirms that, as the IHO found, the student stayed home "in part" due to the rising COVID rates and to the extent that there were other reasons for the student participating in remote instruction, the IHO cited to the parent's testimony in his decision.

<sup>11</sup> The parent's post-hearing brief included a request for the district to fund at least 42 hours of 1:1 compensatory occupational therapy (OT) services to be provided by a qualified provider of the parent's sole choosing, at a reasonable market rate, and "scheduled at the [p]arent[s] discretion and good until used" (Parent Ex. X at p. 36). The parent's request for review does not reiterate this specific request for compensatory OT. The parent alleges that "the [d]istrict failed to prove [the student] was provided with ICT programming during his time as a remote [s]tudent... or that the [d]istrict considered compensatory services to account for its failure to implement [the student]'s ICT or other programming mandated by his then-current IEP" (Req. for Rev. ¶22). The February 24, 2022 due process complaint notice does not include a claim that the February 25, 2020 IEP was not implemented while the student attended remotely from November 2020 through January 2021 (Parent Ex. A at p. 7).

21 and 2021-22 school years. The district also asserts that Fusion was not an appropriate unilateral placement and that equitable considerations do not favor reimbursement as the parent did not provide the district with ten-day written notice of her intention to unilaterally enroll the student at Fusion for the 2021-22 school year. Lastly, the district alleges that the IHO correctly found the parent's remaining claims lacked merit.

In a reply, the parent reiterated her claims.

## V. Applicable Standards

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

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP" (Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). The Supreme Court has indicated that "[t]he IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement" (Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. 386, 399 [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., 580 U.S. at 404). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Endrew F., 580 U.S. at 403 [holding that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"]; Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).<sup>12</sup>

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

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<sup>12</sup> The Supreme Court has stated that even if it is unreasonable to expect a student to attend a regular education setting and achieve on grade level, the educational program set forth in the student's IEP "must be appropriately ambitious in light of his [or her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives" (Endrew F., 580 U.S. at 402).

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**

As an initial matter, I note that my independent review of the hearing record leads me to find that, based on the testimonial and documentary evidence presented, the IHO relied on the proper legal standards to support his conclusion that the district provided the student with a FAPE for the 2020-21 and 2021-22 school years and, further, that the decision also demonstrates that the IHO carefully recited and considered the testimonial and documentary evidence presented by both parties, and additionally, that he carefully marshaled and weighed the evidence in support of his conclusions. Specifically, the IHO in this proceeding set forth a factual background that included details regarding the student's fifth and sixth grade school years in elementary school including incidents of school refusal, the reevaluation of the student in January 2019, and his transition to the district's middle school in July 2020 (IHO Decision at pp. 6-8). The IHO described the special education programming offered in the student's February 2020 IEP, including the ICT services,<sup>13</sup> individual counseling, individual behavior intervention services at school and at home, and parent counseling and training to facilitate the student's transition back into a school environment, and the IHO also recounted the attendance models during the 2020-21 school year (seventh grade) that the district had in place in light of the COVID-19 pandemic, namely full remote/virtual, hybrid remote/live, and later, fully live attendance (IHO Decision at p. 8). The IHO noted that the student began seventh grade with hybrid instruction, but that due in part to rising COVID rates the student switched to all virtual instruction during December 2020 through January 2021 (IHO Decision at pp. 8-9). The IHO further noted that during seventh grade the student asked to visit the nurse during in-person instruction but that he remained in school for the entire 2020-21 school year with the exception of absences for health issues and pandemic-related doctor appointments (IHO Decision at p. 9).<sup>14</sup>

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<sup>13</sup> State regulation defines ICT services as the provision of specially designed instruction and academic instruction provided to a group of students with disabilities and nondisabled students and states that the maximum number of students with disabilities receiving ICT services in a class shall be determined in accordance with the students' individual needs as recommended on their IEPs, provided that the number of students with disabilities in such classes shall not exceed 12 students and that the school personnel assigned to each class shall minimally include a special education teacher and a general education teacher (8 NYCRR 200.6[g]).

<sup>14</sup> The parent asserts that the IHO mischaracterized evidence by stating that the student remained in the middle school for the entire 2020-21 school year and that his only reported absences from school were due to health-related issues and pandemic related doctor's appointments. The parent notes that the student spent two months on remote instruction in the middle of the school year and that the evidence in the hearing records shows that the student struggled to remain in class when he was physically attending school. I have reviewed the evidence and with regard to the period of remote instruction, as discussed above, while there was a difference in opinion between school staff and the parent as to why the student was kept home during that time period, the evidence shows that the decision to keep the student home was made by the parent (Dist. Ex. 31 at p. 28). The attendance records for the 2020-21 school year indicate that the student was absent 16.5 days for the school year but also

