



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 15-103

**Application of the BOARD OF EDUCATION OF [REDACTED]  
[REDACTED] for review of  
a determination of a hearing officer relating to the provision of  
educational services to a student with a disability**

### **Appearances:**

Thomas, Drohan, Waxman, Petigrow & Mayle, LLP, attorneys for petitioner, David H. Strong, Esq., of counsel

Gina DeCrescenzo, PC, attorneys for respondent, Gina DeCrescenzo, Esq., of counsel

## **DECISION**

### **I. Introduction**

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from the decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to respondent's (the parent's) son for the 2013-14 and 2014-15 school years and ordered it to reimburse the parent for his son's tuition costs at the Ridge School (Ridge) for the 2014-15 school year. The appeal must be sustained in part.

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

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

process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[l]).

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

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

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

The student has a longstanding history of anxiety, specifically related to transitions and interacting with peers (e.g., Dist. Ex. 112 at pp. 2-3; Parent Exs. G at pp. 1-2; Y at p. 1). At age eight, the student was diagnosed with Asperger's syndrome and an anxiety disorder (Parent Ex. Y at p. 4). During elementary school, the student attended both private and public schools, in both special and general education class settings, and, for much of the 2011-12 and 2012-13

school years, he was homeschooled (Tr. pp. 40-41, 44, 852-53, 946-47; Dist. Ex. 112 at pp. 2-3; Parent Exs. G at pp. 1-2; Y at p. 3; see Dist. Ex. 116; see generally Dist. Exs. 1-4).<sup>1,2</sup>

In August 2013 the student reenrolled in the district (Tr. p. 44; see Dist. Ex. 5 at p. 1; Parent Ex. U). On August 16, 2013, a CSE convened to develop an IEP for the student for the 2013-14 school year (Dist. Ex. 5 at p. 1). Finding the student eligible for special education as a student with autism, the August 2013 CSE recommended the student attend a Board of Cooperative Educational Services (BOCES) 8:1+1 special class (Tr. p. 46; Dist. Ex. 5 at pp. 1, 6, 8).<sup>3</sup> The August 2013 IEP included three annual goals targeted to address the student's social/emotional needs, including a goal related to his anxiety about attending school (Dist. Ex. 5 at pp. 5-6). In addition, the August 2013 IEP included an accommodation of extended time for all examinations (id. at p. 7). The CSE did not recommend any related services for the student at that time (see id. at p. 6). According to the August 2013 CSE meeting minutes, the student's mother reported to the CSE that the student was "suffering from extreme phobia and anxiety about returning to school" and that she was concerned that the student would refuse to attend school (id. at p. 1). The August 2013 IEP indicated that the district needed to complete a triennial evaluation of the student and, that the student's mother requested an "update[d]" speech-language evaluation and an occupational therapy (OT) evaluation (id.).

The student attended the recommended 8:1+1 special class in a BOCES management needs program (see Dist. Ex. 16 at p. 1). In October 2013, the parents consented to amend the August 2013 IEP without a meeting to include one 30-minute session per week of individual psychological counseling and one 30-minute session per week of psychological counseling in a small group as support for the student's anxiety (Dist. Exs. 6 at pp. 1, 7; 60-62; 90 at p. 1; 97 at p. 1; Parent Ex. R at p. 1). In addition, goals for reading, writing, and mathematics were added to the student's IEP, based on the results of an academic assessment completed by the student's BOCES teacher (Dist. Ex. at pp. 5-6; see Tr. pp. 190-94, 217-23; Dist. Exs. 24; 25).

On January 15, 2014, a CSE convened for an annual review of the student's program and to develop his IEP for the 2014-15 school year (Dist. Ex. 10 at p. 1). Finding that the student remained eligible for special education as student with autism, the January 2014 CSE recommended that the student continue in a BOCES 8:1+1 special class and receive related

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<sup>1</sup> The student was referred to the CSE for special education in June 2010 (Dist. Exs. 29; 77).

<sup>2</sup> The hearing record includes references to phrases such as "home schooling" (Tr. pp. 508, 514-15, 737, 741-42, 744, 775-76, 833, 852-53, 923, 946, 951, 956, 989), "home instruction" (Tr. pp. 42, 128-31, 140-41, 234, 330, 335-36, 662, 802-04, 808, 822), and "homebound instruction" (Tr. p. 180). To clarify, a student may receive instruction at home or outside of school for a variety of reasons (see 8 NYCRR 100.10; 175.21[a]; 200.6[i]). For example, students may be home schooled by their parents (8 NYCRR 100.10); students with disabilities may receive home or hospital instruction as a placement on the continuum of services (8 NYCRR 200.6[i]; see 8 NYCRR 200.1[w]); or students may receive homebound instruction if they are "unable to attend school because of physical, mental, or emotional illness or injury" (8 NYCRR 175.21[a]; see Educ. Law 3602[1][d]).

<sup>3</sup> The student's eligibility for special education programs and related services as a student with autism for both the 2013-14 school year and the 2014-15 school year is not in dispute (see 34 CFR 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

services of individual and small group psychological counseling, each for 30 minutes one time per week (Dist. Ex. 10 at pp. 1, 8, 11). In addition to annual goals and an accommodation of extended time on tests, the IEP provided for the student's access to a computer for assignments at the student's discretion (id. at pp. 6-9). The IEP also set forth supports for the student's management needs, including a "small, highly structured environment[] with minimal distractions," "[a] consistent schedule," reteaching or explaining information another way to help the student reengage in a lesson, as well as supports specific to when the student was upset or frustrated, including "a quiet environment" and "[o]ne-to-one teaching" (id. at pp. 5-6). According to the CSE meeting minutes, a physical therapy (PT) evaluation would be requested (id. at p. 2).

In a letter to the district dated February 10, 2014, the parent requested "an immediate CSE meeting to discuss and remedy a practice in [the student's] classroom that demonstrate[d] that his IEP [wa]s not being followed" (Parent Ex. N). The parent further indicated that there was "a misunderstanding of [the student's] diagnoses" and that, as a result, the student "continue[d] to be neither appropriately nor adequately placed" (id.).

On February 20, 2014, a CSE convened for an emergency CSE meeting per the parent's request (Dist. Ex. 7 at p. 1). According to the February 2014 CSE meeting minutes, the parent discussed the student's anxiety, his concerns about the student's progress and the effectiveness of a behavior management strategy used in the classroom, and his belief that the BOCES 8:1+1 special class was not meeting the student's needs (id. at pp. 1-2). The February 2014 CSE modified the student's special education program for the remainder of the 2013-14 school year by recommending that the student receive two 30-minute sessions of speech-language therapy per week in a small group (id. at pp. 1, 10). The CSE additionally approved the parent's request for a psychological IEE and recommended that the student undergo an assistive technology screening (id. at p. 2). The February 2014 CSE also recommended that the parent visit the BOCES "Asperger Program for Independent Education" (APIE), which was under consideration as a potential program for the student for the 2014-15 school year (id. at p. 2; see Dist. Ex. 20).

During the third quarter of the 2013-14 school year, from January 31, 2014 to April 11, 2014, the student's absences increased significantly (Dist. Exs. 21 at pp. 1-2; 23; 111). Between the February 2014 CSE meeting and the end of the third quarter, the student only attended school for seven days (Dist. Ex. 23 at pp. 1-2). The parent and the district communicated during this time by email regarding a number of topics, including information provided by the parent to the district about the student's anxiety about and refusal to attend school (Dist. Ex. 51 at pp. 9, 12, 19, 21, 33, 59).

On April 10, 2014, a CSE convened to review the PT and assistive technology evaluation reports, as well as to discuss the parent's visit to the BOCES APIE program and the possibility of home instruction or homebound instruction for the student for the remainder of the 2013-14 school year (Dist. Ex. 8 at p. 1). The CSE also discussed the changing enrollment of the BOCES management needs class and whether or not the new students would be appropriate peers for the student (id. at p. 3). Possible out-of-district nonpublic school options were also discussed (id.). The April 2014 CSE recommended that the student remain in the 8:1+1 BOCES management needs program for the remainder of the 2013-14 school year, and agreed to purchase "[c]ozy

shades for lights" (id. at p. 3). The April 2014 CSE further agreed to arrange for a sensory processing evaluation of the student and to send a particular assistive technology suite to BOCES (id.).

In May 2014, the parent communicated to the district by emails information he obtained about the out-of-district nonpublic schools discussed at the April 2014 CSE meeting and their appropriateness for the student and agreed to visit one of the schools (Parent Exs. EE-GG). In an additional email, dated May 2, 2014, the parent followed up on many of the topics discussed at the April 2014 CSE meeting (Parent Ex. DD). In particular, he expressed his confusion about the difference between home instruction for a student with a disability and homebound instruction for a student for medical reasons and again requested that the CSE recommend that the student receive home instruction until the CSE could identify an appropriate placement (id.). Recounting his recollection of the accord of the April 2014 CSE members that the 8:1+1 BOCES management needs program was no longer appropriate for the student, the parent indicated that the student had "adamantly refused" to attend school and that the parent could not "in good conscience force him" (id.). The parent indicated that the student would "not be returning to BOCES under any circumstances" (id.).

