The University of the State of New York

The State Education Department

State Review Officer

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No. 17-028

Application of the BOARD OF EDUCATION OF THE NORTHPORT-EAST NORTHPORT UNION FREE SCHOOL DISTRICT for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:

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

Thivierge & Rothberg, PC, attorneys for respondents, Christina D. Thivierge, 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 respondents' (the parents') son and ordered it to reimburse the parents for their son's tuition costs at the Fusion Academy (Fusion) during the 2015-16 school year. The parents cross-appeal from the IHO's determination which denied their request for reimbursement for their son's tuition costs at the New York Institute of Technology's Vocational Independence Program (NYIT-VIP) during the 2016-17 school year.[1] The appeal must be dismissed. The cross-appeal must be sustained.

[1] The impartial hearing record contains a variety of terms and acronyms identifying the 7-week summer program the student attended at the New York Institute of Technology. The executive director of NYIT's Vocational Independence Program described the program as consisting of four different courses of varying length, and the student attended only one of these courses of study, a 7-week summer program called the "Introduction to Independence Program" (see Tr. pp. 1499-1506). I will, for ease of reference, refer to the program that the student attended as "NYIT-VIP" for the rest of this decision.

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

At the time of the impartial hearing in this proceeding, the student was 17 years old, eligible for special education programs and services as a student with autism, and on track to graduate high school with a Regents diploma (Tr. pp. 32; 1852-53).[2] The student demonstrated strength academically in most areas, but also demonstrated difficulty in math (see Parent Exs. I; M). Formal testing suggested the student had a specific learning disorder including moderate impairment in math calculation and math problem-solving (Parent Ex. I at p. 20). Additional difficulties were related to attention, phonological recall, visual short-term memory, and executive working memory abilities (id. at p. 21). The student exhibited self-care, organization, and time management needs, as well as a tendency to demonstrate hair and nail picking (Parent Ex. H; Dist. Ex. 25).

The hearing record reflects the student began attending the district high school for the 2013-14 school year when he entered 9th grade (Tr. p. 32). During the 2013-14 school year, the student initially attended "inclusion classes" for all subjects, except for a self-contained special class for algebra (Tr. pp. 32-33).[3] The special class in math provided instruction in algebra at a slower pace over a two-year period (Tr. pp. 32-34). In addition, the student received daily resource room and related services of individual and group speech-language therapy, individual counseling and a 1:1 full time aide for health and safety purposes (Dist. Ex. 1 at p. 1; see Tr. pp. 39). Early in the 2013-14 school year, the student worked under a behavior support plan that targeted non-compliance with staff directions (Dist. Ex. 1 at p. 1). The student had been suspended from school during 9th grade for two days following an incident where he reportedly made threatening gestures towards one of his teachers (id. at p. 2; see Tr. 893).

During 9th grade, an independent functional behavioral assessment (FBA) was conducted in November 2013 that indicated in part, the student was uncomfortable in his math class, and recommended that he should not be placed in a self-contained environment as it was stressful for him (Dist. Ex. 1 at p. 5). In addition, the evaluator recommended, among other things, planned fading of the 1:1 aide and parent training address needs related to the student's self-help skills, including travel training (id. at pp. 5-7).

The CSE convened on November 14, 2013 and discussed the results of the independent FBA with the evaluator and the parents in attendance (Tr. pp. 33-36; Dist. Exs. 2; 3). Although CSE team members had concerns that the student had already missed a substantial amount of instruction in Regents algebra, the CSE, with the parents' agreement, recommended changing the student's special math class to an inclusion algebra class that included participation in an academic intervention services (AIS) math lab, consistent with the evaluator's recommendation to move the

[2] The student's eligibility for special education programs and related services as a student with autism is not in dispute (see 34 CFR 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

[3] The district special education teacher, who also provided direct consultant teacher services in inclusion classes, explained that the phrase "inclusion class" was the moniker district staff used to describe general education classes where students received direct consultant teacher services (Tr. pp. 205-08, 234).

student out of a special class for algebra (Tr. pp. 38-40; Dist. Ex. 2 at p. 8).[4, 5] In order to schedule the AIS math lab, the student's daily resource room was changed from five days per week to alternating days (Tr. pp. 38-40). Additional recommendations included one 60-minute session of homebased parent training and counseling per month to support the student's daily living skills, a behavioral intervention plan (BIP) and indirect behavioral consultant services, speech-language therapy, counseling, and indirect speech-language and occupational therapy (OT) consultations for staff (Tr. p. 40; Dist. Ex. 2 at pp. 6, 8). The November 2013 IEP also provided quarterly team meetings for staff, multiple test accommodations, supplementary aids and services/program modifications/accommodations including a 1:1 aide, and use of assistive technology (Dist. Ex. 2 at pp. 8-10). The November 2013 IEP specified post-secondary goals for the student including that he complete course work during high school that would lead to a Regents diploma and enable him to attend a four-year college (id. at pp. 6, 11).

The hearing record reflects that although the student passed the integrated algebra Regents examination with a grade of 65, as well as the "Common Core algebra Regents" examination with a grade of 66, the student failed the 2013-14 algebra inclusion class with a final grade of 50 (Tr. p. 41; Dist. Ex. 4 at pp. 3-4; Parent Exs. K; L).

In preparation for the 2014-15 school year, the CSE convened on April 7, 2014 and, at the parents' request, reconvened on July 3, 2014 (Tr. p. 42; Dist. Ex. 4).[6] The student attended the July 2014 CSE meeting and requested tutoring over the summer to make up for the failed algebra class (Tr. p. 42). The July 2014 CSE rejected his request, but discussed the option of the student repeating the class over the summer through a Board of Cooperative Educational Services (BOCES) summer school program for credit recovery,[7] or in the fall of 10th grade (Tr. pp. 42-43). The parents rejected the summer school option because they had been unaware of the credit recovery option and planned a vacation during the summer (Dist. Ex. 5 at p. 1). For the 2014-15 school year, the CSE recommended direct consultant teacher services (which were described as a special education teacher pushing into all general education academic areas including math on alternating days and a teacher assistant pushing in on the other days) and an increase in resource room services to five days per week (Tr. pp. 43-44; Dist. Ex. 4 at pp. 1, 8). All related services recommended for the 2013-14 school year, as well as the recommendations for a behavior consultant, speech-language and OT consultations, and team meetings, continued to be recommended for the 2014-15 school year (Tr. pp. 45-46; Dist. Ex. 4 at p. 8; see Dist. Ex. 2 at p. 8). The parents did not object to CSE recommendations during the July 2014 CSE meeting (Tr. p. 49).

In August 2014, the CSE amended the student's IEP with the parents' signed consent to do so without holding a meeting (Tr. pp. 49-50; Dist. Ex. 5). In an August 27, 2014 prior written

[4] The evaluator who conducted the independent FBA recommended that the parent consider tutoring after school to improve the student's chances for movement to a less restrictive setting for math (Dist. Ex. 1 at p. 5).

[5] The AIS math lab was a general education service and was not listed on the student's November 2013 IEP (Tr. p. 238).

[6] The hearing record does not contain an IEP developed at the April 2014 CSE meeting.

[7] The "credit recovery" or "recovery credit" terminology used by the parties in the hearing record appears to refer to a make-up credit program as defined in State regulations (see 8 NYCRR 100.5[d][8]).

notice the district proposed that the student would not be enrolled in a Regents geometry course with direct consultant teacher services during the 2014-15 school year (10th grade), and instead would be enrolled in a credit-bearing "bridge" course addressing topics in algebra and geometry to support his math needs (Tr. pp 50-52, 300; Dist. Ex. 5 at p. 1). The first half of the course focused on algebra and the second half prepared the students to take geometry during the next school year (Tr. pp. 51, 300). The parents consented to this amendment to the student's IEP on September 2, 2014, and the district issued another IEP for the student dated September 3, 2014 (Dist. Exs. 5 at p. 3; 6). The September 3, 2014 IEP reflected the recommendation for five resource room sessions (5:1) per week because an AIS math lab would no longer be provided to the student (Tr. p. 53; Dist. Ex. 6 at pp. 1, 8). The parents did not voice any objections to the amended September 2014 IEP (Tr. pp. 53-54).

During the 2014-15 school year (10th grade), a psychological evaluation was conducted for the student across various dates in April 2015 by the district's school psychologist, who was certified as a board-certified behavior analyst (BCBA) and was the student's counselor and social skills class instructor during the 2013-14 and 2014-15 school years (Tr. pp. 54, 329-30, 336-37; Dist. Ex. 7 at p. 5).[8] In addition, the student's case manager/direct consultation teacher for AP Global History/resource room (resource room) teacher during the 2014-15 school year administered an educational achievement test to the student in May 2015 (Tr. pp. 57-58, 207-08, 223-24; Dist. Ex. 8). The student's speech-language pathologist conducted a speech-language reevaluation on May 7, 2015 (Dist. Ex. 9).

Prior to June 4, 2015, the student's mother requested and the district assistant superintendent approved the student for recovery credit in algebra from Fusion, a private school registered with the State Education Department which provides 1:1 academic instruction to its students and does not offer State Regents exams (Tr. pp. 580, 586, 899-900, 1051-052).[9] Also around this time, the student's mother went directly to the district board of education (BOE) to request a job coach for the student as the parents signed the student up for a district-wide summer camp program where he would be a counselor in training (CIT) (Tr. pp. 895-97). The request for a job coach was approved (Tr. pp. 895-97, 912, 935).

On June 4, 2015, the CSE convened for the student's annual review and to develop his IEP for the 2015-16 school year (11th grade) (Dist. Ex. 11). The June 2015 CSE recommended the student continue to receive special education services for the 2015-16 school year (Dist. Exs. 11at pp. 1, 7-10; 13 at pp. 1). Program recommendations included direct consultant teacher services in the areas of English, math, social studies, and science for three 42-minute sessions over a six-day cycle (Dist. Exs. 11 at pp. 1, 7; 13 at p. 1). Related services recommendations were for one 30-mionute session of individual speech-language therapy per week in the classroom, as well as one 30-minute session of speech-language therapy in a small group per week in the therapist's office (Dist. Exs. 11 at pp. 1, 7-8; 13 at p. 1). Individual counseling was recommended two times monthly for 30 minutes (Dist. Exs. 11at pp. 1, 8; 13 at p. 1). Parent counseling and training was

[8] The district school psychologist later became the district's behavior consultant, for ease of reference this person will be referred to as the district behavior consultant (see Tr. pp. 325-29).

[9] The student's mother testified that after the student received an out-of-school suspension early in the 2013-14 school year, he was removed from Spanish class (Tr. p. 893). Sometime prior to the 2015-16 school year, she spoke directly to the head of the high school Spanish department to have the student reinstated into the language program in preparation for college (Tr. p. 894; see Dist. Ex. 26).

recommended for 1 hour per month in the home (id.). The CSE continued to recommend quarterly consultations for speech-language, but discontinued the occupational therapy consultation and amended the behavior consultant to "as needed" (compare Dist. Ex. 11 at p. 9, with Dist. Ex. 4 at p. 9; see Dist. Ex. 13 at p. 1). The CSE recommended the student would continue to have access to assistive technology in his academic classes (a portable word processor and a calculator) (Dist. Exs. 11 at p. 9; 13 at p. 1). The CSE recommended six weeks of 1:1 teacher aide services for hallway transitions during the first six weeks of school, after which a review would occur (Dist. Exs. 11 at p. 8; 13 at p. 1). The CSE also recommended an FBA to determine whether the student needed a BIP for the 2015-16 school year (Dist. Exs. 11 at p. 5; 13 at p. 1). The student's mother told the June 2015 CSE that the student would attend Fusion beginning July 2015 to recover credit for algebra (Tr. pp. 900, 1051-053).[10]

On June 6, 2015, the district conducted a Level II vocational assessment (Dist. Exs. 15; 16).