The IHO also described the programming recommended by the CSE in the March 2021 IEP for eighth grade, which was similar to his seventh-grade programming, but he noted the comparative reduction in behavior intervention service hours both during the summer (from seven to five hours) and during the 10-month school year (from 15 to 10 hours) (IHO Decision at p. 9). The IHO noted that during fall 2021 home instruction was only authorized for medical reasons during that school year and hybrid and remote options were no longer available (IHO Decision at p. 9). The IHO described evidence of an increase in the student's anxiety due to the lack of a remote option and a parental request for a truncated day, a change in placement/home instruction, but the district rejected that request in light of the student's regular attendance during the preceding school year (IHO Decision at pp. 9-10).<sup>15</sup> The IHO recounted an incident during fall 2021 in which the student did not want to attend school, and stated that he had an impulse to throw himself down the stairs in order to leave the building (IHO Decision at p. 10). A team meeting at the district was convened to address the student's recent statement about self-harm, and, among other things, the district granted the parents request to truncate the school day and enter school at third period (IHO Decision at p.10). The IHO recounted facts of the student's attendance of 21 of 28 school days during the 2021-22 school year prior to being removed by the parent and his absence for seven days due to illness and/or doctor's appointments (IHO Decision at p. 10-11).

The IHO recounted the parents' claims

The CSE failed to recommend or conduct a functional behavioral assessment or a behavioral intervention plan for the student. The CSE also failed to evaluate, or recommend adequate programming for, the student's fine motor, sensory, or social skills needs. The CSE failed to develop appropriate goals for the student or appropriately address peer bullying. The District's response to the events of October 19, 2021 was deficient. The CSE predetermined its ICT recommendations for the student for the disputed school years. The record supports the student's need for a small school/class setting.

(IHO Decision at p. 11).

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reflected numerous unexcused absences from class and incidences of tardiness (Dist. Ex. 27).

<sup>15</sup> The parent argues that the IHO erred and should have noted that she requested a truncated day in September 2021. While cross examining the school psychologist the parent's attorney questioned "I believe the record indicates that whether it was September or October of 2021, mom approached you about the truncated school day, correct?" to which the witness responded "Yes" (Tr. p. 375). In a second question, the parent attorney again referenced "September of 2021, and even October of 2021" (Tr. p. 376). Additional transcript pages cited by the parent are to her own testimony in which she recalled asking in September 2021 for a shorter school day and permission for the student to leave class early so there would not be as many students in the hall (Tr. pp. 1142-43). The IHO cited testimony from the school psychologist who indicated that, although she could not recall the exact date, the parent asked for a truncated school day the first or second week of October and also testimony from the student's mother confirming that she had requested that the student be allowed to leave classes early in her October 18th email (Tr. pp. 248-249; 1145-46). The hearing record may indicate differing recollections as to precisely which month the request was made but does not support the parent's claim that the IHO incorrectly recounted witness testimony or erroneously cited the hearing transcript.

In examining the parents claims regarding the inadequacy of an ICT setting, the IHO noted the evaluative materials that were before the February 2020 CSE, including the September 2019 psychiatric evaluation; April 2019 functional behavioral assessment; March 2019 counseling progress report; January 2019 classroom observation; January 2019 psychological evaluation; January 2019 teacher report; January 2019 educational evaluation; January 2019 social history; March 2015 physical examination (IHO Decision at p. 17).<sup>16</sup> The student's IEP described the CSE's rationale and events that occurred during the meeting. According to the February 2020 meeting information summary, the CSE recommended that the "ICT/Collaborative Program" and the related services of counseling, behavior intervention services and parent counseling and training, along with program and testing modifications would best address the student's academic and social/emotional needs (District Ex. 4 at p. 1). Additionally, the CSE recommended 12-month services consisting of parent counseling and training, and behavior intervention services to address the student's "significant social/emotional needs" (id. at pp. 1, 2, 8). The meeting information summary also indicated that the CSE received reports from the "home schooling service staff" on the student's present levels of performance, and considered the reports and evaluations listed in the IEP (id. at p. 2). The meeting information summary further reflected that the CSE discussed the difficulties the student faced attending school (id.). The parent shared her concerns and the CSE recommended providing the student with as much support as possible to address his needs and to help him attend the district middle school (id.). Additional notes in the meeting information summary indicated that the parent reported the student did not want to come to school (id.). The parent stated that the student completed a full day of schoolwork in 2-3 hours (id.). The notes then stated that the parent reported that the student was happy to go back to school in September and got anxious about math (id.). The parent stated that when the student became anxious, he was no longer able to function, became rigid in his thinking and cried out of frustration with the work (id.). The meeting information summary indicated that the student had been diagnosed as having an attention deficit hyperactivity disorder (ADHD) and that he had visited the middle school (id.). According to the summary, the student's resource room teacher stated that the student was inconsistent, and noted that on some days he did well and on others he struggled to follow basic directions (id.). The student reportedly read very quickly, presented as anxious, and had been working on coping strategies that he could use in a classroom setting (id.). The resource room teacher also stated that when the student was anxious, it was difficult to get work done (id.). She further reported that visual supports seemed to help the student, overall the student was able to complete tasks, and on Fridays, the student worked for candy (id.). According to the meeting information summary, the parent also stated that the student would not be homeschooled during the 2020-21 school year and that it was her intention that the student attend the district middle school (id.).