On May 20, 2014, the parent received a letter from the district assistant superintendent denying the parent's request for homebound instruction, stating that "[a]s you are aware, placement for [s]tudents with [d]isabilities are made by the [CSE]" (Dist. Ex. 69). According to the evidence in the hearing record, the assistant superintendent subsequently requested that the district schedule an emergency CSE meeting to consider home instruction for the student (Dist. Ex. 51 at p. 68; see Dist. Ex. 11 at p. 1).

On June 4, 2014, a CSE convened for a review of the student's program (Dist. Ex. 9 at p. 1). For the remainder of the 2013-14 school year, the June 2014 CSE recommended that the student receive five 60-minute sessions per week of home instruction on an individual basis, one 30-minute session per week of speech-language therapy in a small group, and two weekly 30-minute sessions of psychological counseling on an individual basis (id. at pp. 1, 15). For summer 2014, the CSE recommended an 8:1+1 BOCES special class placement but also indicated that the parent refused summer school and that, instead, the student would receive 30 hours of home tutoring, 6 sessions of speech-language therapy, and 12 sessions of psychological counseling (Dist. Ex. 11 at pp. 1, 13).

As for the 2014-15 school year, the June 2014 CSE amended the January 2014 IEP, summarized above, by modifying the special class recommendation to an 8:1+1 special class in a BOCES APIE program (changed from the BOCES management needs program) that would be composed of seventh and eighth grade students (Dist. Ex. 11 at pp. 1, 12). The June 2014 IEP also provided for one 30 minute session of group speech-language therapy per week and two 30-minute sessions of individual psychological counseling per week (id.). In addition, the June 2014 CSE also recommended use of "cozy shades" light filters and access to a particular assistive technology suite (id. at p. 12).

In a letter dated June 11, 2014, the parent provided the district with notice of his intention to remove the student from the district and place him in a private school, based upon the district's

failure to offer the student a FAPE (Parent Ex. K). He also notified the district of his intention to request an award of reimbursement for the costs of the student's tuition from the district (id.).

On August 27, 2014, the parent executed an enrollment contract with Ridge for the student's attendance for 2014-15 school year (Parent Ex. C at p. 6).<sup>4</sup>

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

In a due process complaint notice, dated July 10, 2014, the parent alleged that the district failed to offer the student a FAPE for the 2012-13, 2013-14, and 2014-15 school years (see Parent Ex. A at pp. 5-10). Initially, with respect to the 2012-13 school year, the parent alleged that the district failed to offer the student an appropriate special education program or related services (id. at pp. 5-6).

Next, the parent alleged that, during the 2013-14 school year, the district failed to recommend a program that adequately addressed the student's academic, physical, and social/emotional needs (Parent Ex. A at p. 6). The parent further asserted that the recommended 8:1+1 special class in the BOCES management needs program exacerbated the student's anxiety to a level at which he could no longer attend school and was not appropriate to address the student's identified social/emotional, speech-language, or fine motor needs (id. at pp. 6-7). Additionally, the parent claimed that, notwithstanding the student's anxiety, difficulties with pragmatic speech, and fine motor deficits, the district failed to offer him adequate or appropriate related services, including counseling, social skills training, speech-language therapy, and OT (id. at pp. 7-8). The parent also argued that the district failed to address the student's behavioral needs (id.). More specifically, the parent asserted that the district failed to conduct a functional behavioral assessment (FBA), develop a behavioral intervention plan (BIP), or offer "adequate alternative behavior modification services" to address the student's increased anxiety or "school avoidance" behavior (id.).

With regard to the 2014-15 school year, the parent alleged that the district failed to recommend a program that adequately addressed the student's academic, physical, and social/emotional needs (Parent Ex. A at p. 8). Specifically, the parent asserted that the recommended 8:1+1 special class in the BOCES APIE program was not appropriate to address the student's identified social/emotional, speech-language, or fine motor needs (id. at pp. 8-9). He further contended that the June 2014 CSE failed to offer the student appropriate counseling services, despite a discussion during the June 2014 CSE meeting about the student's "school phobia" and "severe anxiety" (id. at p. 9). In addition, the parent argued that the June 2014 CSE failed to offer the student appropriate speech-language therapy or appropriate OT (id.). The parent also alleged that "the BOCES environment as a whole" caused the student to experience sensory overload and increase his anxiety to the point he was unable to attend school (id. at p. 8). The parent further argued that, despite the student's anxiety and "school phobia," the district

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<sup>4</sup> The Commissioner of Education has not approved Ridge as a school with which school districts may contract for the instruction of students with disabilities (see 8 NYCRR 200.1[d], 200.7).

failed to address the student's behavioral needs by conducting an FBA, developing a BIP, or otherwise including strategies in the IEP (id. at p. 10).

The parent asserted that Ridge met the student's needs and that he cooperated with the district's attempts to develop an appropriate program for the student (Parent Ex. A at pp. 10-11). As relief, the parent requested an award of compensatory education services in the form of academic tutoring, counseling, OT, and speech-language therapy to remedy the district's failure to provide the student with a FAPE for the 2012-13 and 2013-14 school year (id. at p. 11). The parent also requested reimbursement or direct payment for the costs of the student's tuition at Ridge for the 2014-15 school year (id.).

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

The parties proceeded to an impartial hearing on November 13, 2014, which concluded on December 8, 2014, after six days of proceedings (see Tr. pp. 1-1060). In a decision, dated September 29, 2015, the IHO found that the district failed to provide the student with a FAPE for the 2013-14 and 2014-15 school years, that Ridge was an appropriate unilateral placement for the student for the 2014-15 school year, that equitable considerations weighed in favor of the parent's request for relief, and that no further relief in the form of compensatory education was warranted (see IHO Decision at pp. 5-6, 44-63).

First, the IHO found that the student required a small, supportive setting that could address his anxiety and that the district generally lacked the "critical resources" needed to provide the student an appropriate education in a program alongside "comparably aged peers with comparable needs" (IHO Decision at pp. 1, 4, 44). The IHO next held that the BOCES management needs program recommended for the 2013-14 school year consisted of "an environment that was in practice antithetical to [the student's] needs" (id. at p. 46). The IHO concluded that, as a result, the student experienced "spiraling disaffection from school" and, eventually, "a full-fledged school aversive response" when the student largely stopped attending in February 2014 (id.). In addition, the IHO noted that the April 2014 CSE "still did not initiate an FBA, did nothing to address the behaviors all acknowledged, and simply sent the student back into the same program he was refusing to attend" (id. at p. 51).<sup>5</sup> In summary, the IHO found that the management needs program: was not "individually tailored" to address the student's needs; did not provide the praise, positive reinforcement, and support required by the student's educational needs; and, instead, exacerbated the student's behaviors (id. at p. 56). Further, the IHO found that the BOCES program had a "pattern and practice of admitting students into a class whom it knew might render the class inappropriate" for current students (id.).

The IHO next concluded that the June 2014 CSE's proposed placement for the student could not have been seen as "meaningfully different from the elements of the 2013-14 program" (IHO Decision at p. 56). The IHO found that the recommendation for the APIE program for the 2014-15 school year did not specify "essential elements" of the program, such as the student-to-

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<sup>5</sup> The IHO observed that none of the student's IEPs addressed the student's increased absences and withdrawal (IHO Decision at p. 50).

teacher ratio or profile of the students in the program (id. at pp. 46, 56). Further, the IHO found that the APIE program was too educationally indeterminate for the parent to make an informed decision whether the program could meet the student's needs (id.). Finally, the IHO found that the 2014-15 APIE program was offered in a setting that the student perceived as "hostile and threatening" and exacerbated his aversion to school (id. at pp. 47, 56).

With regard to the unilateral placement, the IHO found that Ridge offered a program that was tailored to address the student's needs (IHO Decision at p. 57). The IHO summarized information in the hearing record describing the environment and the program offered at Ridge and concluded that: the program directly addressed the student's "specific profile and needs" in a "home-like and supportive" environment; the school tested the student and came to understand his needs; Ridge was "sensitive and responsive to the students' anxiety"; and the student made progress at Ridge (id. at pp. 57-61). The IHO cited the testimony of the student's psychiatrist that Ridge had caused the student to overcome his school aversion and the "primary presenting problem" of his absenteeism (id. at p. 61). Based on the foregoing, the IHO concluded that the parent met his burden to demonstrate that Ridge was an appropriate unilateral placement for the student for the 2014-15 school year (id. at p. 62). The IHO found no equitable considerations that would warrant a reduction or a denial of an award of the costs of the student's tuition at Ridge (id.).