On June 24, 2015, the district behavior consultant sent the student's mother, via e-mail, a draft of a plan designed to address the student's difficulties specific to not arriving to class prior to the bell (Dist. Ex. 18). In his e-mail, the district behavior consultant asked the student's mother to review the plan and contact him with questions she might have about the plan (Tr. pp. 354-56; Dist. Ex. 18 at p. 1; Parent Ex. Z at p. 3). The district behavior consultant advised the parent that if she wanted to meet with him prior to the end of the academic school year, he was available for almost one more week (see Dist. Ex. 18 at p. 1). The district behavior consultant indicated that he did not receive a response from the student's mother by the end of the 2014-15 school year (Tr. pp. 357; see Tr. p. 437). Consequently, the district behavior consultant did not meet or consult with the parent prior to the start of the 2015-16 school year (Tr. pp. 445-47).

In an August 16, 2015 e-mail to the director of special education and the CSE chairperson, the parents indicated, among other things, their desire to schedule a meeting to discuss possible changes to the student's BIP and its implementation and their request to receive a copy of the June 2015 IEP (Parent Ex. Z at pp. 2-3). On August 24, 2015, the parents sent a second e-mail to the director of special education and the CSE chairperson, again requesting a copy of the June 2015 IEP, as well as a copy of the prior written notice specific to the June 2015 CSE meeting (id. at p. 2). In an e-mail response on August 25, 2015, the director of special education indicated to the student's mother that the district was in the process of finalizing and mailing home all 2015-16 IEPs prior to the start of the 2015-16 school year (id. at p. 1). The director of special education informed the parents that the district behavior consultant would be available to meet with them at the start of the school year (id.).

At the end of August 2015, the student's mother requested that the high school assistant principal remove the geometry class and math lab from the student's schedule and replace them with study hall, because she was having conversations with the superintendent in regard to math (Tr. pp. 87-88).

[10] Fusion Academy courses normally are completed in 30 sessions (Tr. p. 536). The student completed the algebra course in October 2015 after 46 sessions (Tr. p. 536). The parents do not seek reimbursement for the student's algebra course at Fusion Academy as a part of this proceeding.

In an e-mail to the student's mother dated September 1, 2015 the director of special education informed her that the student's team met with the district behavior consultant that day to review the student's updated BIP checklist (Dist. Ex. 19). The director of special education further indicated that the district behavior consultant would be at the high school the next day to meet with the student to support his transition back to school and to introduce the student to his new school psychologist (id.). The e-mail also memorialized a recent conversation in which the director of special education explained to the student's mother that the student's IEP reflected the provision of a 1:1 aide to monitor the student's transition from class to class in a timely manner, and that the need for an aide would be reviewed after five weeks of school (id.). The director of special education indicated she updated the IEP to reflect that the student continued to have a BIP in the form of a checklist to monitor his transitions (id.). She encouraged the student's mother to apply to ACCESS-VR so that the student might have access to other opportunities and indicated the district transition coordinator would be able to help the parents with the application process (id.).[11]

On the first day of school during 11th grade, the district behavior consultant, who had worked with the student since 9th grade, in conjunction with the new school psychologist and the student's speech-language pathologist met with the student to review the proposed behavior checklist (Tr. p. 359). The student indicated he was not going to follow through with the checklist because his mother had not reviewed it yet (Tr. pp. 359-60). Therefore, district staff would not implement the behavior checklist until the parent reviewed it, provided input, and the student was comfortable with it (Tr. p. 360).

In an e-mail to the director of special education dated September 3, 2015, the parents indicated that they received a prior written notice and did not agree with the proposed math program, and they requested an alternative math program that provided more support for the student, or for the student to attend an out of district placement for instruction in geometry at the district's expense (Parent Ex. ZZ at pp. 3-5).[12] The parents also requested that the district conduct a neuropsychological evaluation in order to provide more information about the student's disability in math, and an updated assistive technology evaluation (Tr. p. 918; Parent Ex. ZZ at p. 4). The hearing record suggests that the student did not participate in the recommended district geometry class with direct consultant teacher services (see Tr. pp. 87-88; Dist. Exs. 26; 32).

On September 24, 2015, the CSE convened for a program review (Dist. Ex. 21). The September 2015 CSE recommended the student continue to receive special education services within his current IEP, including direct consultant teacher services in geometry, and the support of

[11] ACCESS-VR is an acronym for Adult Career and Continuing Education Services-Vocational Rehabilitation. ACCESS-VR is an office within a State agency (Tr. p. 1340; see http://www.acces.nysed.gov/vr). As described in the hearing record, the CSE does not provide ACCESS-VR services, but the district provides liaison services for students to connect with ACCESS-VR (Tr. p. 1340). In the September 2015 e-mail to the student's mother, the director of special education further commented on the student's success working as a CIT in the recreation program with a job coach, and indicated the district was committed to providing the student with a job coach if he participated in the recreation program the following summer (Dist. Ex. 19). She also recapped a discussion from the June 2015 CSE meeting that ACCESS-VR created a new summer program where they provide job coaches to students with disabilities in programs outside of the district (id.).

[12] Per the September 3, 2015, e-mail to the director of special education, the parent noted that she received district approval for the algebra credit recovery prior to registering the student at Fusion for that math course (Parent Ex. ZZ at p. 5).

a 1:1 aide, until the end of the first semester (Tr. p. 92; Dist. Exs. 21; 22 at p. 1). The CSE updated the student's IEP to reflect transition information per results of the June 2015 Level II vocational assessment (Tr. p. 92; Dist. Exs. 21 at pp. 2, 11-12; 22 at pp. 1-2). In addition, as noted in a September 24, 2015 prior written notice, the CSE agreed to the parents' request for an assistive technology evaluation and a neuropsychological evaluation (Tr. p. 92; Dist. Ex. 22 at pp. 1-2). The hearing record contains a second prior written notice dated September 24, 2015, specific to the September 2015 CSE meeting, seeking parental consent to conduct the neuropsychological and assistive technology evaluations the parents requested (Dist. Ex. 22 at pp. 4-5).[13]

In an October 27, 2015 letter to the director of special education, the parents expressed among other things, their concerns with the student's September 24, 2015 IEP for the 2015-16 school year (Parent Ex. GG). They requested a more appropriate placement in geometry with 1:1 instruction presented at a slower pace, and provided notice that they intended to enroll the student in a geometry class at Fusion to prepare him to take the geometry Regents, and seek to hold the district financially responsible for the Fusion program (id. at pp. 2-3). The parents also emphasized the student's intent to apply to four-year college programs and requested that a job coach and travel training services be added to the student's IEP (id. at p. 3).

The school psychologist and the behavior consultant completed the student's FBA report on October 29, 2015 (Dist. Ex. 24). Consistent with the recommendations in the October 2015 FBA, a draft October 29, 2015 BIP identified that the student's behavior to be addressed was his ability to make timely transitions when changing classes, which reflected difficulty with executive functions (i.e., planning/advance planning, organizing, time management) (District Ex. 23 at p. 1).

On December 8, 2015, the student began receiving two to three 60-minute sessions per week of instruction in geometry at Fusion (Tr. p. 530).[14]

According to the district director of special education, the CSE scheduled several CSE meetings to consider the draft BIP, which were all rescheduled at the request of the parents (Tr. pp. 99-100; Dist. Ex. 27). In a December 21, 2015 e-mail the parent requested that the CSE meeting scheduled for December 22, 2015 be rescheduled to enable an independent behavior analyst to complete a district-funded independent educational evaluation (IEE), the district approved, and the behavior analyst began her assessment in mid-December (Tr. pp. 100, 622; Dist. Ex. 27).

A. Due Process Complaint Notice and Subsequent Facts

By letter dated December 1, 2015, the parents filed a due process complaint notice (Parent Ex. A). In an amended due process complaint notice dated February 8, 2016, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) during the 2015-16 school year (Parent Ex. B). As relevant to this appeal, the parents asserted that the CSE

[13] The district sent the parents additional requests for consent to evaluate the student on October 1, 2015, November 23, 2015, January 7, 2016, and January 25, 2016 (Tr. pp. 94-95, 102-03, 146-49; Dist. Ex. 28). The parent denied receipt of these correspondences prior to January 2016, noting problems receiving regular mail (Tr. pp. 102-03, 941-43, 944-46; Parent Exs. FF; YY). At the end of January 2016, the district received signed consent to conduct the neuropsychological and assistive technology evaluations of the student (see Parent Exs. EE; FF).

[14] The student's geometry instruction at Fusion ended on October 3, 2016 (Parent Ex. BBB).

failed to produce a timely IEP, predetermined the student's IEP, prevented the parents' meaningful participation in the CSE process, and the IEP did not include sufficient annual goals (id. at pp. 4-5). The parents further asserted that the math program recommended by the CSE was not reasonably calculated to provide an educational benefit because it would not have provided the student with sufficient support (id.). The parents also contended that the district failed to conduct a timely FBA of the student and that the IEP failed to include sufficient behavioral supports strategies or interventions and failed to include a BIP (id.). The parents also asserted that the IEP did not address the student's needs related to activities of daily living (ADLs), hygiene, and socialization—and the CSE erred in failing to provide adequate transition planning, a job coach, and travel training (id.). Further, the parents asserted that the student's math course at Fusion was appropriate for the student and equitable considerations favored reimbursement for the cost of the student's attendance at Fusion.

On March 14, 2016, the CSE convened to consider a proposed BIP and supports for the student for the remainder of the 2015-16 school year (Tr. pp. 826-27, 834-35; Dist. Exs. 62; 63 at p. 2; Parent Exs. E; F; H). The March 2016 CSE reviewed the independent February 2016 FBA, a March 2016 BIP, which the district prepared based on the February 2016 FBA, as well as a parent interview, a learning support team review, a third quarter progress report, a second quarter report card, and the October 2015 FBA conducted by the district (Tr. pp. 834-35; Dist. Exs. 29; 63 at p. 2; 64; Parent Exs. F; H at p. 1). The CSE recommended addressing the student's executive functioning skills through a revised March 2016 BIP agreed upon at the meeting and through the IEP, to which the CSE added an annual goal promoting the student's note-taking skills (Dist. Exs. 62 at p. 7; 63 at p. 1). The CSE also recommended behavior intervention services for one hour per week in the home, and discontinued the 1:1 aide for transitions (Dist. Exs. 62 at pp. 8, 9; 63 at p. 1).

B. Facts Post-Dating the Commencement of the Impartial Hearing

An impartial hearing convened on April 20, 2016 and concluded on October 19, 2016, after eight days of proceedings (see Tr. pp. 1-1875). While the matter was pending on April 29, 2016, the learning support team convened to review the student's progress with his BIP, review results of the neuropsychological evaluation, and to prepare for the student's annual review (Dist. Ex. 66).

On May 17, 2016, the CSE convened for the student's annual review and to develop his IEP for the 2016-17 school year (12th grade) (Dist. Ex. 69). The district school psychologist discussed the proposed behavior support plan for the student, which included objectives pertaining to changing for physical education class, using two backpacks with the school locker, and note taking (Dist. Ex. 70 at p. 2). The prior written notice indicated that the May 2016 CSE reviewed results of the neuropsychological evaluation previously requested by the parents which were consistent with previous evaluations conducted by the district (Dist. Ex. 70 at p. 2; see Dist. Ex. 69 at p. 2; Parent Ex. I). The May 17, 2016 CSE also reviewed results of the parentally requested assistive technology evaluation (Dist. Ex. 70 at p. 2). Consistent with the May 2016 IEP, the May 2016 prior written notice indicated that the student would continue to be provided within access to specialized software and computer technology within the educational environment (Dist. Exs. 69 at p. 10; 70 at p. 2).