On appeal the parent attempts to find fault with the IHO decision on the ground that the student did not have an oppositional defiant disorder and that she reached that conclusion because

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<sup>16</sup> The hearing record does not include the March 5, 2015 physical examination or the January 2, 2019 social history that was referenced in the IEP. Although included in the hearing record, the January 16, 2019 psychoeducational evaluation and March 14, 2019 progress/summary completed by the private social worker were not among the evaluations considered by the February 2020 CSE according to the IEP and prior written notice (Dist. Ex. 4 at pp. 4, 11). While the parent has asserted the district's recommendation for ICT services was unsupported by "available data," there is no indication if the parent's privately obtained evaluative information was shared with the February 2020 CSE and the parent has not claimed that the district failed to consider the evaluative information prepared by the private social worker during the February 2020 CSE (Req. for Rev. ¶17).

another psychiatrist later felt it was not warranted in late October 2021. However, the IHO was not wrong to note the diagnosis in his decision because one of the psychiatrists did opine that the student met the criteria. The evidence shows that North Merrick also obtained a psychiatric evaluation of the student due to school refusal around the beginning of the 2019-20 school year (Dist. Ex. 7 at p. 1).<sup>17</sup> The psychiatrist did provide diagnoses of the student that included autism spectrum disorder without language delay and without intellectual delay, an oppositional defiant disorder, and an unspecified impulse control disorder (*id.*). The parent does not otherwise sufficiently explain how the difference in opinions would have resulted in different programming for the student and the parent's argument is not a basis for disturbing the IHO's decision.

The IHO noted evidence that the ICT was selected by the CSE to assist the student to transition back into a school environment after being home schooled during in his prior programming at North Merrick and to assist with any school refusal issues (IHO Decision at p. 18). The district director of special education and pupil personnel services (director of special education) testified that students transitioning to the district attended a seventh-grade orientation prior to the start of the school year (Tr. pp. 68-69, 78; *see* Dist. Ex. 31 at p. 12). With regard to the student, the director of special education testified that the February 2020 CSE was aware that he had some school refusal issues that they were concerned about, and the student was able to visit the building in February (Tr. p. 78). The director of special education further testified that the visit to the building was part of "the normal transitioning" but also was for the student to get to know the staff prior to school starting (Tr. pp. 78-79). The director of special education also noted that the February 2020 CSE further addressed the student's history of school refusal by recommending behavior intervention services and parent counseling and training for the summer prior to the start of the regular school year to support the student's transition back into the school environment (Tr. pp. 79-80).

The evidence also shows that the district director of special education testified that the February 2020 CSE recommended ICT services for the student in English, math, social studies, and science (Tr. p. 80). She further testified that "[i]n addition to the supports on the IEP where it refers to [ICT] services, we also provide students with a support period that is not listed there where there is math and science alternating days with English and social studies" (*id.*). The director of special education also stated that the support period was taught by one of the special education teachers "in the classroom with the student to reinforce their learning and to address any specific needs that they observe or they see coming up in the classroom related to content" (*id.*). Specifically, the director of special education described that the support class included pre-teaching, reteaching, and reinforcing the curriculum "with breaking down tasks, the executive functioning part of being a student and how to create a schedule. That is the purpose of that support class that is built in" (Tr. p. 81). When asked why ICT services were recommended for a student with few if any academic needs, the director of special education responded that the district had

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<sup>17</sup> The psychiatrist provided a detailed four-page evaluation report and concluded, among other things, that the student was "more than capable of attending his elementary school, as long as everyone including the parent, the behavioral specialist, and the classroom teacher [we]re on board with a consistent behavior plan" (Dist. Ex. 7 at p. 4). She noted that the "school behavioral specialist ha[d] revised the behavior plan multiple times to best suit [the student]'s needs" and that the student needed "to learn to conform to societal demands in order to function in the world around him, and to prepare him for [m]iddle [s]chool (Dist. Ex. 7 at p. 4). She was of the view that "all adults in [the student]'s life need[ed] to set firm limits and have high expectations of him while providing nurturance and kindness" (Dist. Ex. 7 at p. 4).

"found for students who ha[d] social and emotional needs the ability to be able to connect with a smaller ratio of student to teacher [wa]s beneficial for the student" (Tr. p. 82). In addition, the director of special education stated that "having that additional support class with a special ed teacher every day helps [students] to form the adult connections, someone they can trust so when they are in the classroom, they know they have a go-to person" (*id.*). She indicated that for the student in the instant case, the support class was not based upon his learning needs (*id.*). Rather, the purpose of the ICT class was to support the student as much as possible in order to help him transition back into a school setting, particularly given his history of school refusal and homeschooling (Tr. pp. 82-83).