As for relief, the IHO ordered the district to place the student at Ridge for the 2014-15 school year and reimburse the parent and/or directly pay for the costs of the student's tuition for that school year (IHO Decision at pp. 5-6, 63). The IHO determined that the hearing record did not support an award for compensatory education services because the student's placement at Ridge achieved the purpose of such an award; to wit, to enable the student to "perform . . . where he might reasonably be expected to be performing" had the district provided the student with a FAPE (id. at pp. 62-63).<sup>6</sup>

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

The district appeals and argues that the IHO erred in finding that it did not offer the student a FAPE for the 2013-14 and 2014-15 school years. More specifically, the district contends that for the 2013-14 school year, the management needs program was appropriate for the student and that the evidence in the hearing record supports a finding that the student was able to make progress in his areas of deficit. With respect to the 2014-15 school year, the district alleges that the IHO's finding that the BOCES APIE program was not appropriate to address the student's special education needs was unsupported by the evidence in the hearing record. The district argues that, contrary to the IHO's finding that the district did not specify elements of the BOCES APIE program, the IEP included the student-to-teacher ratio, the CSE discussed the profile of the students in the program, and, further, that the district was not required to specify some of the detail cited by the IHO. In addition, the district argues that the IHO inappropriately determined that the district was not capable of developing an appropriate program for the student

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<sup>6</sup> Based on the foregoing, the IHO dismissed the parent's request for compensatory education services "as not ripe" (IHO Decision at p. 63).

based on evidence not in the hearing record regarding the demographic profile of the district, the catchment area for the BOCES, and the low-incidence of the student's disability in the local community.

Regarding the appropriateness of Ridge, the district alleges that the IHO applied an incorrect legal standard in rendering his determination. In addition, the district argues that there is insufficient evidence in the hearing record to establish that Ridge provided the student with specially designed instruction to meet his unique needs. The district further asserts that the hearing record lacks evidence to show that the student made progress at Ridge. Lastly, the district argues that equitable considerations weigh against the parent's request for relief because the parent predetermined the student's placement at Ridge and failed to cooperate with the CSE process. With respect to the relief awarded by the IHO, the district asserts that the IHO exceeded his authority by ordering the district to place the student at Ridge by way of injunction.

In an answer, the parent generally admits or denies the district's allegations and requests that the IHO decision be upheld in its entirety.<sup>7</sup>

## **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. 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; 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. Florida 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]). 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

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<sup>7</sup> The parent has not interposed a cross-appeal contesting the IHO's failure to award additional compensatory education. Accordingly, this aspect of the IHO's decision has become final and binding upon the parties and will not be further addressed (see 34 CFR 300.514 [a]; 8 NYCRR 200.5 [j][5][v]; see also C.H. v. Goshen Cent. Sch. Dist., 2013 WL 1285387, at \*9 [S.D.N.Y. Mar. 28, 2013]; M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at \*6-\*7, \*10 [S.D.N.Y. Mar. 21, 2013]).

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., 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; A.H. v. Dep't of Educ., 394 Fed. App'x 718, 720 [2d Cir. Aug. 16, 2010]).

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 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 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]; 300.324[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]).

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; M.P.G. v. New York City Dep't of Educ., 2010 WL 3398256, at \*7 [S.D.N.Y. Aug. 27, 2010]).

## **VI. Discussion**

### **A. 2012-13 School Year—Scope of Review**

Initially, with regard to the 2012-13 school year, the district argues in a footnote in the petition that the claims should be deemed abandoned because the parent did not address the claims in his post-hearing brief and the IHO did not make a determination relating to that school year (Pet. ¶ 3 n.1; see generally IHO Decision; Parent Ex. MM). In his answer to the petition, the parent generally denies the district's assertion but does not otherwise set forth any references to the evidence in the hearing record regarding the 2012-13 school year or arguments in support of claims arising from the same (see Answer ¶ 3).

The parent's general denial of the district's argument, alone, without any legal or factual arguments or further identification of or explanation as to why the unaddressed issue would rise to the level of a denial of a FAPE, is insufficient to resurrect any claims in the parent's due process complaint notice for a determination in this appeal (see e.g., Gross v. Town of Cicero, Ill., 619 F.3d 697, 704 [7th Cir. 2010] [appellate review does not include researching and constructing the parties' arguments]; Fera v. Baldwin Borough, 350 Fed. App'x 749, 752 [3rd Cir. Nov. 4, 2009] [a party on appeal should at least identify the factual issues in dispute]). Thus, the parent's failure to raise any arguments relating to the 2012-13 school year on appeal constitutes a waiver of the claims at this stage of the proceedings (see, e.g., C.H. v. Goshen Cent. Sch. Dist., 2013 WL 1285387, at \*13 [S.D.N.Y. Mar. 28, 2013]; J.L. v. City Sch. Dist., 2013 WL 625064, at \*14 [S.D.N.Y. Feb. 20, 2013]). Accordingly, any claims relating to the 2012-13 school year will not be further addressed.

### **B. 2013-14 School Year**

As noted above, as the parent did not assert a cross-appeal of the IHO's denial of the parent's request for relief in the form of compensatory education services, the IHO's determination has become final and binding on the parties (see IHO Decision at pp. 62-63; see also Educ. Law § 4404[1]; 34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at \*6-\*7, \*10 [S.D.N.Y. Mar. 21, 2013]). Moreover, the

parent did not otherwise include any request for further relief in the answer. Consequently, because the 2013-14 school year is over and no meaningful relief may be granted relative to the parent's claims about that school year, it appears that such claims are no longer "real and live" and are "academic" and, therefore, moot (see Lillbask v. State of Conn. Dep't of Educ., 397 F.3d 77, 84 [2d Cir. 2005]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]; J.N. v. Depew Union Free Sch. Dist., 2008 WL 4501940, at \*3-\*4 [W.D.N.Y. Sept. 30, 2008]).<sup>8</sup> Nonetheless, in the interest of administrative and judicial economy and because the analysis informs the review of the parent's claims relating to the 2014-15 school year, the 2013-14 school year will be addressed, even though it is my view that this matter is moot and that no exceptions apply in this case.

### **1. August 2013 IEP**

In this instance, although the sufficiency of the student's present levels of performance and individual needs as described in the August 2013 IEP are not disputed, a discussion thereof provides context for the issue to be resolved—namely, whether an 8:1+1 special class in the BOCES management needs program, together with annual goals—were appropriate to meet the student's needs.

The August 2013 IEP contained limited information regarding the student's then present levels of performance (Dist. Ex. 5 at p. 4). With respect to the student's academic and achievement, functional performance, and learning characteristics, the August 2013 IEP indicated that the district needed to complete a triennial evaluation, along with updated speech-language testing to determine the student's needs (id.). Similarly, the IEP did not describe the student's physical development, other than to state that the student did not appear to have any physical or medical problems and note that the CSE recommended an OT evaluation of the student (id.). With respect to the student's social development, the August 2013 IEP reflected information obtained from the student's developmental-behavioral pediatrician that characterized the student as often depressed, prone to worry, and desiring predictability (id.; see Parent Ex. Y). Although the IEP described the student as friendly and likeable, it also indicated that, as reported by the student, he did not have close friends and was bullied at his previous school (Dist. Ex. 5 at p. 4). The IEP noted the student's lack of social skills and his need to improve his pragmatic language skills (id.). The IEP further noted that the student required additional assistance, such as a smaller class, to function in the educational setting (id.).

Based on the student's needs, the hearing record supports a finding that, at the time of the August 2013 CSE, the recommendation for an 8:1+1 special class in BOCES was appropriate for the student (see Dist. Ex. 5 at pp. 1, 6). According to the August 2013 CSE meeting minutes, the student's mother requested that the CSE place the student at Ridge but that the CSE discussed

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<sup>8</sup> It is generally accepted that a claim for compensatory education or additional services presents a live controversy (Student X v. New York City Dep't of Educ., 2008 WL 4890440, at \*15 [E.D.N.Y. Oct. 30, 2008]; see Lesesne v. Dist. of Columbia, 447 F.3d 828, 833 [D.C. Cir. 2006]; Lillbask, 397 F.3d at 89-90; Sch. Admin. Dist. No. 35 v. Mr. & Mrs. R., 321 F.3d 9, 17-18 [1st Cir. 2003]; Indep. Sch. Dist. No. 284 v. A.C., 258 F.3d 769, 774 [8th Cir. 2001]; Fullmore v. Dist of Columbia, 40 F. Supp. 3d 174, 178-79 [D.D.C. 2014]). Accordingly, had the parent sought additional relief on appeal, the claims would not be moot.

that Ridge was not a State-approved school (*id.* at p. 1). Instead, the CSE discussed doing an intake with BOCES for a special class for the student, which the parent agreed to pursue (*id.*). At the time of the August 2013 CSE meeting, the CSE had not specified whether the student would attend the BOCES management needs program or the BOCES APIE program (*see generally* Dist. Ex. 5).<sup>9</sup> Nonetheless, the recommended 8:1+1 special class, which State regulation provides is designed for students whose management needs are intensive, was aligned with the student's needs at the time of the August 2013 CSE meeting (8 NYCRR 200.6[h][4][ii][b]). However, the August 2013 IEP was lacking in other respects.