The May 2016 prior written notice also noted that the district transition coordinator updated the student's measurable post-secondary goals and coordinated set of transition activities on the

May 2016 IEP (Dist. Ex. 70 at p. 2). The student's postsecondary goals included obtaining a Regents diploma and attending college to study history or political science (Dist. Ex. 69 at p. 7). The student's mother indicated that she pursued post-secondary agencies but up to that time, had not shared that information with the district (Dist. Ex. 70). The student had been found eligible for services through the Office of People with Developmental Disabilities (OPWDD), where he was currently a youth ambassador (id.).

The May 2016 prior written notice also noted that the student's mother had expressed concerns about the student's ADL skills within the home and his need for travel training (id.). The district offered to provide a job coach at the district's summer recreation program in the six-week CIT program that the student participated in the previous summer; however, the student's mother declined the job coach for summer 2016, instead indicating her intent for the student to attend a summer program for the 2016-17 school year at NYIT-VIP at district expense (Dist. Ex. 70 at pp. 2-3). The request was denied at that time as the CSE determined the student was not eligible for 12-month services during summer 2016, and NYIT-VIP was not a State-approved nonpublic school (NPS) special education program (id. at p. 2).

The May 2016 CSE recommended the following changes to the student's IEP: home based behavior intervention services would increase to 90 minutes a week in the home, an occupational therapy evaluation was necessary to assess the student's difficulties with his fine-motor speed, dexterity, and visual-motor integration, four hours of AT consultation, speech-language consultation would be increased to one time monthly by 30 minutes and behavior consultation would be reduced to 20 hours yearly as a support for school personnel on behalf of the student, adaptive rating scales would be completed by the parent and teacher, a BIP was developed and agreed to, and that 12-month services (i.e. services during July and August 2016) were not warranted for the student for the 2016-17 school year (id. at p. 1).

The parents submitted application to NYIT-VIP sometime after the May 2016 CSE meeting, whereupon the student was accepted and participated in the summer program (Tr. pp. 1727-728; Parent Exs. OO; TT).

C. Second Due Process Complaint Notice and Consolidation

The parents submitted a second due process complaint notice dated July 1, 2016, challenging the May 17, 2016 IEP (12th grade) and services that the district failed to offer during the months of July and August 2016 (Parent Ex. KK). The parents alleged that the offered program failed to include sufficient transition services, and failed to provide a job coach and travel training. The parents further alleged that the unilateral placement of the student at NYIT-VIP during summer 2016 was appropriate for the student and that equitable considerations favored reimbursement to the parents for the cost of the student's attendance at NYIT-VIP (Parent Ex. KK at pp. 1-4). In an order dated July 25, 2016, the IHO consolidated the July 1, 2016 due process complaint notice with the February 8, 2016 amended due process complaint notice (IHO Ex. I at p. 2).

D. Impartial Hearing Officer Decision

By decision dated February 21, 2017, the IHO determined that the district failed to offer the student a FAPE for the 2015-16 school year (IHO Decision at pp. 22-31). The IHO found that the math program recommended in the June and September 2015 IEPs for the student's 11th grade

school year was inappropriate because the student had not succeeded in an algebra class with similar supports during his 9th grade year, and the student had not progressed well during the "bridge" math class he attended during his 10th grade school year (id. at pp. 22-24). The IHO also found that the district's failure to ensure that an appropriate BIP was in place at the start of the school year was a procedural violation, and the procedural violation resulted in a denial of a FAPE because, although the IEPs identified some of the student's behavioral needs and contained some accommodations to address them, an effective BIP related to the student's ability to access his postsecondary goals due to executive functioning and ADL deficits "was critical," and the district had not addressed those issues by other means (id. at pp. 24-29). The IHO then rejected the parents' claims related to transition planning (id. at pp. 29-31). The IHO found that there was no evidence the parents requested a job coach for the September through June portion of the 2015-16 school year (id. at p. 30). In addition, the IHO determined that although the parents provided testimony that the student's travel skills were "non-existent," the parents claim for a travel trainer related only to the student's access to a school club that traveled to New York City four times per year, and accordingly, the district's offer to provide a 1:1 aide to accompany the student on those trips was reasonable (id. at p. 31). With respect to relief for the 2015-16 school year, the IHO determined that the parent's unilateral placement of the student in a geometry program at Fusion was appropriate and rejected the district's contentions that the student's teacher at Fusion was not sufficiently qualified and that the program's 1:1 instruction was not the student's least restrictive environment (LRE) (id. at pp. 33-36). The IHO also found that equitable considerations favored reimbursement to the parents for the cost of the student's math program at Fusion because they had cooperated with the district in developing the student's program, had allowed implementation of the program to the extent that it was appropriate, had provided appropriate notice of their intention to unilaterally place the student in the Fusion geometry class, and that although consent for certain evaluations had been delayed, the delay was not willful on the parents' part (id. at pp. 40-41).

With respect to the 2016-17 school year and the May 2016 IEP, the IHO determined that the hearing record did not support the relief requested by the parents, reimbursement for the costs of the student's attendance at NYIT-VIP's seven-week summer program (IHO Decision at pp. 31-32). Specifically, the IHO found that the parents' contention that the student required a job coach and travel training as part of a 12-month program to be without merit because the parents had not claimed that the student exhibited substantial regression without services over the summer between school years, and that none of his teachers or evaluators had recommended 12-month services (id. at p. 32). Despite this finding, the IHO went on to determine the appropriateness of the unilateral placement at NYIT-VIP and found it to be reasonably calculated to lead to meaningful progress for the student, and rejected the district's arguments that the student was not properly grouped there, and that NYIT-VIP did not confer academic benefits, was not individualized, and was not the LRE for the student because it was residential rather than a day program (id. at pp. 38-40).

The IHO ordered the district to reimburse the parents for the costs of the student's attendance in the geometry course at Fusion for two semesters upon proof of payment for a specified number of sessions (IHO Decision at p. 41).

IV. Appeal for State-Level Review

The district appeals in a request for review, asserting that the IHO erred in finding that the district failed to offer the student a FAPE for the 2015-16 school year, that Fusion was an

appropriate unilateral placement for the student, and that equitable considerations weighed in favor of the parents' request for an award of tuition reimbursement.

With respect to the IHO's determination that the district failed to offer the student a FAPE by recommending an inappropriate math program, the district asserts that the math program recommended for the 2015-16 school year was appropriate because the student had passed the "bridge" course the previous school year, and had performed better in the geometry portion of the class, such that recommending an inclusion geometry course with support of a direct teacher consultant, a math lab, and resource room, was appropriate for the student. The district also contends that the IHO inappropriately discounted the student's passing grades on the Regents algebra exam and the common core math exam during the 2013-14 school year, which the district contends is evidence of the student's getting at least some educational benefit from the inclusion algebra class during the 2013-14 school year.

With respect to the determination that the student's 2015-16 school year program had failed to adequately address the student's behavioral needs, the district asserts that BIPs in place for the student since the 2013-14 school year had resulted in social and behavioral progress and that recommending a new FBA was appropriate. The district further asserts that after the FBA was completed early in the 2015-16 school year, a BIP was developed but was not implemented at the student's request and that implementation of a BIP was thereafter delayed by the parents' request for an independent FBA. The district contends that the IHO erred in finding a procedural error, arguing that it was appropriate for the CSE to decide to conduct an FBA in order to determine if a BIP was necessary. The district further contends that no harm resulted from the lack of a BIP as the IEP included interventions to address the student's behaviors and the district continued to provide behavioral consultations directly to the student's teachers.

With respect to the determination that Fusion was an appropriate unilateral placement for the student, the district contends that the student's Fusion geometry teacher was unqualified, that 1:1 instruction was not the student's LRE, and that the IHO should not have ordered reimbursement for the second semester of the geometry course at Fusion because there had been no evidence the student was successful the second semester. The district also appeals from the IHO's determination that NYIT-VIP was an appropriate placement, asserting that it is not in the student's LRE because the student does not require a residential placement, that it was not individualized for the student, and that it was designed for students who are lower functioning than the student. With respect to equitable considerations, the district asserts that equitable considerations do not favor reimbursement because the parents delayed consent for certain evaluations, failed to consent to an application to a particular transition service, failed to consent to implementation of a "behavior checklist" during the 2015-16 school year, and never intended to have the student attend the district's inclusion geometry class during the 2015-16 school year.

In an answer and cross-appeal, the parents assert general admissions and denials, and argue in favor of upholding the IHO's determinations that the district failed to offer the student a FAPE during the 2015-16 school year based on an inappropriate math program and inappropriate behavioral supports, that Fusion was an appropriate unilateral placement, that NYIT-VIP was an appropriate placement, and that equitable considerations favored an award of tuition reimbursement.

With respect to the district's claim that its recommended math program was appropriate, the parents contend that the student was not more adept at geometry and had not been successful in the "bridge" class the prior school year. Moreover, the parents assert that the IHO erred in failing to consider their claim that the student's math program had been predetermined because the CSE failed to consider other possible placements and placed the student in the inclusion geometry class because it lacked a Regents credit bearing geometry class with sufficient support for the student.

With respect to the district's contention that the student's 2015-16 school year program adequately addressed the student's behavioral needs, the parents assert that the IHO correctly determined that the district failed to create a timely or appropriate BIP at the start of the student's 2015-16 school year and that the parents' objections to the behavioral checklist were made in good faith and did not obstruct the district's development of the BIP.

With respect to the district's assertion that Fusion was not an appropriate unilateral placement for the student, the parents contend that the IHO correctly determined that Fusion was appropriate, that the student's Fusion geometry teacher was highly qualified, that the student required the intensive 1:1 instruction Fusion provided in light of his specific learning disability in math, and that parents are not subject to the same LRE concerns as districts.

With respect to equitable considerations, the parents assert that the IHO correctly determined that equitable considerations favored reimbursement because the parents cooperated with the district, delays in consent were not willful and were caused by communication mishaps, and the parents removed the student from the district's math program and refused to consent to implementing the "behavior checklist" because they were inappropriate.

The parents cross-appeal, asserting that the IHO erred in finding that the district offered appropriate transition services and further contend that the May 2016 IEP failed to adequately address ADLs, social skills, job training, and travel training. Further, the parents contend that the district did not offer travel training until October 2016, after the student already obtained travel training at NYIT-VIP.

For relief, the parents request an order upholding the IHO's decision awarding reimbursement for Fusion for the 2015-16 school year and further request an award of reimbursement for the cost of the student's attendance at NYIT-VIP's 7-week program during the summer of the 2016-17 school year.

In its answer to the cross-appeal, the district asserts general admissions and denials, and contends that the math program recommended for the 2015-16 school year was not predetermined because the hearing record shows that multiple options were considered and discussed with the parents at the relevant CSE meetings. With respect to the parents' cross-appeal, the district contends that it provided appropriate transition services, conducted timely vocational assessments, developed postsecondary goals, offered an aide to allow the student to participate in a school travel club, provided a job coach at the district's CIT program during summer 2015, and offered to provide one during summer 2016. Relatedly, the district also asserts that the IHO correctly determined that the student was not eligible for 12-month services because there is no indication the student was in danger of substantial regression over the summer.