With regard to planning for the 2021-22 school year, the IHO reasoned that the student had performed well academically during seventh grade, achieved two out of his three IEP goals and made improvements on his attendance goal (IHO Decision at p. 18).<sup>18</sup> The IHO noted that similar ICT programming was planned for the student for eighth grade but he noted evidence that the student's motivation to attend the district middle school declined when the student became aware of an option to attend a different school (IHO Decision at p. 18).<sup>19</sup> In describing the student's school-based team, the director of special education testified that the student's counseling was provided by a school psychologist, and that the school had a full time behaviorist (BCBA) on staff to provide additional support to all students within the building (Tr. p. 83). The February 2020 CSE also recommended that the student receive school-based behavior intervention services by the behaviorist (Dist. Exs. 4 at p. 8; 13 at p. 1). The evidence shows that the district school psychologist testified that she thought the continuation of the program recommendation for the 2021-22 school year was appropriate because the student needed the extra support to keep him on

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<sup>18</sup> The student's 2020-21 academic school year IEP (February 2020) progress report reflected that during the first marking period the student was progressing gradually toward his three social/emotional annual goals (Dist. Ex. 22 at p. 1; *see* Dist. Ex. 4). For the second marking period, the student was progressing satisfactorily toward his first and third annual goal and progressing gradually toward his second annual goal (*id.*). The student's 2020-21 record of attendance reflected that for the first quarter the student was absent from his first, second, third, and ninth period classes six times, was absent from his fourth period class nine times, and was absent from his sixth, seventh and eighth period classes five times (Dist. Ex. 27 at p. 5). The student was also tardy for his second period class one time (*id.*). During the second quarter, the student was absent from his first period class three times, was absent from his second and third period classes one time each, was absent from fourth and ninth period classes four times, and was absent from his sixth, seventh and eighth period classes two times (*id.*). The student was also tardy for his first period class five times, and for his fourth and seventh period classes two times (*id.*). The student's health office visit report for the 2020-21 school year reflected that as of March 23, 2021, the student visited the nurse's office ten times (Dist. Ex. 29 at p. 1). The student's 2020-21 record of attendance indicated that as of the end of the second quarter the student had missed a total of seven full school days (Dist. Ex. 27 at p. 6).

<sup>19</sup> According to the school psychologist both the student and the parent were anxious about the lack of a remote option when they learned about the implementation of State guidance regarding COVID-19 for the 2021-22 school year and they began to consider alternatives (Tr. pp. 208, 243-44). When asked about the impact of the student knowing there was a pending option for him to go to another school, the school psychologist replied, "...from a psychological point of view if you avoid what makes you anxious, it feels really good in the short term, but overall in the long term it increases the anxiety" (Tr. p. 246). She continued, "if there is some sort of an out or escape, so some sort of another option that exists that you find more desirable, you are not going to be motivated to use the skills and work in the school building" (*id.*). The school psychologist further testified that she advised the parent that "[i]f we are not aligned with the same goals and he is thinking that there's this other option, he is not going to be committed. He is not going to work and we are not going to see the gains that we did last year" (Tr. pp. 246-47).



track and motivate him (Tr. p. 233). She stated that the student "required the model because he needed a little more assistance and support and it's more flexible. He was doing well within that model" (id.). The school psychologist further testified that she wrote the social development section of the March 2021 IEP (id.). She recounted the social development section in her testimony (compare Tr. pp. 234-35, with Dist. Ex. 5 at p. 5). She testified that at the time of the CSE meeting, and "throughout most of the year" the student had generalized the skills necessary to decrease his school avoidance behavior and engage in problem solving in an effective way (Tr. pp. 235-36).

Based upon reports from the student's teachers and providers, the student was described in the March 2021 IEP as bright, and while he could "appear to be checked out or sleepy during class" the student was listening (Dist. Ex. 5 at p. 4). The student was reportedly best kept engaged by frequently calling on him or giving him some sort of leadership role in the class that showcased how personable he was in addition to enabling him to reinforce material (id.). The IEP noted that the student had improved his ability to take notes although, he would "doodle all over his papers" (id.). The "doodling" reportedly actually helped keep the student on task (id.). The student also needed to be reminded to show work during math, "which included mental math and whatever he [wa]s inputting into his calculator" and it was noted that the student could be inconsistent with showing work (id.). The student reportedly had a large fund of knowledge and brought a lot of interesting information to class discussions (id.). The student's strengths included that he was bright and capable, and that he loved to read, play video games and participate in physical education class because he enjoyed the movement (id.). The IEP further noted that the student would like to create video games or become a lawyer when he grew up (id.). With respect to the student's academic, developmental and functional needs, the IEP indicated that cognitively, the student was solidly intact and required little to no academic support other than reminders to make up work if he happened to miss an assignment (id. at p. 5). The student reportedly often knew information before it was presented to the class (id.). The student needed to be reminded to slow down his work pace, and it was noted that the student worked best with teachers who recognized where his mood was in the moment (id.). The IEP also reflected that sometimes the student could not access academics when he was dealing with anxiety and needed a more supportive approach (id.).