According to the August 2013 CSE meeting minutes, the student's mother reported that the student was suffering from "extreme phobia and anxiety" about returning to school (Dist. Ex. 5 at p. 1). She expressed concern that the student would refuse to go to school (*id.*). Furthermore, the August 2013 CSE created annual goals that targeted the student's difficulties with social interaction, language pragmatics, and anxiety (Tr. pp. 46-47; Dist. Ex. 5 at pp. 4-5). Despite being advised of the student's extreme anxiety and developing annual goals to address it, the CSE did not recommend counseling as a related service for the student (*see* Dist. Ex. 5 at p. 6). Moreover, the district was aware that the parents had removed the student from the public school during the 2011-12 school and decided to homeschool him for a year and a half, due in part, to his escalating anxiety (Parent Ex. G at p. 2; *see* Dist. Exs. 5 at pp. 1-2; 46 at p. 2).

When appropriate, an IEP must include counseling services if necessary for the student to receive a FAPE (34 CFR 300.34[a]; 8 NYCRR 200.1[qq]). Given the district's knowledge of the student's longstanding history of anxiety and extended period of homeschooling, it should have recommended counseling as a related service for the student to assist him with the transition back to a school environment and to address his school-related anxiety.<sup>10</sup> While a district need not provide a student with "everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132), in this instance, the student's primary area of need was in the social/emotional realm and counseling was a service necessary for the student to receive an educational benefit (*see Cerra*, 427 F.3d at 195-97). Based on the foregoing, a review of the evidence in the hearing record supports a finding that the district's failure to recommend counseling as a related service in the August 2013 IEP resulted in a failure to offer the student a FAPE during the period of August 2013 through October 2013.

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<sup>9</sup> The district director of special education and the BOCES supervisor of special education testified that, at the time of the August 2013 CSE, the CSE considered two classes in the BOCES APIE program but that it turned out that one of the APIE classes consisted of students that were lower functioning than the student and the other was composed of students older than the student (Tr. pp. 46, 391-92; Dist. Ex. 20). The BOCES supervisor testified that she informed the student's mother at the BOCES intake that the management needs program would address the student's needs and that the other students expected to attend the class were students who exhibited anxiety, social concerns, or psychiatric needs but who did not "severely act[] out" (Tr. pp. 435, 437).

<sup>10</sup> The district director of special education testified that, although the August 2013 CSE did not recommend direct counseling for the student, the recommended class in the management needs program had a counselor assigned to it that would measure the student's social/emotional goals included in the August 2013 IEP (Tr. pp. 88-89); however, there is no indication in the hearing record that this was discussed at the CSE meeting and, consequently, the testimony of the district director of special education constitutes impermissible retrospective testimony that cannot be relied upon to "rehabilitate a deficient IEP after the fact" (*see R.E.*, 694 F.3d at 186).

## 2. October 2013 and February 2014 IEPs

Following the August 2013 CSE meeting, the district conducted speech-language and OT evaluations of the student, as recommended by the August 2013 CSE (Dist. Ex. 5 at pp. 1, 4; see Dist. Exs. 13; 18). On August 28, 2013, the district conducted an OT evaluation of the student and determined that he was "doing well in all OT related areas" and did not qualify for OT services at that time (Dist. Ex. 13 at p. 2). On September 5, 2013, the district conducted a speech-language evaluation of the student, the results of which revealed that the student's receptive, expressive, and pragmatic language abilities were all within the average range (Dist. Ex. 18).<sup>11</sup> In addition, the student's teacher in the BOCES management needs program conducted an assessment of the student's academic abilities (Tr. pp. 189-94; Dist. Exs. 24; 25).

As summarized above, in October 2013 the parents and the district consented to amend the student's IEP without convening a CSE (Dist. Exs. 59-62; see Tr. p. 215). Among other changes, the CSE determined that the student required "counseling support for anxiety" and amended the student's IEP to include individual and small group psychological counseling, one time per week each, for 30 minutes (Tr. pp. 217-18; Dist. Exs. 6 at p. 1; 90 at p. 1). Thus, notwithstanding the district's failure to offer the student a FAPE at the beginning of the 2013-14 school year, the district rectified the shortcomings of the August 2013 IEP in the October 2013 IEP. As a result, as of October 24, 2013, the district had developed an IEP for the 2013-14 school year that was reasonably calculated to enable the student to receive educational benefits (see Rowley, 458 U.S. at 206-07).

In December 2013 the district conducted a psychological evaluation of the student that included intelligence and achievement testing, as well as a behavioral observation of the student (Dist. Ex. 16). Administration of the Wechsler Intelligence Scale for Children-Fourth Edition (WISC-IV) yielded "overall cognitive scores in the average range," but highlighted the student's relative weaknesses in working memory and processing speed (id. at p. 3). With respect to academic achievement, the evaluating psychologist reported that the student demonstrated average to high average skills in reading and written language (id. at p. 4). However, the student scored in the very low range on a measure of his ability to solve basic math problems (id.). According to the evaluating psychologist, the student got all of the items that he was willing to complete correct, but refused to attempt test items that he perceived as difficult (id.). The psychologist observed that the student's mood "shifted very swiftly and dramatically" during testing and that it was difficult to find anything that was consistently motivating for the student (id. at pp. 2, 4). The psychologist concluded that the student was appropriate for a smaller class setting, but noted that he should be placed with peers that were cognitively and academically his equal, in order to challenge and motivate him (id. at p. 4).

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<sup>11</sup> Although the speech-language pathologist who evaluated the student reported that his pragmatic language skills appeared to be age appropriate, she also suggested that it might be "beneficial to further assess [the student's] ability to generalize social communication skills across contexts as he begins his new school and classroom experiences" (Dist. Ex. 18 at p. 3).

In or around December 2013 or January 2014, the student changed residences, moving from one parent's home to the other parent's home (Tr. pp. 428-30; Dist. Ex. 7 at p. 2). According to the BOCES supervisor of special education, during this time, the social worker was in contact with both parents (Tr. pp. 429-30). In addition, the social worker met with the student when he felt anxious (Tr. p. 430). The student was also able to sit by himself in an empty office in the supervisor's office suite if he desired, or engage in talking with the supervisor or other school personal (id.).

In January 2014, the CSE convened to conduct an annual review and develop the student's IEP for the 2014-15 school year (Dist. Ex. 10 at p. 1). The CSE reviewed the results of the December 2013 psychological evaluation, as well as the student's functioning within the school setting (id. at pp. 1-3). According to CSE meeting minutes, the parent stated that the student was safe in his then-current placement and was "getting what he needs" (id. at p. 2). However, he also noted that the student was "burdened with anxiety" and did not have peers with whom he could relate (id.). The parent opined that the student would be better off placed in a class specifically for students who had received diagnoses of Asperger's disorder and who were high-functioning (id.). The parent discussed placing the student in a private school (Ridge) and inquired as to the viability of the BOCES APIE program (id.). The parent further stated that public school provided a "minimal program" for the student and that he was going to get "the best" program for his son (id.). Although the purpose of the January 2014 CSE meeting was primarily to develop an IEP for the student for the 2014-15 school year, the IEP indicated that, at that time, the student would remain in his then-current program (id.).

First and second quarter report cards covering the period between September 2013 and January 2014, indicated that the student received passing grades, ranging from 82 to 94 for all academic subjects (see Dist. Exs. 108, 109). In addition, the district's IEP progress reports indicated that, by the end of the second quarter of the 2013-14 school year, the student had achieved two math goals and was progressing satisfactorily toward his goals for reading and writing (Dist. Ex. 104 at pp. 2-3). Further, administration of diagnostic reading and math tests by the student's teacher demonstrated that the student's math skills had advanced from an overall third to an overall fifth grade level (Tr. p. 197; Dist. Exs. 7 at p. 2; 25; 115). In reading, the student tested at or above grade level throughout the time he attended the 8:1+1 special class in the BOCES management needs program (Tr. p. 192; Dist. Exs. 24; 114). Although the IEP progress reports showed that the student was making "less than anticipated progress" toward his social/emotional/behavioral goals, anecdotal information provided by the student's social worker indicated that the student was "doing wonderful in counseling" (Dist. Exs. 10 at p. 1; 104 at pp. 4-5).<sup>12</sup> Beginning in February 2014 the student's school attendance began to rapidly decline (Dist. Ex. 23).

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<sup>12</sup> According to the January 2014 IEP, the social worker reported that the student was working on empathy and various social skills (Dist. Ex. 10 at p. 1). The social worker was "amazed" at the student's courage by volunteering in a group, "I do that sometimes" (id.). The IEP indicated that the social worker described the student as "cautious and guarded" and that he could be easily offended, but the IEP also noted that the student was learning how to identify and express his feelings (id.).