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 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]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at *10 [S.D.N.Y. Feb. 9, 2007]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). The 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; see Endrew F. v. Douglas County Sch. Dist. RE-1, 580 U.S. __, 137 S. Ct. 988, 998-1001 [2017] [holding that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"]; 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]; 8 NYCRR 200.4[d][2][i]; Tarlowe v. New York City Bd. of Educ., 2008 WL 2736027, at *6 [S.D.N.Y. July 3, 2008] [noting that a CSE must consider, among other things, the "results of the initial evaluation or most recent evaluation" of the student, as well as the "'academic, developmental, and functional needs'" of the student]), 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).

VI. Discussion

A. 2015-16 School Year

1. Recommended Math Programming

The district asserts that the math programming recommended for the 2015-16 school year was appropriate because the student had passed the algebra/geometry "bridge" class the previous school year, and had performed better in the geometry portion of the class, such that recommending an inclusion geometry course with the support of a direct consultant teacher, a math lab, and

resource room, was appropriate for the student.[15] The parents counter that the student was not more adept at geometry and had not been successful in both the bridge math class the prior school year and his inclusion algebra class during the 2013-14 school year.

Neither party disputes the student struggled with math, and the hearing record shows that he failed the Regents algebra class during the 2013-14 school year (Tr. p. 41; Dist. Ex. 26). However, testimony by the district behavior consultant indicated that despite the student's cognitive profile and difficulty with math, the student's performance in math was such that he passed the algebra Regents exam (Tr. p. 461; see Dist. Ex. 26). The behavior consultant indicated, "Because [the student] has this cognitive deficit (in math) doesn't preclude him from learning math" (Tr. p. 461). As discussed below, testimony by the student's math teacher of the bridge class, as well as that of his resource room teacher during the 2014-15 school year, describes their knowledge of the student, the assistance he received related to the bridge math class, and why the math services and supports for the 2015-16 school year were recommended (Tr. pp. 205-296, 298-323).

Although the parents contend that the student was not more adept at geometry and had not been successful in the bridge math class during the 2014-15 school year, the hearing record demonstrates otherwise. The hearing record reflects that the student's bridge math class during the 2014-15 school year consisted of approximately 15 students comprised of sophomores, juniors, and seniors (Tr. pp. 300-01, 306). Testimony by the student's math teacher indicated the class was for students who had some difficulty with algebra and were not quite ready to continue forward to geometry (Tr. at pp. 300, 314-15). The class was designed so that the teacher reviewed algebra the first semester of the school year, and introduced concepts in geometry during the second semester of the school year, so the student would subsequently be more comfortable when he took the geometry class the next school year (Tr. pp. 300-01). The teacher noted the purpose of introducing the geometry topics was for students to have "a leg up in the class" in their comfort level and understanding of the material because they would have already been exposed to geometry topics (id.). The student's math instruction was supported by his resource room teacher who had familiarity with the student's assignments and his behavior, and who built a rapport with him (Tr. pp. 242, 303). Additionally, the student's 1:1 aide helped keep the student safe and in the right place, and she wrote down his homework assignments if he did not (Tr. pp. 252-53).

The bridge math teacher testified that at the beginning of the 2014-15 school year the student struggled "a little bit" with reviewing algebra and received a first quarter grade of 60 (Tr. p. 301; Parent Ex. N). As the school year progressed, the student did better with the algebra curriculum, receiving a grade of 71 for the second quarter, but still struggled with some of the concepts and received a grade of 56 on the midterm exam (Tr. pp. 301-02; Parent Ex. N). As instruction moved to geometry, the math teacher testified that the student's grades increased steadily[16] and he received a grade of 87 on the final exam, with a final grade of 73 for the bridge math class (Tr. pp. 302, 308, 318; Dist. Ex. 26).[17] The math teacher indicated the student

[15] The math class the student attended during the 2014-15 school year is referred to in the hearing record as both the "topics of algebra and geometry" and the "bridge" class (see e.g., Tr. pp. 65, 300, 314-15; Dist. Ex. 26).

[16] The hearing record does not reflect the student's third and fourth quarter bridge class grades (see Parent Exs. M at pp. 1-2; N; Dist. Ex. 26).

[17] The parents indicated that the student had been provided with all final exam test questions beforehand, and was

participated more during the second half of the year, and he "definitely had a stronger grasp of the geometry material" (Tr. p. 302). She indicated that the student was successful in her math class during the 2014-15 school year (Tr. p. 305). Testimony by the resource room teacher is consistent with that of the math teacher, in that he indicated the student's achievement improved when the math class started geometry in the third quarter of the school year (Tr. p. 240).

Regarding the student's IEP math goal for the 2014-15 school year, the math teacher indicated she discussed the student's abilities in the classroom and how he progressed with the resource room teacher, and the resource room teacher worked on the student's math IEP goal (Tr. p. 304). The math teacher and the resource room teacher talked about the student's progress throughout the school year, information that the resource room teacher used to assess how the student performed in relation to that goal (id.). The student's IEP progress report for the 2014-15 school year demonstrated he achieved his math goal that anticipated, "[The student] will independently solve multi-step mathematical problems relating to his current algebra/geometry class curriculum" (Dist. Ex. 17 at p. 2).

With regard to the supports the student received to assist him with the bridge math class, the math teacher testified that during the 2014-15 school year, she collaborated with the student's resource room teacher (Tr. pp. 256, 303). The math teacher and the resource room teacher communicated at least weekly concerning the student's progress, how to help the student overcome his obstacles, and discussed everything about "what's coming up, tests, what he had completed, what he hadn't completed, strengths, weaknesses, work on this, look at that" (Tr. pp. 214, 256, 303-04). The resource room teacher testified that resource room in general has a maximum of a 5:1 student-to-teacher ratio, and that he saw the student in the resource room every day with two to four other students (Tr. at pp. 208-09, 215-16). Addressing the student's difficulty with correcting mistakes on his completed homework assignments, the math teacher indicated that class notes, including solutions to the previously assigned homework, were posted on the high school website (Tr. p. 303; see Tr. p. 211). According to the math teacher, the resource room teacher worked with the student 1:1, and reviewed the homework and class notes, going over with the student what he had on his paper and whether it did or did not match with what the math teacher did in class (Tr. p. 303). Additionally, the math teacher testified the student often used extra time when taking tests pursuant to his IEP (Tr. p. 307; see Dist. Ex. 6 at pp. 1, 10).

Similar to the testimony of the math teacher, the resource room teacher testified that he was in constant contact with the student's teachers, understood the student's current assignments, and used the high school's web based program where teachers posted their assignments, upcoming tests, homework, daily lessons, class notes, and papers that students were expected to complete (Tr. pp. 211-14). The resource room teacher used the program to keep the student structured, organized, and on-track with his assignments and indicated the student knew how to access and use the program as he was "good with the computer" (Tr. pp. 211-14, 252). The resource room teacher explained that he told the students who needed help to go to him and ask for assistance otherwise, he would always have work for them to do, based on their IEP goals (Tr. p. 210).[18]

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permitted to take the test with an index card that included mathematical formulas needed to correctly answer test questions (Tr. pp. 1101-02, 1179-80; Parent Ex. GG at p. 2).

[18] The resource room teacher indicated that he "had to build [the student's] trust, and he felt he was successful in building a collegial relationship with the student and that they had a "strong bond" (Tr. pp. 210-11, 241-42).

Specific to math, the resource room teacher indicated that he determined what math work needed to be addressed in resource room by asking the student every day what he needed help with, and by communicating with the student's math teacher and teacher aide (Tr. pp. 226, 256). For example, during the resource room period, the resource room teacher and the student might complete a math review packet in preparation for an upcoming test (Tr. pp. 226, 248, 253).

On the topic of the CSE's math recommendation for the 2015-16 school year, the evidence indicates that as the student's case manager, it was the resource room teacher's responsibility to take on a significant role in drafting an IEP for the 2015-16 school year (Tr. pp. 208-09, 227). Based upon the student's successful performance in the bridge math class, the June 2015 CSE recommended that the student receive special education direct consultant teacher services in geometry for the 2015-16 school year (Tr. pp. 64-65; Dist. Ex. 11 at pp. 1, 7). The resource room teacher indicated that the special education direct consultant teacher services provided the student with support in geometry from a special education teacher three times per week on a six-day schedule, and from a teacher assistant on the alternate days (Tr. pp. 237-38). The resource room teacher testified that based on the student's performance in the geometry portion of the bridge math class during the 2014-15 school year, the recommendation for geometry with direct consultant teacher services and the math lab was "absolutely" appropriate for the student (Tr. pp. 237-40). The bridge math teacher testified that based upon her knowledge gained through working with the student during the 2014-15 school year, she believed the student would be successful in the geometry class recommended for the 2015-16 school year (Tr. pp. 310-11). The director of special education testified that after finding out the parents were removing the student from the geometry class, she asked staff "bluntly" if they believed the math class would provide enough support for the student to be successful, to which staff responded "yes" (Tr. p. 89).

Additionally, the CSE recommended that the student receive five 42-minute sessions per week of resource room services to continue small group work on IEP goals, and study, organizational, and executive functioning skills (Tr. p. 67; Dist. Ex. 11 at pp. 1, 7). The student's 2015-16 IEP also mandated supplementary aides and services/accommodations for refocusing and redirection, check for understanding, copy of class notes, preferential seating, and use of a calculator (Dist. Ex. 11 at pp. 7-8).

The parents assert that because the student failed the algebra class during the 2013-14 school year when provided with supports and services similar to those recommended for the 2015-16 school year, the program is not appropriate. Review of the student's November 2013 IEP shows that he received three sessions per six-day cycle of direct consultant teacher services in math, and three sessions per six-day cycle of resource room services (Dist. Ex. 2 at p. 8). Although the student would receive direct consultant teacher services with the same frequency during the 2015-16 school year as he had during the 2013-14 school year, during the 2015-16 school year he would have received resource room every day, in addition to the geometry math lab built into his schedule, which the parent testified she was aware of at the time of the June 2015 CSE meeting (Tr. pp. 1092-93; Dist. Ex. 20; compare Dist. Ex. 2 at p. 8, with Dist. Ex. 11 at p. 7). Furthermore, as described above, in this instance, the hearing record reflects that the student demonstrated more difficulty with algebra in general than with geometry, which he had a successful introduction to during the second half of the 2014-15 school year (compare Tr. pp. 302, 308-09, 318, and Dist. Ex. 26, with Parent Ex. N).

The district has a deficiency in its case regarding the math instruction that cannot be overcome on the basis of the evidence in the hearing record. As mentioned several times above, in conjunction with the special education direct consultant teacher services, the student's 2015-16 schedule included a general education AIS math lab component—provided as part of the student's geometry program during one period every other day—that offered the student opportunity for preteaching, and reteaching and review of what was taught that day in math in a smaller group of students (Tr. pp. 64-66, 237-40, 275, 309-11; Dist. Ex. 20). However, that service is not listed on the student's IEP. In fairness to the district, the parent's claims regarding the deficiencies of the math services are broadly worded and do not specify the failure to list the geometry lab on the student's IEP. However, in making its case that the math services offered to the student are sufficient to offer the student a FAPE, the district explicitly includes the geometry math lab in its description of the district's offerings to assist the student.

According to the resource room teacher, the AIS math lab was not set forth as part of the student's program on the IEPs because it is not a special education service (Tr. p. 238; see Dist. Exs. 11; 21). State regulations define AIS as additional instruction which supplements the instruction provided in the general curriculum and assists students in meeting the State learning standards and/or student support services which may include guidance, counseling, attendance, and study skills which are needed to support improved academic performance (8 NYCRR 100.1[g]). AIS is intended to assist students who are at risk of not achieving the State learning standards in English language arts, mathematics, social studies and/or science, or who are at risk of not gaining the knowledge and skills needed to meet or exceed designated performance levels on State assessments (id.). AIS is available to students with disabilities on the same basis as nondisabled students, provided such services are provided to the extent consistent with the student's IEP; however, according to the guidance, AIS does not include special education services and programs (id.). Additionally, while certain additional instructional or supportive services may be available to special education students and non-disabled students alike (e.g., AIS or "building level services"), according to the State Education Department, such services should not be listed on a student's IEP (see "Academic Intervention Services: Questions and Answers," at pp. 5, 20, Office of P-12 Mem. [Jan. 2000], available at http://www.p12.nysed.gov/part100/pages/AISQAweb.pdf).