With regard to the student's social development, the March 2021 IEP described the student as having a high level of anxiety (Dist. Ex. 5 at p. 5). The student had reportedly made significant gains upon his reentry to school despite the additional challenges as a result of the pandemic (id.). The student had successfully managed his anxiety most days and appropriately sought out support (id.). The student had a small group of friends that he socialized with outside of school day (id.). It was noted that the student preferred to work alone during partner or group activities but would not resist doing so (id.). The IEP reported that the student had significantly benefited from counseling as he had shown malleability in his ability to turn "I can't" statements into "It's hard" (id.). The student had also made gains in flexible thinking, he was able to identify short-term vs. long-term consequences in situations and project outcomes (id.). The student had also shown a great deal of maturity and had expanded his ability to work toward long-term goals (id.). The student reportedly had been able to delay his impulse to avoid an anxiety-provoking situation and demonstrated frustration tolerance (id.). The IEP further indicated that the student had formed solid rapport with the teaching staff, his peers and the support people within the building (id.). The student responded well to interventions to decrease his school avoidance behavior, such as mask

breaks, positive reinforcement, and goal setting (id.). The student had also benefitted from using a social skills group as a reward to maintain himself within the school setting.

With regard to the student's social strengths, the March 2021 IEP indicated that he had a great sense of humor (Dist. Ex. 5 at p. 5). The student could get up in front of the classroom and articulate information effectively to his peers during presentations or explanations of topics (id.). The student demonstrated good social reciprocity in a small group setting, such as eye contact, turn taking, and asking questions (id.). The IEP described the student as empathetic and as loving animals (id.). According to the IEP, the student had a close relationship with his younger brother and tried to be a positive role model (id.). The student was reportedly a strong advocate for his social and emotional needs (id.). The IEP indicated that the student had good insight into his strengths and weaknesses as a learner (id.). It also noted that the student was "a big video game player" (id.). With regard to the student's social needs, the IEP reflected that the student had decreased his school avoidance behavior and had engaged in problem solving in an effective way (id.). The IEP noted that, going forward, the student needed to generalize skills he had learned and apply them with less assistance from his support network (id.). The student was reportedly very responsive to positive reinforcement and validation (id.). The IEP further noted that the student needed to continue to work on decreasing his reassurance seeking behavior so that he could effectively navigate his negative emotions with less assistance (id.). The student also needed to transition from one activity to the next, including transitioning from more preferred to less preferred tasks or activities (id.).

The IHO addressed contrary opinions of private providers who believed the student should be placed in a smaller class or school and their viewpoint that the student was in crisis, however, the IHO also noted the student's strong academic performance at the time of his exit from the district (IHO Decision at p. 19). The IHO noted that the opinions of the private providers were not constrained by LRE considerations whereas the CSE was required to observe the principles of LRE when making placement recommendations (IHO Decision at p. 19). The IHO reasoned that evidence of the student's strong grades, solid rapport with school staff, and positive social interaction with a small group of preferred friends at school supported the CSE's placement recommendation (IHO Decision at p. 19).<sup>20</sup>

Turning to the topic of emotional supports and the student's interfering behaviors and the parent's claim that the CSE failed to sufficiently evaluate and or plan for the student in this area, the IHO reviewed the requirements that a school district must address behavior that for impedes a student's learning or that of others after noting the relevant standard (IHO Decision at p. 20). The IHO found that "the CSE had a significant amount of information about the student's social/emotional and sensory needs, social skills deficits, and interfering behaviors, i.e., anxiety and school refusal," noting the January 2019 psychological evaluation, March 6, 2019 counseling summary report, April 2019 functional behavioral assessment, and September 2019 psychiatric

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<sup>20</sup> The student's 2020-21 record of attendance indicated that he missed a total of 16.5 full school days (Dist. Ex. 27 at p. 6; see Tr. p. 225). According to the student's 2020-21 seventh grade report card, the student's final grade in ELA was 88, in math was 92, in science was 95, and in social studies was 96 (Dist. Ex. 24 at pp. 3-4). The student's final grades in all other subjects ranged from 74 in his foreign language class to 100 in physical education (id.). Despite the social emotional struggles that the student experienced since at least fifth grade, the evidence shows that going into the 2021-22 school year, the district's plan was working overall, even if the student experienced setbacks from time to time.