In a letter to the district, dated February 10, 2014, the parent requested an immediate CSE "to discuss and remedy a practice in [the student's] classroom that demonstrate[d] that his IEP [wa]s not being followed" (Parent Ex. N). On February 20, 2014, the CSE convened in response to the parent's request (Dist. Ex. 7 at p. 1). According to the CSE meeting minutes, the parent stated that the student's anxiety was his "biggest concern" and that the student was not progressing and did not want to attend school (id. at p. 2). The parent cited the school's use of behavior cards and practice emergency drills as contributing to the student's anxiety (id. at pp. 1-2). The parent described the student as uncooperative, defiant, and belligerent at home (id. at p. 1). The parent also advised the February 2014 CSE that the student did not belong in the management needs program and that he should attend Ridge (id. at p. 2). In response, BOCES staff indicated that they could address the parent's specific concerns if he made the school aware of them (id. at pp. 1-2). The February 2014 CSE concluded that the student had demonstrated progress since returning from homeschooling to a school-based setting (id. at p. 2).

Despite the parent's dissatisfaction with the student's progress and his view of the appropriateness of the student's class thus far, expressed at the February 2014 CSE meeting, the CSE had information available to it indicating that the student was receiving educational benefit in the recommended placement in both academic and social/emotional realms. Accordingly, as with the October 2013 IEP, there is no indication in the hearing record that the district denied the student a FAPE as a consequence of the February 2014 CSE's recommendation that the student continue in the 8:1+1 special class in the BOCES management needs program.

### **3. April and June 2014 IEPs**

According to district attendance records, between February 10, 2014 and April 10, 2014, the student attended school for six days (Dist. Ex. 23 at pp. 1-2). The parent and the district communicated during this time by email regarding a number of topics, including information provided by the parent to the district about the student's anxiety about and refusal to attend school (Dist. Ex. 51 at pp. 9, 11-12, 19, 21, 59). For example, the parent informed the district by email that the student "refus[ed] to go to school" and that the student's experiences in the class had caused a setback in the parent's progress getting the student to attend school "without utter dread" (id. at pp. 9, 12). The parent also expressed that the student "need[ed] to be in school" and assured the district that he was attempting to "reassure, encourage and persuade [the student] to give it a go" (id. at p. 11). Other information in the emails indicated that the student refused to attend school, in part, as a consequence of the behaviors of another student in the class and the student's perception that he lacked a consistent or safe alternative to remove himself from such an anxiety producing situation (id. at pp. 19, 21, 59).

On April 10, 2014 the CSE reconvened for a review of the student's program, including recently conducted assessments (Dist. Ex. 8 at p. 1). The April 2014 CSE also discussed the parent's visit to the BOCES APIE program (id. at pp. 2-3). The parent opined that the class that he observed was inappropriate for the student because, among other things, the presence of two teachers and background noise was distracting, the health class subject matter was inappropriate for the student, the class was disorganized and disorderly, and the population of the class was inappropriate (id. at pp. 2-3).

With respect to the student's educational placement, the CSE chairperson asked the parent if he intended to pursue home tutoring for the student for medical reasons (Dist. Ex. 8 at p. 3). The parent questioned why, if a special education student needed home tutoring, the CSE could not recommend it (id.). He was advised by the CSE chairperson that the CSE could not recommend home tutoring as a program and that, if the parent wanted the student to receive home tutoring, he would need to go through the district assistant superintendent (id.).<sup>13</sup> In addition to home tutoring, the CSE discussed the possibility of the student returning to the BOCES management needs program (id.). The BOCES supervisor advised the parent that there were new students slated to attend the 8:1+1 special class and the social worker would be less available on an "as needed basis" to help the student (id.). She also noted that there was different staff available to assist the student and provide him with access to a phone if he wanted to call the parent (id.). According to the BOCES supervisor, due to the student's sporadic attendance at that time, BOCES offered to have the student come in and meet one of the new students and get acclimated (Tr. pp. 422-23).

The CSE chairperson discussed out-of-district placements with the parent (Dist. Ex. 8 at p. 3). At the conclusion of the meeting, the April 2014 CSE recommended that the student remain in his then current class (id.). CSE meeting minutes indicated that the parent was going to speak to the student's physician and possibly obtain medical information for the assistant superintendent to approve home tutoring (id.). Although the parent opined that the student "didn't fit" in the management needs program he agreed to attempt to send the student to school (Dist. Exs. 8 at p. 3; 11 at p. 2).

According to district attendance records, between April 11, 2014 and June 4, 2014, the student attended school for one day (Dist. Ex. 23 at pp. 1-2). In an email, dated May 2, 2014, the parent informed the district that the student had "adamantly refused" to attend school and that the parent could not "in good conscience force him" (Parent Ex. DD). The parent indicated that the student would "not be returning to BOCES under any circumstances" (id.).

On June 4, 2014, the CSE reconvened for a program review (Dist. Ex. 9). The parent explained that he had sought home instruction by providing medical documentation to the assistant superintendent, but that the assistant superintendent had indicated the parent's request for home instruction was "a CSE matter" and recommended that the CSE reconvene (id.).<sup>14</sup> According to CSE meeting minutes, the parent acknowledged that he had made the decision not

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<sup>13</sup> The CSE chairperson informed the parent that the CSE could only recommend home instruction as an interim measure, pending a different placement recommendation (Dist. Ex. 8 at p. 3).

<sup>14</sup> In a letter to the assistant superintendent, dated May 10, 2014, the student's developmental-behavioral pediatrician confirmed that the student was diagnosed with Asperger's Syndrome and overanxious disorder of childhood and adolescence (Dist. Ex. 68). She opined that the behavior problems of the other students in the management needs program, as well as the need for "armed officers" at BOCES had served to magnify the student's anxiety (id.). The developmental-behavioral pediatrician stated that it was "medically contraindicated" for the student to continue in the BOCES program and recommended that he be provided with home instruction until an appropriate placement could be identified (id.). In a response, dated May 20, 2014, the assistant superintendent indicated that he had reviewed the pediatrician's letter and advised the parent that placement decisions for students with disabilities were made by the CSE, that he had shared the parent's letter with the CSE, and that he requested the CSE schedule an emergency review meeting (Dist. Ex. 69).

to send the student to school following the April 2014 CSE meeting (id. at p. 2). He stated that he was inclined "to never have [the student] return to BOCES" (id.). The CSE meeting minutes further indicated that, based on parent report, the student was doing well, but that he was wondering why he was not in school (id. at p. 4). According to CSE meeting minutes, the CSE chairperson recalled that the parent had stated to both her and the Board of Education that his ultimate goal was to have the student attend Ridge (id. at p. 3). Following a discussion regarding the appropriateness of the BOCES management needs program, the CSE recommended that the student receive home instruction for the remainder of the 2013-14 school year (id. at pp. 1, 4).

Based on the student's unverified absences throughout the 2013-14 school year and the parent's acknowledgements at the June 2014 CSE meeting that he decided not to send the student to school (Dist. Ex. 9 at p. 2), it appears that the parent held the mistaken belief that, if he disagreed with the district's program, he could keep the student home without home schooling him or enrolling him in any other educational program (see Dist. Ex. 21). If the parent disagreed with the proposed placement, he was entitled to request an impartial hearing (as he ultimately did), and he, like all parents, had three choices relative to educating the student in the interim: (1) he could choose to enroll the student in what the CSE had determined to be an appropriate educational program and await the outcome of the hearing; (2) he could choose to home school the student by filling out all the necessary paperwork and submitting an individualized home instruction plan, in conjunction with which the student might have received some supplemental support services from the district; or (3) he could choose to enroll the student at his own expense in a private school of his choosing while awaiting the outcome of the hearing. State compulsory education laws require that parents ensure children ages six to sixteen attend public school or receive a substantially equivalent education through enrollment in a private school or home school program each year (Educ. Law §§ 3205; 3212[2][b]). In short, if the parent rejects the district's program, he must enroll the student in another program to educate him each year.

Nonetheless, even if the parent was complicit in allowing the student's nonattendance to become so severe, the student's excessive absences leading up to the April 2014 CSE meeting, in conjunction with his history of school related anxiety and avoidance, triggered a duty on the part of the CSE to review the student's IEP in light of his nonattendance (see Springfield Sch. Comm. v Doe, 623 F. Supp. 2d 150, 159-61 [D. Mass. 2009] [finding that the district had an affirmative duty to respond to a student's excessive absenteeism by considering whether the truancy was related to a student's disability and, if it was, addressing it through the IEP]; but see L.O. v New York City Dep't of Educ., 94 F. Supp. 3d 530, 569 n.17 [S.D.N.Y. 2015] [declining to decide whether or not improper handling of absenteeism could result in the denial of a FAPE but acknowledging school personnel's repeated efforts to arrange for the student's return to school]). That is, the IDEA requires that a district review and revise, as appropriate, a student's IEP in light of, among other things, any lack of expected progress toward annual goals, information provided by a student's parents, the student's needs, or other matters (20 U.S.C. § 1414[d][4][A][ii]; 34 CFR 300.324[b][1][ii]; see also Educ. Law § 4402[2]; 8 NYCRR 200.4[f]). Instead, when the CSE convened in April 2014, meeting participants discussed potential homebound instruction, home instruction, and out-of-district placement for the student, but the resultant IEP did not recommend a change in placement and the meeting minutes do not reflect that the April 2014 CSE considered other interventions or strategies to address the student's frequent unexcused absences (Dist. Ex. 8 at p. 3). Likewise, while the June 2014 CSE

recommended home instruction and related services for the remainder of the 2013-14 school year, the June 2014 IEP does not reflect that the district took sufficient action to address the student's unverified absences before recommending such a restrictive placement on the continuum of special education programs and services (Dist. Ex. 9; see 20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see also Newington, 546 F.3d at 111). The student had approximately 50 unverified absences during the period from February 21, 2014 through June 4, 2014 (Dist. Ex. 21). There is some evidence in the hearing record that, in email communications with the parent, the district proposed options to address the student's refusal to attend school, such as the provision of a 1:1 aide and assistance in the morning to get the student on the bus (Dist. Ex. 51 at pp. 22-23, 25). However, the hearing record does not reveal that the district convened a CSE to formally recommend these proposed interventions or discussed them at either the April or June 2014 CSE meetings.