On the other hand, subsequent guidance by the United States Department of Education (USDOE) indicates that services that clearly fall into the realm of special education are required to be listed on an IEP, stating in particular that "[t]he IEP Team is responsible for determining what special education and related services are needed to address the unique needs of the individual child with a disability. The fact that some of those services may also be considered 'best teaching practices' or 'part of the district's regular education program' does not preclude those services from meeting the definition of 'special education' or 'related services' and being included in the child's IEP" (Letter to Chambers, 59 IDELR 170 [OSEP 2012]).

In light of the most recent guidance from the USDOE's in Letter to Chambers, the district might have presented a stronger argument had it contended that either that the AIS services offered to the student in this case did not meet the definition of specially designed instruction and therefore did not need to be placed on the student's IEP in accordance with both federal and State guidance or, alternatively, that the IEP successfully provided the student with appropriate special education services in math which offered a FAPE even if one were to exclude the AIS geometry lab from the calculus. The district has done neither, and further hurting the district's argument, the IHO did

not make that distinction and appears to have explicitly included in the fact-finding portion of her decision that the challenged geometry program included a lab component envisioned by the CSE (IHO Decision at pp. 11-12), and the record evidence does not indicate otherwise. In light of the available evidence that the lab was to include preteaching and reteaching of materials in a small group, I am hard pressed to reach a conclusion on this record that it was not specially designed instruction, that is, an adaptation of the content, methodology, or delivery of instruction to address his unique needs and ensure his access to the general education curriculum (see 34 CFR 300.39[b][3]). To that end, contrary to the reasoning of the resource room instructor, the math lab instruction must be included on the IEP to consider it in the analysis of the parents' claim that the math services on the IEP were inappropriate (see E.M. v. N.Y. City Dep't of Educ., 758 F.3d 442, 462 [2d Cir. 2014] [explaining that "[b]y way of example, we explained that 'testimony may be received that explains or justifies the services listed in the IEP,' but the district 'may not introduce testimony that a different teaching method, not mentioned in the IEP, would have been used [internal citations omitted). When considering the student's program without the math lab services listed on the 2015-16 IEP, the district's argument that the IHO's conclusion that the math services were inadequate to offer the student a FAPE is too weak and the district's request to overturn that portion of the IHO's decision must be rejected.

To summarize the findings detailed above, I find that, contrary to the IHO, that the hearing record shows that the student made progress in the geometry portion of the bridge class. However, upon considering the June 2015 CSE's recommendation for geometry with direct consultant teacher services and resource room, but excluding consideration of the proposed preteaching and reteaching in the geometry lab that was not listed on the student's IEP, I am constrained to reach the same ultimate conclusion as that reached by the IHO that the district did not establish that it offered the student a FAPE in the 2015-16 IEP.

2. Predetermination of Math Programming

The parents assert that the IHO erred in failing to consider their claim that the student's math programming had been predetermined because the CSE failed to consider other possible placements, and recommended the inclusion geometry class because it lacked a Regents credit bearing geometry class with what they believed to be sufficient support for the student. The district counters that the math programing recommended for the 2015-16 school year was not predetermined because the hearing record shows that multiple options were considered and discussed with the parents at the relevant CSE meetings.

The IDEA sets forth procedural safeguards that include providing parents an opportunity "to participate in meetings with respect to the identification, evaluation, and educational placement of the child" (20 U.S.C. § 1415[b][1]). Federal and State regulations governing parental participation require that school districts take steps to ensure that parents are present at their child's IEP meetings or are afforded the opportunity to participate (34 CFR 300.322; 8 NYCRR 200.5[d]). Although school districts must provide an opportunity for parents to participate in the development of their child's IEP, mere parental disagreement with a school district's proposed IEP and placement recommendation does not amount to a denial of meaningful participation (see J.E. & C.E. v. Chappaqua Cent. Sch. Dist., 2016 WL 3636677, at *11 [S.D.N.Y. June 28, 2016]; T.F. v. New York City Dep't of Educ., 2015 WL 5610769, at *5 [S.D.N.Y. Sept. 23, 2015]; A.P. v. New York City Dep't of Educ., 2015 WL 4597545, at *8, *10 [S.D.N.Y. July 30, 2015]; E.F. v. New York City Dep't of Educ., 2013 WL 4495676, at *17 [E.D.N.Y. Aug. 19, 2013] [stating that "as

long as the parents are listened to," the right to participate in the development of the IEP is not impeded, "even if the [district] ultimately decides not to follow the parents' suggestions"]; P.K. v. Bedford Cent. Sch. Dist., 569 F. Supp. 2d 371, 383 [S.D.N.Y. 2008] ["A professional disagreement is not an IDEA violation"]; Sch. for Language & Commc'n Dev. v. New York State Dep't of Educ., 2006 WL 2792754, at *7 [E.D.N.Y. Sept. 26, 2006] ["Meaningful participation does not require deferral to parent choice"]). When determining whether a district complied with the IDEA's procedural requirements, the inquiry focuses on whether the parents "had an adequate opportunity to participate in the development" of their child's IEP (Cerra, 427 F.3d at 192).

As to predetermination, the consideration of possible recommendations for a student prior to a CSE meeting is not prohibited as long as the CSE understands that changes may occur at the CSE meeting (T.P., 554 F.3d at 253; A.P., 2015 WL 4597545, at *8-*9; see 34 CFR 300.501[b][1], [3]; 8 NYCRR 200.5[d][1], [2]). The key factor with regard to predetermination is whether the district has "an open mind as to the content of [the student's] IEP" (T.P., 554 F.3d at 253; see D.D-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at *10-*11 [E.D.N.Y. Sept. 2, 2011], aff'd 506 Fed. App'x 80 [2d Cir. Dec. 26, 2012]; R.R. v. Scarsdale Union Free Sch. Dist., 615 F. Supp. 2d 283, 294 [E.D.N.Y. 2009], aff'd, 366 Fed. App'x 239 [2d Cir. Feb. 18, 2010]). Districts may '"prepare reports and come with pre[-]formed opinions regarding the best course of action for the child as long as they are willing to listen to the parents and parents have the opportunity to make objections and suggestions'" (Dirocco v. Bd. of Educ. Of Beacon City Sch. Dist., 2013 WL 25959, at *18 [S.D.N.Y. Jan. 2, 2013] [alternation in the original], quoting M.M. v. New York City Dept. of Educ. Region 9 (Dist. 2), 583 F. Supp. 2d 498, 506; [S.D.N.Y. 2008]; see B.K. v. New York City Dep't of Educ., 12 F. Supp. 3d 343, 358-59 [E.D.N.Y. 2014] [holding that "active and meaningful" parent participation undermines a claim of predetermination]).

The parents' predetermination claim is against the weight of the evidence contained in the hearing record. The student's mother testified that options for a math program were discussed at the June 2015 CSE meeting, and that the student required a Regents math course to stay on track to go on to a four-year college after graduating from high school (Tr. pp. 897-900, 908-09, 1092-95). Her testimony reflects that the CSE considered placing the student in a financial literacy course, a non-Regents course introducing students to concepts such as "life math" and balancing checkbooks, but "that really would be of no help for [the student's] college potential" (Tr. pp. 908-09, 1092-93). Additionally, the parents countered that geometry would be a part of standardized testing to occur in the student's junior year, and the student would need to be familiar with that material in order to be prepared for those tests (Tr. pp. 898-99). The other option the CSE discussed was the math program ultimately recommended, "inclusion" geometry with the math lab, which the parent informed the CSE was not appropriate due to the large size, inadequate support, and regular pace of the class (Tr. pp. 907-08, 1092-93). The parent testified that "neither of the offerings" that the CSE put forth would "suit" the student as one was at a regular pace, and the other would have taken "him out of the [R]egents track" (Tr. p. 909). The prior written notice associated with the June 2015 CSE meeting notes that the parents and the student both actively participated in the CSE meeting and the district's behavior recalled that "math was a concern" at the June 2015 CSE meeting (Tr. pp. 328-29, 404-05; Dist. Ex. 13 at p. 2). The district's director of special education also testified that the primary purpose of the September 2015 CSE meeting was to discuss the parents' concerns with the inclusion geometry class recommended by the CSE for the 2015-16 school year, and that although the parents described their concern that the program

would not provide sufficient support, the CSE decided to continue with the recommendation (Tr. pp. 89-92; see Dist. Ex. 22 at p. 2).[19]

In light of the above, the hearing record shows that the CSE discussed math options for the student and the parents' concerns during both the June and September 2015 CSE meetings, and that the district's decision to recommend the inclusion geometry class does not show predetermination (i.e. the lack of the requisite open mind that is willing to hear and consider parental concerns), but rather a disagreement with the parents as to the level of support the student required. Therefore, I decline to find that the district predetermined the student's recommended math program for the 21015-16 school year.

3. Special Factors—Interfering Behaviors

The district contends that the IHO erred in finding that the student's 2015-16 school year program failed to adequately address the student's behavioral needs. The district contends that the student had made social and behavioral progress with the BIPs that were in place since the 2013-14 school year and accordingly, the CSE was reasonable in recommending a new FBA in order to determine if a BIP was necessary for the 2015-16 school year. The district further asserts that after the FBA was completed early in the school year, a BIP was developed but was not implemented at the student's request, and that implementation of a BIP was thereafter delayed by the parent's request for an independent FBA.

The parents assert that the IHO correctly determined that the district failed to create a timely or appropriate BIP at the start of the student's 2015-16 school year despite noting on the student's IEPs that he required a BIP, and that they did not obstruct the process.

Under the IDEA, a CSE may be required to consider special factors in the development of a student's IEP. Among the special factors in the case of a student whose behavior impedes his or her learning or that of others, the CSE shall consider 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]; see also E.H. v. Bd. of Educ., 361 Fed. App'x 156, 160 [2d Cir. Oct. 16, 2009]; A.C., 553 F.3d at 172). State procedures for considering the special factor of a student's behavior that impedes his or her learning or that of others may also require that the CSE consider developing a BIP for a student that is based upon an FBA (8 NYCRR 200.4[d][3][i], 200.22[a], [b]). State regulation defines an FBA as the process of determining why a student engages in behaviors that impede learning and how the student's behavior relates to the environment" and includes, but is not limited to,

> the identification of the problem behavior, the definition of the behavior in concrete terms, the identification of the contextual factors that contribute to the behavior (including cognitive and affective factors) and the formulation of a hypothesis regarding the general conditions under which a behavior usually occurs and probable consequences that serve to maintain it

[19] The September 2015 prior written notice indicated that the CSE denied the parents' request to remove the student's direct consultant teacher services in geometry (Dist. Ex. 22 at p. 2).

(8 NYCRR 200.1[r]). According to State regulation, an FBA shall be based on multiple sources of data including, but not limited to, "information obtained from direct observation of the student, information from the student, the student's teacher(s) and/or related service provider(s), a review of available data and information from the student' record and other sources including any relevant information provided by the student's parent" (8 NYCRR 200.22[a][2]). An FBA must also be based on more than the student's history of presenting problem behaviors (8 NYCRR 200.22[a][2]).