evaluation that were conducted by or at the behest of North Merrick (IHO Decision at pp. 20-22). The evidence supports the IHO's conclusion that an FBA had been conducted in the year prior to the student's entry into middle school. North Merrick sought a functional behavior assessment (FBA) from a private behavior consultant (behavior consultant) to assess the student's need for a behavioral intervention plan (BIP) to address his school refusal (Parent Ex. I at p. 1). According to an FBA report dated April 12, 2019, the student, who was attending a fifth grade general education class at time, was receiving counseling services, and had been documented to refuse to enter the classroom, which eventually lead to refusing to enter the school building (id.). The behavior consultant noted that "[a]lthough these behaviors [we]re [] being addressed through informal behavioral strategies, an FBA was recommended to determine the function of these responses so that a function-based Behavioral Intervention Plan c[ould] be developed to most effectively address these responses" (id.). The operationally defined target responses were listed as school refusal, which was defined as any instance of refusing to enter the school building and/or classroom (id.). According to the report, baseline data on the response of school refusal was obtained during the full school day over three weeks and the magnitude of the student's response was listed as "3" which was defined as "High intensity-impedes skill acquisition and social interactions" (id. at p.2).

The FBA report further indicated that the setting event for school refusal was having to enter the classroom and/or building, the immediate antecedent was also having to walk into the classroom and/or school building, and the consequences for school refusal occurred at home, while the consequences for refusing to enter the classroom were the student was permitted to spend time in a 1:1 setting with the North Merrick social worker or school psychologist's office (Parent Ex. I at p. 4). According to the behavior consultant's preference assessment, the student showed a preference for chocolate candy, snacks and time spent away from the classroom with the North Merrick social worker and school psychologist (id.). The behavior consultant concluded that school refusal appeared to be maintained by automatic negative reinforcement (id.). She further noted that the responses increased in frequency when the student perceived a situation may bring him anxiety (id.).

The evidence in the hearing record includes extensive session notes regarding the services provided to the student and the parent (Dist. Ex. 31).<sup>21</sup> The district psychologist also provided testimony describing her provision of services to the student (see Tr. pp. 189-210). The in-school BCBA also testified regard her collaboration with other personnel to support the student in implementing strategies as he continued to face challenges (Tr. pp. 424-448). The IHO went on to describe the psychological counseling and in-school behavior intervention services that the district provided as called for by the February 2020 and March 2021 IEPs (IHO Decision at pp. 22-26). The IHO also reviewed the provision of home-based behavior intervention services and

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<sup>21</sup> Review of the clinician's session notes revealed the student and/or the parent was provided with support and CBT strategies (e.g., mindfulness, sensory distraction, "stress demolition," addressing thinking traps) and other therapeutic techniques (e.g., psychoeducation), which was consistent with the testimony of the school psychologist and the BCBA (Tr. pp. 600-04, 610; Dist. Ex. 31 at pp. 1, 7-8, 10, 18, 23, 25, 32, 33-35, 38).

parent training and counseling during the seventh grade school year (IHO Decision at pp. 26-28).<sup>22</sup> The evidence hearing record supports the IHO's conclusions.

The March 2021 IEP included three social/emotional annual goals requiring the student to attend school/class every day, to transition from one activity to the next, including transitioning from more preferred to less preferred tasks or activities, and when presented with a scenario containing the expression of a negative emotion, the student would independently identify a plan to change the situation and/or thoughts that led to the negative emotion without prompting or suggestion, and identify the steps he will take to reach the goal (Dist. Ex. 5 at pp. 6-7).

As noted previously, for the 12-month 2021-22 school year beginning on July 1, 2021, the CSE recommended individual parent counseling and training four times per year for one hour in the student's home, and individual behavior intervention services five times per year for one hour in a flexible location (Dist. Ex. 5 at pp. 1-2, 8). The CSE also recommended individual counseling one time per six-day cycle for 30 minutes in the therapy room and individual parent counseling and training ten times per year for one hour in the home, with these services beginning September 14, 2021 (id. at pp. 1-2, 7).

As to the parent's claim that the CSE failed to conduct an FBA of the student, the IHO rejected this claim, finding that the district had enough information to support its decision than an FBA was not required notwithstanding criticisms by the October 2021 private psychiatric report that one should have been conducted (IHO Decision at pp. 28-30). The IHO also noted that the private report had not yet been conducted at the time of the CSE meetings in question and occurred after the student had been placed at Fusion (IHO Decision at p. 30).

The school psychologist who provided the student's counseling and building-level supports testified that at no time did she feel the student needed an FBA (Tr. p. 230). She stated that an FBA looks at the antecedent, the behaviors and the consequences and identifies conscious behaviors, establishes their function and recommends whether or not to put a BIP in place (id.). The school psychologist noted that the behavioral strategies put in place with the student, when delivered with fidelity and consistently employed in the home and school environment, were successful and were reported as such at the time by both the student and the parent (id.). The