Moreover, the hearing record does not contain any evidence that the district conducted an FBA of the student or developed a BIP to address how the student's absences interfered with his learning during this time period. The IDEA requires that when a student's "behavior impedes the child's learning or that of others," the CSE must "consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior" (20 U.S.C. § 1414[d][3][B][i]; 34 CFR 300.324[a][2][i]; see 8 NYCRR 200.4[d][3][i]). When a student's "behavior impedes his or her learning or that of the others," the CSE is required to conduct an FBA, to "ascertain the physical, mental, behavioral and emotional factors which contribute to the suspected disabilities" (8 NYCRR 200.4[b][1][v]; see 8 NYCRR 200.1[r]; 200.22[a]). The CSE must also create a BIP to provide strategies to reduce the problem behavior (8 NYCRR 200.22[b]).

In light of the foregoing, given the district's failure to address the student's unexcused absences and refusal to attend school, the hearing record supports a finding that the district failed to offer the student a FAPE during the period of April 2014 through June 2014.

### **C. 2014-15 School Year**

As noted above, the CSE initially convened on January 15, 2014 to discuss the student's needs and develop an IEP for the 2014-15 school year (Dist. Ex. 10 at p. 2).

With respect to the student's academic achievement, functional performance, and learning characteristics, the January 2014 IEP indicated that, when interested, the student participated in reading activities by asking questions and adding comments to the discussion (Dist. Ex. 10 at p. 4). The IEP stated that the student frequently required assistance "during before" reading activities, but noted that the student's comprehension had improved and he was able to analyze textual details when responding using the close reading protocol (id.). According to the IEP, the student's narrative writing skills "shone" and, when responding to text using the close reading protocol, he used evidence from the text with clear, complete thoughts and sentences (id. at p. 5). With respect to mathematics, the IEP indicated that it was important to review rules, definitions, and how the student's prior knowledge connected to new concepts (id. at p. 4). The IEP indicated that the student could order positive and negative integers, express inequalities, and find the absolute value with 88 percent accuracy (id. at p. 5). However, the IEP also stated that

the student was working on lower level skills such as multiplying two digit times three digit numbers to "set the skills" for additional grade level concepts (id.). The IEP noted that the student enjoyed interacting with peers and adults and that he had made friends with students in the other middle school classes (id.). According to the IEP, the student was able to ask for help with academic tasks he did not understand (id. at p. 1). With respect to academics, the IEP noted that the student needed to continue to work on reading and informational writing, determining the meaning of words and phrases, and analyzing the impact of an author's purpose, meaning, and statement for a specific audience (id. at p. 5). In addition, the student needed to build his confidence in multiplication and division so as to apply this knowledge to higher-level, real-world problems (id. at p. 2).

With respect to social development, the January 2014 IEP indicated that the student had gradually warmed to his peers and environment, that he generally interacted well, and that he appeared to feel good about himself (Dist. Ex. 10 at p. 5). The IEP described the student as earnest and sincere and indicated that he was bright and inquisitive (id.). The IEP also indicated that the student needed to further develop his ability to relate to and accept others and noted that the student sometimes provoked others, but acknowledged that this was an area for growth (id.). In terms of physical development, the January 2014 IEP indicated that the student's balancing skills were slightly delayed, as were his eye-hand and eye-foot coordination (id.). The IEP noted that the student was easily distressed during sports if he sensed unfairness and that staff were working on improving the student's sportsmanship (id.). The January 2014 IEP described the environmental and human or material resources needed to address the student's management needs (id. at pp. 5-6). Specifically, the IEP noted that the student functioned well in a small highly structured environment with minimal distractions, it was important for him to have a consistent schedule so he knew what to expect, he required a quiet environment and time to himself when upset, re-teaching or explaining to help him to re-engage in a lesson, and 1:1 teaching when upset or frustrated (id.). The January 2014 IEP indicated the student used a graphic organizer to assist in writing more than one paragraph and benefitted from the use of prompts and question starters to help him respond to a reading (id. at p. 3). The January 2014 CSE also developed academic and social/emotional/behavioral goals to address the student's identified needs (id. at pp. 7-8).

To address the student's academic weaknesses and social/emotional difficulties, the January 2014 CSE recommended placement in an 8:1+1 BOCES special class with related services of one 30-minute session per week of individual psychological counseling and one 30-minute sessions per week of small group psychological counseling (Dist. Ex. 10 at p. 8). The student information summary generated by the January 2014 CSE indicated that the student would be referred to the BOCES APIE program (id. at p. 1). Following the January 2014 CSE meeting the parent visited the BOCES APIE program in April 2014 (Tr. p. 800; Dist. Ex. 8 at p. 3).

As previously noted, the CSE reconvened on June 4, 2014 to review the student's IEP for the student for the 2014-15 school year (Dist. Ex. 11). Despite the student's ongoing anxiety and lengthy absence from school, the present levels of performance remained largely unchanged

from the IEP developed by January 2014 CSE and neither the student's history of anxiety nor his difficulty going to school were mentioned in the June 2014 IEP (*id.* at pp. 7-8).<sup>15</sup> In addition, the June 2014 IEP did not reflect the modifications made to the social/emotional present levels of performance in the February 2014, April 2014, or June 2014 IEPs developed for the 2013-14 school year (*compare* Dist. Ex. 11 at p. 8, *with* Dist. Ex. 7 at p. 6, Dist. Ex. 8 at p. 8, *and* Dist. Ex. 9 at p. 11). However, the June 2014 CSE did modify the student's psychological counseling services mandate by removing the group session and adding an additional individual session (*compare* Dist. Ex. 11 at pp. 1, 12, *with* Dist. Ex. 10 at pp. 1, 8).

The June 2014 CSE discussed the student's social/emotional needs and the possibility of the student attending the BOCES APIE program for the 2014-15 school year (Dist. Ex. 11 at pp. 1-5). According to CSE meeting minutes, the BOCES supervisor explained that BOCES was reconfiguring its APIE class and that, during the 2014-15 school year, there would be a class for seventh and eighth grade students (*id.* at p. 2). The CSE chairperson asked the parent if he would like to see a class profile and the parent agreed (*id.*). The BOCES social worker indicated that there would not be any students with management needs in the APIE class (*id.*). As noted in the CSE meeting minutes, the CSE Chairperson indicated that BOCES believed that the next year's class would be very appropriate for the student (*id.*). The parent expressed his concern with the BOCES program the student attended during the 2013-14 school year and indicated that he was inclined to never have the student return to BOCES (*id.*).

According to the CSE meeting minutes, the BOCES supervisor described the APIE program to the committee (Dist. Ex. 11 at p. 2). She indicated that the APIE program included group "[o]ccupational, speech, and social skills" (*id.*). The parent made numerous inquiries related to the designated teacher of the class, teacher credentials, methodology, and disciplinary methods employed (*id.* at pp. 2-3). The parent specifically asked about behavior objective cards and whether they would be used with the student (*id.* at p. 3). He explained that the student viewed the cards as punitive (*id.* at p. 4). The BOCES supervisor reported that most of the students would use a behavior card system, but that if it was a negative trigger for the student he would have his own individual plan (*id.* at p. 3).

According to CSE meeting minutes, the parent detailed his concerns with the BOCES school building, such as his observed lack of cleanliness, chaos, and lock-down drills and asked whether the district had taken these into consideration or whether they had been ignored (Dist. Ex. 11 at p. 4). The parent raised concerns with respect to the student's sensory needs and the CSE chairperson indicated that, if necessary, accommodations would be made to address the student's needs (*id.*). The CSE further discussed lock-down drills and how BOCES was able to prepare students in APIE programs for such drills (*id.*). According to CSE meeting minutes, the parent advised the CSE that the student wanted to be in school, to do well, and to "feel like a regular kid," but that, at BOCES, he felt "out of place, not accepted, honored or appreciated"

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<sup>15</sup> The physical development section of the present levels of performance in the June 2014 IEP included the notation "[c]omplete [s]ensory [p]rocessing [a]ssessment" (Dist. Ex. 11 at p. 8). This notation did not appear in the January 2014 IEP (*see* Dist. Ex. 10 at p. 5).