Although State regulations call for the procedure of using an FBA when developing a BIP, the Second Circuit has indicated that, when required, "[t]he failure to conduct an adequate FBA is a serious procedural violation because it may prevent the CSE from obtaining necessary information about the student's behaviors, leading to their being addressed in the IEP inadequately or not at all" (R.E., 694 F.3d at 190; see L.O. v. New York City Dep't of Educ., 822 F.3d 95, 113 [2d Cir. 2016]). The Court also noted that "[t]he failure to conduct an FBA will not always rise to the level of a denial of a FAPE," but that in such instances particular care must be taken to determine whether the IEP addresses the student's problem behaviors (id.).

With regard to a BIP, the special factor procedures set forth in State regulations note that the CSE or CPSE shall consider the development of a BIP for a student with a disability when:

> (i) the student exhibits persistent behaviors that impede his or her learning or that of others, despite consistently implemented general school-wide or classroom-wide interventions; (ii) the student's behavior places the student or others at risk of harm or injury; (iii) the CSE or CPSE is considering more restrictive programs or placements as a result of the student's behavior; and/or (iv) as required pursuant to" 8 NYCRR 201.3

(8 NYCRR 200.22[b][1]). If the CSE determines that a BIP is necessary for a student the BIP shall identify: (i) the baseline measure of the problem behavior, including the frequency, duration, intensity and/or latency of the targeted behaviors . . . ; (ii) the intervention strategies to be used to alter antecedent events to prevent the occurrence of the behavior, teach individual alternative and adaptive behaviors to the student, and provide consequences for the targeted inappropriate behavior(s) and alternative acceptable behavior(s); and (iii) a schedule to measure the effectiveness of the interventions, including the frequency, duration and intensity of the targeted behaviors at scheduled intervals (8 NYCRR 200.22[b][4]).[20]

[20] The Official Analysis of Comments to the federal regulations explains that the decision regarding whether a student requires interventions such as a BIP rests with the CSE and is made on an individual basis (Consideration of Special Factors, 71 Fed. Reg. 46683 [August 14, 2006]). However, neither the IDEA nor its implementing regulations require that the elements of a student's BIP be set forth in the student's IEP. State guidance indicates that New York State regulations merely "require that a student's need for a BIP be documented in the student's IEP" ("Student Needs Related to Special Factors," Office of Special Educ. [April 2011], available at http://www.p12.nysed.gov/specialed/formsnotices/IEP/training/QA-411.pdf). However, once a student's BIP is developed and implemented, "such plan shall be reviewed at least annually by the CSE or CPSE" (8 NYCRR 200.22[b][2]). Furthermore, "[t]he implementation of a student's [BIP] shall include regular progress monitoring of the frequency, duration and intensity of the behavioral interventions at scheduled intervals, as specified in the [BIP] and on the student's IEP. The results of the progress monitoring shall be documented and reported to the student's parents and to the CSE or CPSE and shall be considered in any determination to revise a student's [BIP] or IEP" (8 NYCRR 200.22[b][5]).

As with the failure to conduct an FBA, the district's failure to develop a BIP in conformity with State regulations does not, in and of itself, automatically render the IEP deficient, as the IEP must be closely examined to determine whether it otherwise addressed the student's interfering behaviors (see C.F. v. New York City Dep't of Educ., 746 F.3d 68, 80 [2d Cir. 2014]; F.L. v. New York City Dep't of Educ., 553 Fed. App'x 2, 6-7 [2d Cir. Jan. 8, 2014]; M.W. v. New York City Dep't of Educ., 725 F.3d 131, 139-41 [2d Cir. 2013]; R.E., 694 F.3d at 190).

As discussed below, the hearing record supports the IHO's finding that the lack of a BIP for the student at the start of the 2015-16 school year was a procedural violation that rose to the level of a denial of FAPE (see IHO Decision at pp. 29-30).

A November 2013 FBA report indicated that early in the 2013-14 school year when the student entered high school, staff implemented a behavior support plan that targeted non-compliance with staff directions including behaviors such as stating "no" multiple times, repeating statements or arguing with adults, crying/whining, raising his voice, yelling, and/or infringing upon social boundaries by attempting to engage staff physically (Dist. Ex. 1 at p. 1; see Dist. Ex. 2 at p. 2). At that time, the student's behaviors were reported to impede learning because he did not complete work assignments, disrupted classroom instruction, and often required additional staff to intervene; which negatively affected the overall learning environment (id.). Behavioral supports employed at the time included differential reinforcement of appropriate behavior, planned ignoring of initial "no" responses, visual reminder cards to establish clear expectations for the class period, social stories, and modeling of appropriate social interactions (id.).

Testimony by the district behavior consultant indicated that during the 2013-14 school year he worked with the independent consultant who completed the November 2013 FBA to develop a BIP for the student (Tr. pp. 333-35). The district behavior consultant indicated that overall from the beginning of the 2013-14 school year towards the end of that school year, the student made significant progress behaviorally (Tr. pp. 334-36). The student was more accepting of teacher guidance and began viewing teachers as a source of reinforcement, interacting with them in a more appropriate manner (Tr. p. 335).

For the 2014-15 school year, the district behavior consultant testified that he provided counseling and social skills training to the student one and a half to two times per week in individual, impromptu, and incidental settings, noting that he and the student had a good working relationship (Tr. pp. 336-38). He indicated the student also participated in group social skills meetings with his "buddies" during the 2014-15 school year (Tr. p. 337). The purpose of the group was to increase the group members' skills in trying to expand their network of friends, understanding the behaviors of other people within the building, and successfully navigating the school building (Tr. pp. 337-38). The behavior consultant described the student's behavioral progress as "great," whereby "he just kept climbing," progressing, and making significant gains (Tr. p. 338). Specifically, the behavior consultant indicated the student progressed in the way he interacted with others, the way he accepted feedback from teachers and other staff, his ability to actively listen, and to "feign interest sometimes in a topic that somebody else may be speaking to him about, responding to that topic," all leading the behavior consultant to perceive the student as appearing more comfortable within the school building (Tr. p. 347).

When the June 2015 CSE convened in anticipation of the 2015-16 school year, the district behavior consultant recommended a reduction of counseling to two monthly sessions as opposed

to one session per week because the student was performing "much better" (Tr. p. 348). He indicated the student was not accessing him and he was not needed as often to go into classrooms to assist teachers with anything that might be going on behaviorally or emotionally, as compared to when the student was in 9th or 10th grade (Tr. pp. 348-49). In his view, the student did not demonstrate the need for a higher level of support (id). The student was able to transition to classes, and show a level of increased skill in his ability to interact with others, specifically teachers and staff (id.).

The district behavior consultant testified that he did not think the student needed the support of a 1:1 aide because he had shown significant progress in his ability to navigate the school building in a safe manner and he wanted the student to become as independent as possible, without an aide following him around, especially as the student was safe in school without his 1:1 aide (Tr. pp. 349, 351). Ultimately, the June 2015 CSE decided to maintain the 1:1 aide for transitions during the first six weeks of the 2015-16 school year with a review thereafter to determine whether or not the aide was necessary (Tr. pp. 350-51; Dist. Ex. 11 at pp. 1, 8; 13 at p. 1). The June 2015 IEP indicated that the student needed a BIP and further indicated that the student's 2014-15 BIP would be revised to address the student's transitions from class to class in a timely manner and that a FBA "is recommended to assess [the student's] needs in this area" (Tr. p. 352; Dist. Ex. 11 at p. 5; 13 at p. 1). The prior written notice indicated that the CSE discussed the need for a BIP to address the student's lateness to class, but determined that the student was not exhibiting any interfering behaviors that impacted his ability to access instruction and further indicated a FBA was recommended to determine if a BIP was necessary for the 2015-16 school year (Dist. Ex. 13 at pp. 1-2).

A June 24, 2015 e-mail from the district behavior consultant to the parent and others included an attached draft self-monitoring plan that the district behavior consultant intended the student use to start off the 2015-16 school year, pending the completion of the recommended FBA (Tr. pp. 355-56; Dist. Ex. 18). The self-monitoring plan indicated that the student's behaviors to be addressed involved executive functions, such as organizing belongings, time management, and planning ahead in order to arrive to the next class on time (Dist. Ex. 18 at p. 2). The plan hypothesized that the function of the student's behaviors served to avoid non-preferred activities, for example, packing up or transitioning (id.). Replacement behaviors, reinforcement procedures, and responsibilities were delineated, as was a narrative of procedures for the student, parents, and teachers (id. at pp. 2-4). The plan indicated that the intent of those procedures was to address the student's need to develop his ability to self-monitor, organize materials, and demonstrate time management skills, in a more natural way with less reliance on cues from others (id. at p. 5). The district behavior consultant indicated that he did not receive a response from the parent by the end of the 2014-15 school year, and therefore, he did not meet or consult with the parent prior to the start of the 2015-16 school year (Tr. pp. 357, 444-47; see Tr. p. 437).

On the first day of school for the 2015-16 school year, the district behavior consultant, a school psychologist who was new to the district, and the student's speech-language pathologist met with the student to review the proposed self-monitoring plan (Tr. p. 359). The student indicated he would not follow through with the self-monitoring plan because the parent had not reviewed it yet (Tr. pp. 359-60). At that point, the district behavior consultant stated that district staff would not implement the plan until the parent reviewed it, provided input, and the student was comfortable with it (Tr. p. 360).

On September 24, 2015, the CSE convened for a program review (Dist. Ex. 21). The September 2015 IEP indicated that the student needed a BIP and further indicated that the student's 2014-15 BIP would be revised to address the student's transitions from class to class and that a FBA was "in progress to assess [the student's] needs in this area" (id. at p. 6). The CSE determined that the student would continue to receive 1:1 aide services during transitions between classes through January 29, 2016 (id. at p. 9).

Consistent with the IEP notation that an FBA for the student was in progress, the hearing record contains an October 29, 2015 FBA report conducted by the district behavior consultant, and the new school psychologist (Tr. p. 85; Dist. Ex. 24). The FBA report indicated that the student had a history of using a BIP (Dist. Ex. 24 at p. 1). The report further indicated that a record review showed the student demonstrated increasingly less reliance on the BIP, and previously interfering behaviors had been addressed successfully (id.). At the time of the FBA, the parents reported their continuing concerns regarding the student's executive functioning skills, and reemergence of previous behaviors (picking at skin and scalp) (id.). The student's teachers reported that in general, the student was a motivated and compliant student, demonstrating the ability to remain on task and contribute positively to classroom discussions (id.). Teacher reports indicated that the student continued to need support with organizational skills and note-taking (id.). The FBA report indicated that the tests and methods used to conduct the assessment included the Behavior Rating Inventory of Executive Functioning (BRIEF), classroom observations completed between September 21, 2015 and October 13, 2015, teacher feedback reports, a progress report for the first quarter of the 2015-16 school year, a parent interview, a student interview, a provider interview, and a review of records (id.). The FBA report indicated that the evaluators discussed, in general terms, results of observations and rating scales with the parents' private educational consultant (id. at p. 6). The FBA report noted that the parent's private educational consultant agreed with the assessment of executive functioning difficulties as a primary area of concern, and suggested a continuation of a plan to support the student in these areas (id. at pp. 6-7). The FBA report further indicated, "It was discussed that this plan could be scaled back from previous, more intensive versions, in order to increase self-efficacy and decrease reliance on external supports" (id. at p. 7). The FBA report included recommendations that the student would benefit from the use of a plan (BIP) to address his executive functioning deficits, and would benefit from assistance in effectively managing his schedule and planning for long-term assignments, as well as self-monitoring and shifting his attention (id.). Additional recommendations were for the inclusion of monitoring and intervention with reported skin/hair picking as a part of the student's plan and that the plan also include criteria for success, and identify areas where support could be scaled back as the student developed his skills (id.). Although the student would be expected to be an active participant in his BIP, ongoing monitoring would be provided by school personnel (id.).