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<sup>22</sup> The parent asserts that the IHO erred by citing to the February 2020 IEP as evidence that the student received behavior intervention services and the parent received parent counseling and training over the summer 2020 to facilitate the student's transition back to a school environment. Although the parent is correct in stating that the February 2020 IEP indicated that behavior intervention services were recommended "in order to conduct a functional behavioral assessment as well as possible implementation of behavioral intervention plan for 15/hours year," the director of special education testified that the due to the student's history of school refusal, the CSE recommended behavior intervention services for the summer to support the student's transition back into a school environment (Tr. pp. 78-80, 93-94). While the IHO may have chosen a more accurate citation for his statement, his description of the purpose of summer 2020 behavior intervention services and parent counseling and training is supported by the hearing record. To the extent that the parent asserts that the IHO erred in stating that behavior intervention services were recommended for the student at home and in school for the 2021-22 school year the March 2021 IEP indicates that the location of the behavior intervention services for the 12-month portion of the school year was "flexible" while the location for the 10-month portion of the school year was the school building (Dist. Ex. 5 at pp. 7,8). Moreover, the hearing record shows that some of the behavior intervention services provided to the student during August 2021 were in fact provided in the student's home (Dist. Ex. 30 at pp. 1-9). Therefore, the parent's argument for overturning the IHO's decision is without merit.

school psychologist further noted that she observed the student's success when he used the strategies qualitatively (*id.*). She testified that the student's anxiety appeared lessened, he was able to maintain attendance and he was achieving academically (Tr. p. 230; *see* Dist. Ex. 24).

The district BCBA testified that an FBA was not warranted for the student (Tr. p. 453). She indicated that an FBA would typically be conducted in school if there was a significant impact on a student's academic functioning or an impact on the functioning of the class (*id.*).

The evidence shows that an FBA of the student was conducted, and it is arguable if, in order to be fully compliant with State procedures, a second FBA was required after the student transitioned into the district. However, even assuming for the sake of argument that there was a procedural deficiency in this instance, it did not result in a denial of a FAPE because the student's IEPs were primarily designed to support his social/emotional struggles and it is not clear that a repeat of the FBA procedure would have resulted in any substantive change to the IEPs at all. Furthermore, because the IEPs included additional goals, strategies and services to address the student's behaviors and social/emotional struggles, any lack of an updated FBA or BIP would not lead me to reverse the IHO's conclusion that the district offered the student a FAPE (*E.E. v. New York City Dep't of Educ.*, 2018 WL 4636984, at \*4 [S.D.N.Y. Sept. 26, 2018] [explaining that although the failure to conduct an adequate FBA or implement a BIP is a "serious procedural violation," it "does not rise to the level of a denial of a FAPE if the IEP adequately identifies the problem behavior and prescribes ways to manage it"]).

The hearing record also shows that the district continued to be responsive to continuing challenges as the 2021-22 school year progressed. By email dated October 18, 2021, the parent wrote to the school psychologist stating that the student was "resting after his meltdown th[at] morning (Parent Ex. L at p. 2). Approximately 30 minutes later, the school psychologist responded asking whether the student would be coming to school and what had happened (*id.* at p. 1). Approximately 20 minutes later, the parent replied

No[,] he is not. He said he would rather kill himself than continue to feel this way. One day happy[,] one day sad. He has felt this way since September. Push push push. I told you this would happen, I'm done. Going forward his day will be shortened[,] and he will walk the halls empty to lessen his stress. If these accommodations can't be met[,] then the district can send him to go to private school. I'm calling his psychiatrist today to discuss a mood stabilizer and bring him in. I already reached out to [the home-based behavior intervention services provider] and see if she can come over today

(Parent Ex. L at p. 1).

The school psychologist testified that on or about October 19, 2021, the parent told her that the student was having a rough time getting to school (Tr. p. 251). The school psychologist met the student in the morning to conduct a check-in with him (*id.*). The student told her he did not want to be in school (*id.*). The student's affect and mood toward the end of the session was stable, and he was able to go back to class on his own (*id.*). Within two hours of that meeting the school psychologist received a call from the school's main office that the parent was on the line and that

the student had texted her that he tried to kill himself by throwing himself down the stairs (Tr. pp. 251-52).

After speaking with the parent, the school psychologist went to see the student but saw that he arrived outside her office on his own (Tr. p. 252). The school psychologist conducted a risk assessment (*id.*). The school psychologist indicated that she found the student was not suicidal and did not want to die (Tr. pp. 253-54). The student was very clear that he had an impulse to throw himself down the stairs in order to get out of being in the building and escape being in the building (Tr. p. 254). The school psychologist walked the student downstairs and turned him over to the parent who was waiting for him (*id.*). The parent brought the student to a children's medical hospital for psychiatric evaluation, whereupon he was released into the parent's care after approximately five hours (Tr. pp. 255-56). The school psychologist and the parent kept in touch throughout (Tr. p. 256). A previously scheduled team meeting scheduled for October 20, 2021 was rescheduled at the parent's request for October 21, 2021 (Tr. pp. 256-58).