(id.). The parent explained that the student needed to feel comfortable and that he was in a safe place and that, if he did not, he would not do well (id.).

The CSE modified the annual goals initially developed at the January 2014 CSE meeting by adding a math goal (and removing a different math goal) and adding speech-language goals related to interpreting the non-verbal communication of peers and identifying the cause of his stress in situations he perceived as stressful (compare Dist. Ex. 10 at pp. 7-8, with Dist. Ex. 11 at pp. 10-11). The June 2014 CSE ultimately recommended that the student attend an 8:1+1 special class in the BOCES APIE program for the 2014-15 school year (Dist. Ex. 11 at pp. 1, 4, 12).

The BOCES APIE program, as described in the hearing record, included numerous components that matched the student's identified needs. A BOCES brochure included in the hearing record indicated that the objective of APIE was to provide students who exhibited qualities of Asperger's syndrome and Asperger-related disorders with academic and vocational experiences necessary to succeed during and after education (Dist. Ex. 20 at p. 2). According to the brochure, in its effort to nurture the academic and therapeutic needs of its students, APIE placed a heavy emphasis on self-advocacy and transition to adult life (id.). The brochure noted that students in APIE had average to above average intelligence and, although they lacked social and communication skills, they were high-functioning autistic individuals (id.). This description is consistent with the needs of the student. Also similar to the student, the brochure stated that, although students who had received diagnoses of Asperger's syndrome often had large vocabularies, they had difficulty using language in a social context (id.). The brochure explained that, in order to address students' difficulties using social language, speech-language therapy and counseling services provided in APIE emphasized students' practical abilities in dealing with social skills, transitions, or changes and their ability to cope and communicate in these situations (id.). In addition, the brochure indicated that job training provided by APIE strove to provide students with life skills and vocational training essential for daily life outside of school (id.). Finally, in order to address specific challenges in the home environment created by having an adolescent family member on the autism spectrum, APIE made family counseling available (id.).

Based on the foregoing, the recommended 8:1+1 special class in the BOCES APIE program was aligned with the student's needs and, but for the deficiencies in the June 2014 IEP described below, the IEP was designed to enable the student to receive educational benefit.

A review of the hearing record shows that, by the time the June 2014 CSE convened, the district was aware of traumatic events that had occurred in the student's family during the 2013-14 school year, parent reports of the student's increasing and debilitating anxiety, and the student's continued unverified absences from school from February 2014 to June 2014 (Tr. pp. 233-34; 428-29, 462; Dist. Exs. 11 at pp. 1, 9; 23). As of June 4, 2014, the student was either unable to attend school due to his anxiety or his parent was unwilling to send him school. The meeting minutes show that the June 2014 CSE reviewed the student's attendance (Dist. Ex. 11 at p. 4). However, the June 2014 CSE failed to address the primary issue of how to get the student to return to school. The hearing record does not demonstrate that the district made any attempt to determine whether the student could not come to school because of his anxiety, or because the parent chose to keep the student home as a way to manage his anxiety (see Dist. Ex. 11 at pp. 1-5). Moreover, notwithstanding that the student's IEPs for the 2013-14 school year included an

annual goal targeted to address the student's anxiety to the extent it interfered with his ability to attend school (Dist. Exs. 5 at p. 6; 6 at p. 7; 7 at p. 9; 8 at p. 11), which the student did not achieve by the end of the 2013-14 school year (Dist. 107 at p. 4), the CSE did not carry the goal over to the student's IEP for the 2014-15 school year, nor was a comparable goal or support developed to address the student's attendance (see Dist. Ex. 11). Notably, the June 2014 CSE did not recommend a psychiatric evaluation or conduct an FBA to assess the student's anxiety, especially as it related to school (see Dist. Exs. 9 at p. 12; 23).

As a consequence of the foregoing, even if the 8:1+1 special class in the BOCES APIE program was appropriate for the student, it was not likely to confer educational if the student would not attend and the June 2014 IEP failed to address this underlying concern. Therefore, as with the latter part of the 2013-14 school year, the hearing record shows that the district failed to offer the student a FAPE for the 2014-15 school year.

#### **D. Appropriateness of Ridge**

The student began attending Ridge in September 2014 (Tr. p. 581).<sup>16</sup> Turning to a discussion of whether Ridge constituted an appropriate unilateral private placement for the student for the 2014-15 school year, a private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school must offer an educational program which meets the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak, 142 F.3d at 129; Matrejek, 471 F. Supp. 2d at 419). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or develop an IEP for the student (Carter, 510 U.S. at 13-14). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ., 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement'" (Gagliardo, 489 F.3d at 112, quoting Frank G., 459 F.3d at 364; see Rowley, 458 U.S. at 207). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). Nonetheless, "[a]t a minimum, the [unilateral placement] program must 'provide some element of special education services in which the public school placement was deficient'" (M.C. v. New York City Dep't of Educ., 2015 WL 4464102, at \*4 [S.D.N.Y. July 15, 2015], quoting Frank G. v. Bd. of Educ., 459 F.3d 356, 365 [2d Cir. 2006]). When determining whether a unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether the placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see Gagliardo, 489 F.3d at 115; Berger v.

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<sup>16</sup> The parent's verified answer indicates the student is not attending school at this time because the parent could not afford the cost of the student's tuition at Ridge during the pendency of the instant appeal (Answer ¶ 3). For the reasons discussed above regarding the 2013-14 school year, I remind the parent of his responsibility to either permit the district to provide an education for the student or make alternate arrangements if the student is no longer attending Ridge (Educ. Law §§ 3205; 3212[2][b]).

Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] [stating "evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]. A private placement is appropriate if it provides instruction specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; Educ. Law § 4401[1]; 34 CFR 300.39[a][1]; 8 NYCRR 200.1[ww]; Rowley, 458 U.S. at 188-89; Hardison v. Bd. of Educ., 773 F.3d 372, 386 [2d Cir. 2014]; C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 836 [2d Cir. 2014]; Gagliardo, 489 F.3d at 114-15 [noting that even though the unilateral placement provided special education, the evidence did not show that it provided special education services specifically needed by the student]; Frank G., 459 F.3d at 365).

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

No one factor is necessarily dispositive in determining whether parents' unilateral placement is reasonably calculated to enable the child to receive educational benefits. Grades, test scores, and regular advancement may constitute evidence that a child is receiving educational benefit, but courts assessing the propriety of a unilateral placement consider the totality of the circumstances in determining whether that placement reasonably serves a child's individual needs. To qualify for reimbursement under the IDEA, parents need not show that a private placement furnishes every special service necessary to maximize their child's potential. They need only demonstrate that the placement provides educational instruction specially designed to meet the unique needs of a handicapped child, supported by such services as are necessary to permit the child to benefit from instruction.

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

According to the Ridge special education teacher, Ridge is a day school for students in kindergarten through twelfth grade (Tr. pp. 559-60). The school's population was described as consisting of students who did not succeed in a public school environment, many with processing and language disabilities (Tr. pp. 555-56). The students generally had difficulties with communication and social skills and had received diagnoses of autism spectrum disorder (Tr. pp. 573-74). At the time of the impartial hearing, four students ranging in age from 12 to 15 were enrolled at Ridge (Tr. pp. 616-17). According to the Ridge special education teacher, the four students were taking Regents level high school courses in preparation for taking Regents examinations (Tr. pp. 613-14, 619-20, 640, 643). The school employed two full-time and five part-time teachers, including a math teacher and a foreign language and music teacher, as well as a speech-language pathologist, an occupational therapist, and a counseling psychologist (Tr. pp. 559-561, 620, 622, 624-627).

As noted above, to qualify for reimbursement under the IDEA, parents must demonstrate that the unilateral placement provides educational instruction specially designed to meet their child's unique needs, supported by services necessary to permit the child to benefit from

instruction (Gagliardo, 489 F.3d at 112; see Frank G., 459 F.3d at 364-65). The IHO found, and the parent contends, that, by removing the anxiety-producing elements from the student's environment, Ridge addressed his needs relating to anxiety. However, a unilateral placement is not appropriate simply because it removes the student from an anxiety-provoking environment, as avoiding a need does not serve the same purpose or have the same effect as addressing it; rather, the placement must be tailored to address the student's specific needs to qualify for reimbursement under the IDEA (John M. v Brentwood Union Free Sch. Dist., 2015 WL 5695648, at \*9 [E.D.N.Y. Sept. 28, 2015]). In this case, there is little evidence describing how Ridge's program was tailored to address the student's unique special education needs (L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 489-90 [S.D.N.Y. 2013]).

Testimony by the special education teacher from Ridge indicated that Ridge based the student's acceptance to the school on testing administered to the student in January 2014 and February 2014 (Tr. pp. 562, 575, 634).<sup>17</sup> The special education teacher testified that, though the student had strengths and weaknesses in reading and math, all of his scores on formal testing were in the average range (Tr. pp. 633, 638-39; Parent Exs. P at p. 7; Q at p. 3). Overall, she described him as "a fairly strong student" (Tr. p. 570).