Consistent with the June 2015 draft behavior plan, and the observations in the October 2015 FBA, the draft October 29, 2015 BIP identified that the time the student took to pack up and move to his next class resulted in his not arriving to class on time (compare Dist. Ex. 23 at p. 1, with Dist. Ex. 18 at p. 2, and Dist. Ex. 24 at pp. 5-6). The October 2015 draft BIP also reflected the student's difficulty with executive functions (i.e., planning/advance planning, organizing, and time management) (Dist. Ex. 23 at p. 1). The draft BIP included environmental changes needed to alter the student's behavior (i.e., use of a personal electronic device such as a cell phone to alert student five minutes before the period ended as a signal to begin packing up his things) (id.). The draft BIP hypothesized that the function of the identified behaviors that the BIP sought to change was the avoidance of non-preferred activities (id.). Further, the draft BIP identified the

replacement behavior of packing belongings up with punctuality to ultimately help the student move towards independence in transitioning during school (id.). The draft BIP described strategies to assist the student with development of organizational skills, such as a self-monitoring checklist of what the student needed to accomplish before leaving a class (id.). The draft BIP also included reinforcement procedures/responsibilities for the student, his teachers, and the parent, as well as a narrative of procedures for the student and his teachers to follow (id. at pp. 2-3). The draft BIP contained a description of the intent of the procedures, reinforcer options, and a description of delivery of a reinforcement schedule (id. at pp. 4-6). A self-monitoring checklist card designed for the student to complete for each class required the student to indicate his performance during class regarding behaviors related to when he left and arrived at his classes, when he began packing up, whether he completed assignments and copied down homework, and whether he engaged in hair/skin picking behaviors (id. at pp. 7-8).[21] The draft BIP indicated the plan would be reviewed every two weeks in the beginning of the school year, and that depending on the trajectory toward independence, review would occur more or less frequently (id. at p. 6).

According to the district director of special education, the CSE scheduled several CSE meetings to review the draft BIP and each meeting was rescheduled by the district at the request of the parents (Tr. pp. 99-100; Dist. Ex. 27). The student's mother notified the CSE, by e-mail on December 21, 2015, that the parents wanted the independent FBA to be completed before holding the next CSE meeting (Dist. Ex. 27). The independent behavior analyst began the independent FBA in December 2015, completed her observations in January 2016, and generated a report on February 2, 2016 (Parent Ex. F at p. 1).

On March 14, 2016, the CSE convened to review the October 2015 FBA and February 2016 FBA and to consider a proposed BIP and supports for the student for the remainder of the 2015-16 school year (Tr. pp. 826-27, 834-35; Dist. Exs. 62; 63 at p. 1-2; Parent Exs. E; F; H).[22] CSE attendees included the school psychologist, the district behavior consultant, the school social worker, the parents, the independent behavior consultant, and the parent's educational advocate (Tr. p. 827; Parent Ex. H at p. 1). The March 2016 CSE reviewed a proposed March 2016 BIP that the district prepared based on the independent February 2016 FBA, as well as parent interview, a learning support team review, a third quarter progress report, a second quarter report card, and the October 2015 FBA conducted by the district (Tr. pp. 834-35; Dist. Exs. 63 at pp. 1-2; 64; Parent Exs. F; H at p. 1). A March 14, 2016 prior written notice indicated that the behavior consultant and the school psychologist discussed classroom observations of the student across a variety of settings (Dist. Ex. 63 at p. 1). The March 2016 BIP and the March 14, 2016 prior written notice indicated that the private educational consultant and the parent engaged in discussion with the school psychologist, the district behavior consultant, and the school social worker (id.; Parent Ex. H at p. 1). According to the prior written notice, the student typically participated constructively in classroom discussions without evidence of disruptive behaviors; generally arrived to classes on time; demonstrated a desire to attempt presented tasks on his own, but typically accepted teacher assistance; and was engaged with the subject matter (Dist. Ex. 63 at p. 1). According to the prior

[21] The self-monitoring checklist included as a part of the October 2015 BIP was the same as the checklist for the June 2015 self-monitoring plan except the October 2015 checklist added a question related to picking behaviors (compare Dist. Ex. 23 at p. 7, with Dist. Ex. 18 at p. 8).

[22] The hearing record refers to the March 2016 document as both a BIP, and a B[ehavioral] S[upport] P[lan] (see e.g. Tr. pp. 834-35; Parent Ex. H at p. 1).

written notice, the independent behavior consultant discussed the student's time management skills, and his habit of picking his hair, nails, and skin (Dist. Ex. 63 at p. 2). Discussion also emphasized the student's note-taking skills in class, his timely arrival to class, his ability to self-monitor, and his organizational skills (id.).

The March 2016 CSE agreed that the target behaviors of changing for physical education class, using a two-backpack system with the intent of eventually using a locker, and taking notes in class would be addressed first (Parent Ex. H at p. 1). The CSE recommended addressing the student's executive functioning skills through implementing the revised March 14, 2016 BIP and through annual goals, and added an annual goal promoting the student's note-taking skills (Dist. Exs. 62 at p. 13; 63). The CSE also recommended, behavior intervention services for one hour per week in the home as an addition to the student's IEP, and discontinued the 1:1 aide for transitions, to facilitate efforts to increase the student's level of independence in the school setting (Dist. Exs. 62 at pp. 8, 9; 63 at p. 1).

In light of the above, although the district consistently took steps to identify and address the student's behavioral needs, the IHO's determination that the district's failure to have a BIP in place for the student at the start of the 2015-16 school year was a procedural violation is supported by the hearing record as both the June 2015 and September 2015 IEPs identified the student as requiring a BIP and the district did not implement a BIP at the start of the 2015-16 school year (Tr. pp. 359-60; Dist. Exs. 11 at p. 5; 21 at p. 6). As set forth above, 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, 550 U.S. at 525-26; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245; A.H., 394 Fed. App'x at 720; E.H., 2008 WL 3930028, at *7; Matrejek, 471 F. Supp. 2d at 419).

Here, the district does not contend that other portions of any of the student's operative IEPs directly addressed the behavioral needs that were the subject of the March 2016 BIP that was ultimately implemented. Nor does the district contend that the March 2016 BIP was inappropriate or unnecessary. The unavoidable conclusion to be drawn here is that the CSE concluded that the student required a BIP to address specific behavior needs in the realm of executive function and hygiene at the start of the 2015-16 school year and failed to implement a BIP addressing those needs until March 2016. That the March 2016 CSE concluded that the needs were still present at that time and had not been addressed or abated such that a BIP was no longer required, compels the conclusion that during the period of the 2015-16 school year prior to March 2016 the student had behavioral needs that went unaddressed, which prevents the conclusion that the student was not deprived of educational benefits during that period of time. I therefore find that the district's arguments that the IHO's determination that the lack of a BIP resulted in a denial of FAPE should be reversed are not sufficiently supported by the evidence.

With respect to the district's assertion that the student's mother and/or the student impeded the creation or implementation of a final BIP, I am unpersuaded that the district can simply deviate from an IEP and avoid its obligation to implement a BIP for the student simply by asserting that the parents or the student did not agree to it. Once a parent has initially provided consent for special education services, services must be provided by the district in conformity with the

student's IEP (20 U.S.C. § 1401[9][D]; 34 CFR 300.17[d]; see 20 U.S.C. § 1414[d]; 34 CFR 300.320). The district could have scheduled a CSE meeting to put an interim BIP in place based on the available information, which was not insignificant. If the student and the parent believed that not implementing a BIP at the beginning of the school year was a better option, that also may be good cause for convening the CSE to reassess whether the interfering behaviors were insufficiently severe such that removal of the BIP from the IEP was the better course pending further evaluation.[23] Although parental participation in the development of the student's IEP is central to the IDEA, if district staff believed that the parent was preventing the district from providing the student with necessary services, repeatedly agreeing to cancel the CSE meetings at the parent's request and deciding not to implement the BIP called for by the governing IEP for the student was not a viable course of action. Had the district developed a timely BIP that the parents disagreed with, the parents have the option to accept it for the time being, initiate due process, or, although highly unlikely, in this case, they technically have the right to withdraw consent for special education services and prevent the implementation of the BIP if they felt sufficiently compelled to press matters in that fashion.[24, 25]

[23] There are instances in which some of the issues described in this case as problem or interfering behaviors are procedurally addressed as areas of need in the IEP with corresponding goals to address the deficits in skill (i.e. executive functioning issues), and the procedures for addressing such deficits are different than the approach in the FBA/BIP procedures. However, the district identified the student as having interfering behaviors on the governing IEP and employed the FBA/BIP procedural approach at all times relevant to this proceeding and its case must be evaluated under those procedures.

[24] The options discussed here that are available once the parent and student essentially vetoed implementation of a component of the plan are clearly not conducive at all to the continuation of cooperative spirit envisioned by the IDEA, but it was incumbent on the district when faced with the non-implementation of the governing IEP to explain to the parent in no uncertain terms that the law does not extend flexibility to school districts to disregard an IEP that is in effect for months at a time. The only reason I mention the drastic option regarding a parent's right to withdraw consent for services is that in some cases a parent may find the pendency and implementation of the proposed IEP service options to be worse than the option of withdrawing consent. The consent withdrawal is a nuclear option, figuratively speaking, with serious drawbacks such as cutting off the right to pursue certain types of FAPE claims and preventing other services from being delivered.

[25] I note that the IDEA allows parents to withdraw or revoke consent for special education services, and essentially opt out of the IDEA's provisions for disabled students, however it does not contain provisions for withdrawing consent for any particular service, while accepting the balance of a given special education program (see 8 NYCRR 200.5[b][5]). Going forward, the parent should note that, while federal and State regulations governing parental participation require that school districts take steps to ensure that parents are present at their child's IEP meetings or are afforded the opportunity to participate (34 CFR 300.322; 8 NYCRR 200.5[d]) and the parent remains free not to provide consent for the provision of services or to revoke consent once given (34 CFR 300.9[c]; 300.300[b]), she may not control or direct the specific manner in which the district implements services recommended by the CSE once she has provided consent for the provision of services (White v. Ascension Parish Sch. Bd., 343 F.3d 373, 380 [5th Cir. 2003] [holding that "[t]he right to provide meaningful input is simply not the right to dictate an outcome and obviously cannot be measured by such"]; Lachman v. Illinois State Bd. of Educ., 852 F.2d 290, 297 [7th Cir. 1988] ["parents, no matter how well-motivated, do not have a right under the [predecessor statute to the IDEA] to compel a school district to provide a specific program or employ a specific methodology in providing for the education of their handicapped child"]; see T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 420 [2d Cir. 2009]; Ganje v. Depew Union Free Sch. Dist., 2012 WL 5473491, at *11 [W.D.N.Y. Sept. 26, 2012], adopted at 2012 WL 5473485 [Nov. 9, 2012]; L.K. v. Dep't of Educ. of New York, 2011 WL 127063, at *11 [E.D.N.Y. Jan. 13, 2011]).

4. Relief for the 2015-16 School year

Having determined that the district failed to offer the student a FAPE during the 2015-16 school year, I next turn to the relief requested by the parent: reimbursement of the costs of the student's attendance at the Fusion geometry course during the 2015-16 school year. The district objects to the IHO's decision finding the Fusion geometry class appropriate on multiple grounds. The district contends that the student's math teacher at Fusion was not qualified to address the student's special education needs, that placement at Fusion—in a 1:1 setting—was not in the student's LRE, that the student did not make sufficient progress in geometry to take and pass the geometry Regents exam, and that even if Fusion was appropriate for the first semester of the 2015-16 school year, there is insufficient evidence that the student attended Fusion during the second semester or how it may have met his needs to award relief for that semester.