On October 21, 2021, the team meeting occurred with the school psychologist, the CSE chairperson, two teachers, the behaviorist (BCBA), the parent, and the student in attendance (Tr. p. 258). The school psychologist indicated the parent and student agreed the student would begin a truncated school day (Tr. p. 265). Information about the parent-team meeting was included on an October 27, 2021 IEP which stated that "[a] parent-team meeting was held to discuss strategies and supports that could be put in place to assist [the student] with acclimating to the building" (Dist. Ex. 6 at p. 2). The notes describing the October 21, 2021 team meeting further indicated that it was determined that the student would follow a truncated class schedule and a follow up CSE meeting would be held to reflect the program changes needed (*id.*). To accommodate the student's truncated schedule, the district removed the student's (co-taught) math class (*id.*). The plan was supposed to start October 25, 2021 (Tr. p. 259). However, the student did not return to the district middle school after the October 21, 2021 meeting (Tr. pp. 262, 264).

By email dated October 26, 2021, the parent wrote to the student's school team stating that she was "signing up" the student at Fusion "on the 3rd so he won't be coming in anymore" and asked to be notified if an already scheduled CSE meeting was still necessary (Parent Ex. B at p. 2). In a later email exchange dated October 26, 2021, the CSE chairperson advised the parent that the meeting would still be held on October 27, 2021 and the parent indicated that she would attend via video conference (*id.* at pp. 1-2).

The CSE convened on October 27, 2021 with a CSE chairperson, the school psychologist, a general education teacher, a special education teacher, and a school counselor, in attendance (Tr. p. 258; Dist. Ex. 6 at p. 1). The parent and the student attended the CSE meeting virtually (*id.* at p. 2). The meeting information summary indicated that consistent with the parent's October 26, 2021 email to the district, the parent had agreed to waive her right to the five day notice of the CSE meeting, due to the circumstances (Dist. Ex. 6 at p. 2; *see* Parent Ex B at p. 1).

The October 2021 CSE discussed the student's "anxiety to return to the school building due to recent social-emotional distress" (Dist. Ex. 6 at p. 2). The meeting information summary indicated the CSE had recently reviewed the student's special education services and determined that the student continued to meet the criteria to be classified as a student with autism, and based on student's then-current progress, the committee recommended additional behavioral intervention services for a total of 15 hours for the year, implemented with a flexible setting to provide home

hours if needed (*id.* at p. 1). In addition, the October 2021 CSE recommended amending the management needs section of the IEP to reflect the social/emotional supports available to the student in the building (*id.* at pp. 1, 7). The October 2021 CSE also recommended the addition of the extra time needed to go between classes modification to the IEP to allow the student to transfer from class to class in the hallways with smaller crowds (*id.* at pp. 1-2, 8). To accommodate a truncated schedule, the October 2021 CSE recommended the removal of the student's ICT mathematics class (*id.* at pp. 2, 7).

The IHO concluded that the school psychologist had convincingly testified that the student had stabilized after the episode (IHO Decision at p. 19). Although the parent alleges that the district failed to carry its burden to prove its repeated recommendations against the consensus of opinion from the parent and independent providers, again I note, as the IHO did, that the hearing record reflects that none of the "independent providers" described in the request for review attended the October 2021 CSE, nor were any independent evaluations could have been shared at the time of the October 2021 CSE (Parent Ex. A at p. 10), thus the CSE cannot be held accountable for failing to respond to the opinions therein as the parent seems to suggest, and that does not overcome the concerns over LRE that the IHO pointed out with regard to the opinions of the private experts.

Instead, I find that the evidence shows that the district created an intensive program for the student that was responsive and flexible to address his needs on a daily basis. The district modified the level of behavior intervention services in March 2021 due to the student's demonstrated progress. When the student appeared to exhibit some regression in the social/emotional aspects, the district was again responsive and reconvened the CSE in October 2021 to provide for a truncated day, a hallway pass and to incorporate some building-level services into the IEP in order to help the student engage rather than reinforce avoidance strategies. Overall, the CSE's recommendations for the student's program for the 2020-21 and 2021-22 school years were comprehensive, flexible and appropriately supportive and targeted the student's complex and individual needs as presented at the time of the CSE meetings.

As described above the IHO determined that the district did not deny the student a FAPE (IHO Decision at p. 30). Similarly, except as stated otherwise herein, I agree with the conclusions reached by the IHO and adopt such findings of fact and conclusions of law as my own.

## **VII. Conclusion**

Having found no reason to disturb the IHO's conclusions that the district offered the student a FAPE in the LRE for the 2020-21 and 2021-22 school years, I need not reach the issues of whether Fusion was appropriate for the student or whether equitable considerations support the parents' request for relief and the necessary inquiry is at an end (*Mrs. C. v. Voluntown*, 226 F.3d 60, 66 [2d Cir. 2000]; *Walczak*, 142 F.3d at 134).

**THE APPEAL IS DISMISSED.**

**Dated:** Albany, New York  
June 14, 2023

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