Although the Ridge special education teacher discussed the student's relative strengths and weakness, she testified that she did not create a remedial program for the student (Tr. pp. 566-68, 571, 586, 590). Instead, she stated that she used "some of the techniques that [she] would normally use just in day-to-day teaching with [the student]" (Tr. p. 568). In addition, the special education teacher indicated that Ridge did not write an educational program for the student, or develop academic goals for him (Tr. p. 662). The Ridge special education teacher testified that all students sat around a table and read from the same textbook with the teacher, subsequently breaking to watch a movie related to the subject area (Tr. p. 590). She further testified that she removed students from the group for individual instruction per their IEPs in order to address their special education needs (Tr. p. 615); however, she did not specify what this entailed for the student. Although Ridge did not provide assistive technology to the student, he used his personal tablet device to take notes and complete other writing tasks (Tr. pp. 643, 668).<sup>18</sup> The special education teacher noted that the only modification provided to the student was his use of his personal tablet device, because he preferred using his tablet to the physical act of writing (Tr. pp. 590-91).<sup>19</sup>

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<sup>17</sup> Testimony by the special education teacher indicates that as a general practice she would sometimes review students' records from their home school district (Tr. pp. 574, 661). In the student's case, the special education teacher "glanced" over some of the student's report cards but "[she] didn't pay a lot of attention to them" (Tr. p. 662).

<sup>18</sup> The hearing record reflects, if the student chose to use it, Ridge School had a slant board available for the student to use when writing (Tr. p. 586). However, the student preferred to use his personal tablet device (id.).

<sup>19</sup> Additional testimony by the special education teacher at Ridge indicates that students enrolled at Ridge took part in field trips most Fridays (Tr. p. 606). She indicated the student participated in a number of the field trips offered by Ridge including full-day field trips to various places in the regional community (Tr. pp. 606-07, 648-49, 653).

The hearing record reflects that, if the student refused to write something out or chose not to read aloud in science and history class, one of the strategies used at Ridge was to allow the student a day or two to "kick back in" (Tr. pp. 588-89, 668-69). The hearing record indicates that Ridge avoided addressing the student's refusal to read aloud in some classes, his handwriting concerns, or making up any incomplete work (see Tr. pp. 596-97, 668-69, 671-72). Furthermore, the hearing record provides no information about why the student might refuse to read aloud, why he might not complete his work, or if he might be able to work through not liking the "feel of the pencil against the paper" (Tr. p. 586).<sup>20</sup> The special education teacher testified that there was no consequence for students not completing assignments such as being required to make up missed work (Tr. p. 671-72). In addition, Ridge did not develop a written behavior plan for the student (Tr. p. 677).

The Ridge special education teacher testified that the school's psychologist was at the school one day per week and provided individual counseling to students based on their IEPs, and group counseling to the entire student body once per week (Tr. pp. 628-29, 686-87). Although the student's June 2014 IEP called for twice weekly individual counseling, the special education teacher testified that the student received one individual session of counseling per week "as needed" (Tr. p. 687). The special education teacher indicated that social skills training was provided "almost on a constant basis," in that Ridge would immediately address "anything that comes up" (Tr. p. 584). To address the student's anxiety, Ridge did not use fluorescent lighting or school bells (Tr. pp. 591-92). Additionally, instruction at Ridge was provided in an incremental fashion, focusing on portions of a task before moving on (Tr. pp. 594-95). However, the hearing record offers no further description of the social skills training or counseling the student actually received at Ridge; in particular, the special education teacher did not know what goals the student worked on during counseling and the hearing record contains no progress reports indicating the manner in which the counseling addressed the student's identified needs (Tr. p. 681).<sup>21</sup> The hearing record reflects the special education teacher met with the student's therapists in the fall and quarterly thereafter, but there are no written summaries or minutes of these meetings in the hearing record (Tr. p. 628). Accordingly, there is insufficient evidence in the hearing record to conclude that Ridge provided the student with specially designed instruction designed to address the student's social/emotional needs, as opposed to providing a different environment than the one in which he had experienced anxiety (John M., 2015 WL 5695648, at \*9).

Without further evidence, a determination cannot be made regarding whether the services the student received at Ridge addressed the student's needs (see Hardison, 773 F.3d 372, 387 [finding a unilateral placement inappropriate where the hearing record lacked "more specific information as to the types of services provided to [the student] and how those services tied into [the student's] educational progress," and additionally stressing the importance of "objective

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<sup>20</sup> The hearing record reflects that the student read aloud and completed his work during the first half of the 2013-14 school year when he attended school in the district (Tr. pp. 200-02, 464-65).

<sup>21</sup> The special education teacher indicated that the school district in which Ridge was located developed goals for the student; she did not specify of what those goals consisted (Tr. pp. 662-63).

evidence" in determining whether a parent's placement is appropriate]; see also L.Q., 932 F. Supp. 2d at 490 [rejecting parents' argument that counseling services met student's social/emotional needs absent the counselor's testimony or evidence about the counselor's "qualifications, the focus of her therapy, or the type of services provided" or how the services related to the student's unique needs]; R.S. v. Lakeland Cent. Sch. Dist., 2011 WL 1198458, at \*5 [S.D.N.Y. Mar. 30, 2011] [rejecting the parents' argument that speech-language therapy services met student's needs where parents "did not offer any evidence as to the qualifications of the provider of the therapy, the focus of the therapy, or when and how much therapy was provided"], aff'd sub nom., 471 Fed. App'x 77 [2d Cir. Jun. 18, 2012]).

With respect to the student's progress, although the student's attendance improved relative to the 2013-14 school in the BOCES program, the Ridge special education teacher testified that the student has had to leave group instruction about one time per week (Tr. pp. 673-74; see Tr. pp. 839-41). At least once, the student had an altercation with another student whereby staff removed him from the classroom and provided the student time to cool down (Tr. pp. 676-77). In addition, the special education teacher testified that all of the enrolled students demonstrated work refusal (Tr. p. 676). The special education teacher did testify that, although the student seemed more outgoing and less reserved than when he first arrived at Ridge, she had not conducted any standardized assessments of the student since his enrollment (Tr. pp. 598-99, 654-56, 673).<sup>22</sup> Under the circumstances presented, given the very limited amount of objective information contained in the hearing record documenting the student's progress, the evidence does not support the conclusion that Ridge was appropriate solely based on the progress that the student made there during the 2014-15 school year (Gagliardo, 489 F.3d at 115; Frank G., 459 F.3d at 364; see M.B. v. Minisink Valley Cent. Sch. Dist., 523 Fed. App'x 76, 78 [2d Cir. Mar. 29, 2013]; D.D-S. v. Southold Union Free Sch. Dist., 506 Fed. App'x 80, 82 [2d Cir. Dec. 26, 2012]).

Based on the foregoing, the evidence contained in the hearing record does not show that Ridge provided the student with specially designed instruction to address his unique special education needs during the 2014-15 school year. In particular, the hearing record does not indicate that Ridge provided services to affirmatively address the student's anxiety, and thus did not correct the deficiencies in the district's proposed program (Frank G., 459 F.3d at 365; see Mr. I. v. Maine Sch. Admin. Dist. No. 55, 480 F.3d 1, 24-25 [1st Cir. 2007]; Berger, 348 F.3d at 523). Rather, Ridge provided the student with the types of advantages—including a small class size, with instruction provided at a pace which permitted the student to feel more comfortable—"that might be preferred by the parents of any child, disabled or not" (Gagliardo, 489 F.3d at 115; see Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 451-52 [2d Cir. 2015]).

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<sup>22</sup> Thus, while the hearing record offers some anecdotal information regarding the student's progress, it does not contain the objective evidence preferred by the Second Circuit that supports the parent's assertion that the student has progressed in his areas of need during his enrollment at Ridge (see Hardison, 773 F.3d at 387).

## VII. Conclusion

In sum, the hearing record supports a finding that the student was denied a FAPE for a portion of the 2013-14 school year and the entirety of the 2014-15 school year. Having determined that the parent did not establish the appropriateness of Ridge for the 2014-15 school year, it is not necessary to determine the issue of whether equitable considerations support the parent's requested relief, and the necessary inquiry is at an end (see M.C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]).

I have considered the parties' remaining contentions and find them unnecessary to address in light of my determinations herein.

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

**IT IS ORDERED** that the IHO's decision dated September 29, 2015, is reversed to the extent that the IHO determined that the district failed to offer the student a FAPE for the entirety of the 2013-14 school year, as detailed in the body of this decision; and

**IT IS FURTHER ORDERED** that the IHO's decision dated September 29, 2015, is reversed to the extent that the IHO found Ridge to be an appropriate unilateral placement and ordered the district to place the student at Ridge for the 2014-15 school year and reimburse the parent or directly pay for the costs of the student's tuition.

**Dated:**            **Albany, New York**  
                         **January 11, 2016**

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**SARAH L. HARRINGTON**  
**STATE REVIEW OFFICER**