In order for a parent to prevail in a unilateral placement case, a private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak, 142 F.3d at 129; 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 have its own IEP for the student (Carter, 510 U.S. at 13-14). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ., 231 F.3d 96, 104 [2d Cir. 2000]).

"Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement'" (Gagliardo, 489 F.3d at 112, quoting Frank G. v. Bd. of Educ., 459 F.3d 356, 364 [2d Cir. 2006]; see Rowley, 458 U.S. at 207). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). When determining whether a unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether the placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see Gagliardo, 489 F.3d at 115; Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] [stating "[e]vidence 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; 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 the special education services needed by the student]; Frank G., 459 F.3d at 365; see 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]).

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).

Initially, the district asserts that the student's teacher at Fusion was "unqualified and untrained to address [the student's] special education needs," in that he was not a certified special education teacher and was unaware of the nature of the student's disability as well as the specific special education needs related to his math deficiency. Despite these assertions, the evidence in the hearing record supports the IHO's conclusion that the services provided to the student at Fusion were appropriate.

The student's geometry teacher at Fusion has a Masters degree in math education, holds secondary math education certification in New York State, and had worked for five years in a public high school in another state, teaching primarily algebra and geometry (Tr. pp. 528-29, 542). The math teacher testified that he provided two to three 60-minute sessions per week of 1:1 instruction in geometry to the student (Tr. pp. 529-30). Fusion's curriculum follows the common core curriculum and the math teacher provided instruction to the student "so that he can take and pass the geometry [R]egents" (Tr. pp. 534-35). The student was assessed via "traditional style tests" and verbal assessments when the math teacher noticed the student struggling (Tr. p. 535).

Contrary to the district's assertion that the math teacher was unaware of the student's math needs, the math teacher testified that he was aware of the student's math disability prior to beginning work with him, he spoke to the student's Fusion algebra teacher about the student's abilities, and that he received the student's IEP within the first few weeks of working together (Tr. pp. 543-44, 573). According to the math teacher, the student struggled with number sense, exhibited computation difficulties, and demonstrated difficulty with visual representations and "relating algebraic equations to geometric figures," deficits consistent with the results of the March 2016 neuropsychological evaluation (compare Tr. pp. 530-31, with Parent Ex. I at pp. 5, 9-10, 12, 14). The math teacher also testified that one of the biggest challenges in working with the student was keeping him focused on the material, consistent with the September 2015 IEP that indicated the student needed to "learn to stay on task, with reduced assistance, in order to complete school work" and that the student "requires prompting to stay on task" (compare Tr. pp. 532-33, 540-41, with Dist. Ex. 21 at pp. 1, 4-5, 8). Ongoing needs of the student the math teacher identified included spending more time working on the material to gain better comprehension of geometric figures in relation to algebra, and to better express himself when developing geometric proofs (Tr. pp. 536-37). Given these facts, the hearing record supports the IHO's decision that the student needs the math teacher identified were consistent with the needs identified in the IEP and other evaluative information (IHO Decision at p. 35).

In addition, the district contends that the parent's placement of the student at Fusion for geometry was not appropriate because it was not in the student's LRE. The IHO rejected the district's argument because the student was only removed from the public school for "a few sessions per week" (IHO Decision at p. 36) and the district counters on appeal that the IHO did not give sufficient weight to its LRE argument.

Generally, although the restrictiveness of the parents' unilateral placement is a factor that may be considered in determining whether the parents are entitled to an award of tuition reimbursement (Rafferty v. Cranston Public Sch. Comm., 315 F.3d 21, 26-27 [1st Cir. 2002]; M.S., 231 F.3d at 105), parents are not held as strictly to the standard of placement in the LRE as are school districts (see Carter, 510 U.S. at 14-15; C.L., 744 F.3d at 837 [indicating that "while the restrictiveness of a private placement is a factor, by no means is it dispositive"]; D.D-S. v. Southold Union Free Sch. Dist., 506 Fed. App'x 80, 82 [2d Cir. Dec. 26, 2012]).

The district's LRE argument lacks merit. In this instance, the parent's unilateral placement directly targeted the district's denial of a FAPE by providing the student with direct math instruction and otherwise allowing the student to remain in the public school he would otherwise attend with his non-disabled peers for the remainder of his classes. Even though Fusion did not provide the student with access to nondisabled peers during math instruction, instead providing instruction in a 1:1 setting, in view of the totality of the circumstances such as the student's continued access to his regular education peers in his other classes, LRE considerations alone are an insufficient basis to reverse the IHO's finding that the parents' unilateral placement of the student in a Fusion geometry class for the 2015-16 school year was appropriate (see C.L., 744 F.3d at 837; Gagliardo, 489 F.3d at 112; see Frank G., 459 F.3d at 364-65; Berger, 348 F.3d at 523).

To the extent that the district argues that the student did not sufficiently progress at Fusion to take and pass the geometry Regents exam, a finding of progress is not required for a determination that a student's unilateral placement is adequate (Scarsdale Union Free Sch. Dist. v. R.C., 2013 WL 563377, at *9-*10 [S.D.N.Y. Feb. 4, 2013] [noting that evidence of academic progress is not dispositive in determining whether a unilateral placement is appropriate]; see M.B. v. Minisink Valley Cent. Sch. Dist., 523 Fed. App'x 76, 78 [2d Cir. Mar. 29, 2013]; D.D-S., 506 Fed. App'x at 81; L.K. v Northeast Sch. Dist., 932 F. Supp. 2d 467,486-87 [S.D.N.Y. 2013]; C.L. v. Scarsdale Union Free Sch. Dist., 913 F. Supp. 2d 26, 34, 39 [S.D.N.Y. 2012]; see also Frank G., 459 F.3d at 364 [holding that although a student's "[g]rades, test scores, and regular advancement [at a unilateral placement] may constitute evidence that a child is receiving educational benefit, . . . 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"]). However, although not dispositive, a finding of progress is, nevertheless, a relevant factor to be considered (Gagliardo, 489 F.3d at 115, citing Berger, 348 F.3d at 522 and Rafferty, 315 F.3d at 26-27; Lexington County Sch. Dist. One v. Frazier, 2011 WL 4435690, at *11 [D.S.C. Sept. 22, 2011] [holding that "evidence of actual progress is also a relevant factor to a determination of whether a parental placement was reasonably calculated to confer some educational benefit"]).

The district alleges that Fusion is not an appropriate placement because the student did not complete all the required sessions in time to take either the June 2016 or August 2016 Regents exam, causing the student to be "delayed in taking the necessary exams for him to be able to graduate from high school." However, the math teacher testified that he began providing

instruction to the student on December 8, 2015, well after the start of the 2015-16 school year (Tr. p. 530). Additionally, the student only received instruction two to three times per week, with a break in service requiring two sessions to review material covered prior to the break (Tr. pp. 537-40, 546-47). To help the student with his focusing difficulty, the math teacher testified that he gives the student a few minutes to talk about a topic "so that he can get it off his mind" before moving back to the math at hand (Tr. p. 533). The math teacher also used redirection and breaks where he allowed the student to "go off task" to improve the student's ability to retain the information (id.). The math teacher testified that although the curriculum is designed to be delivered in 30 sessions per semester, not all students finish the course in that time, as was the case with this student (Tr. pp. 536. 568).

In essence, the district's argument regarding the timeframe for completing the course and its view of the appropriate timeframe for taking the Regents exam are outcome-based measures that the district is attempting to use to assess the appropriateness of the unilateral placement under the Burlington/Carter analysis (i.e. the placement was not appropriate because it failed to meet objectives). The argument fails because it is little more than a variation on the progress argument above and even school districts are not to a substantive standard under Rowley that is outcome-based.[26] Regardless of the preferred timeframe the district has set forth for the student to have completed the geometry course, the hearing record shows that given the later start to the course during the school year, the frequency of sessions during the week, and the student's attention needs that required breaks during sessions, the student made progress at Fusion and eventually passed the first semester of geometry on May 24, 2016 receiving a grade of "B" (Tr. pp. 534, 536; Parent Exs. S; BBB). The evidence does not detract from the conclusion that Fusion is appropriate.

The Fusion geometry class involved two semesters with each expected to take 30 sessions (Tr. pp. 545, 605, 1079). The first semester took the student 46 sessions to complete (Tr. p. 536) and there is no evidence as to how many sessions the student took to complete the second semester. The IHO awarded the parent reimbursement for the cost of 46 sessions for the student's first semester and also awarded reimbursement for the cost of the expected 30 sessions for the second semester (IHO Decision at p. 36). Having determined that the geometry class offered by Fusion was appropriate to meet the student's needs, it would not be prudent to cut off reimbursement for the class in the middle of the school year (see Greenwich Bd. of Educ. v. G.M., 2016 WL 3512120, at *20 [D. Conn. June 22, 2016] [reimbursement for entire school year was appropriate where IHO's order directing reimbursement was issued in the middle of the school year]. Accordingly, the IHO's award is affirmed.

[26] While evidence of progress at a unilateral placement is a relevant factor to be considered (Gagliardo, 489 F.3d at 115), a lack of progress does not bear the same relevance because the IDEA does not guarantee that a student will achieve a specific level of benefit under the Act. In other words, just as a IEP is viewed prospectively and courts will not engage in Monday-morning quarterbacking on a parent's behalf guided by knowledge of a student's subsequent progress at a unilateral placement when evaluating an IEP, the district cannot reasonably expect a finder of fact to engage in Monday morning quarterbacking on the district's behalf and find that a unilateral placement was inappropriate because, months after the student was placed the student hadn't progressed to the point being ready to successfully pass the Regents exam.

B. 2016-17 School Year—Transition Services

1. Recommended Services

In their cross-appeal, the parents assert that the IHO improperly found that the district offered the student appropriate transition services and erred in denying tuition reimbursement for the NYIT-VIP program the student attended during summer 2016. A review of the hearing record shows that the student demonstrated significant life skill and travel training needs, and that his 2016-17 IEP, including his post-secondary and transition plan, was inadequate to address those needs.

Initially, although both parties to some extent couch their arguments on this topic in the context of the student's eligibility for 12-month services to prevent substantial regression, the appropriate standard of whether the parent may be reimbursed for services provided over the summer is whether the district failed to adequately address the student's needs in the areas of travel training and community/independent living skills instruction within the recommended program for the 2016-17 school year to the extent it resulted in a denial of FAPE, and, if so, whether the services provided by the parent are appropriate and, if so, whether the relief requested is supportable in light of equitable considerations.

According to the student's mother, she and the student had requested transition services from the district to improve his ability to be "independent as an adult" since the end of the student's eighth grade school year (Tr. pp. 1682-83).[27] The need for the student to increase his skills in the realm of grooming, health and safety, job readiness and travel training were identified during 9th grade in an independent evaluation provided to the district as early as November 2013 (see Dist. Ex. 1 at pp. 3, 6). In 10th grade, the parent requested the district provide the student with a running guide during his cross-country team training in November 2014, as the student "was getting lost" (Tr. pp. 1304, 1461). The parent testified that she had requested travel training as early as the student's transition from 8th to 9th grade (2013-14 school year) to no avail (Tr. pp. 896-97, 1034-35, 1698-99; Parent Ex. GG at p. 3).[28] According to the parent, the district was aware of the student's difficulty walking to school safely, and independently negotiating the network of driveways and parking areas in front of the school (Tr. pp. 1683-86, 1695-99).

The provision of special education includes travel training, which is defined as "providing instruction, as appropriate, to children with significant cognitive disabilities, and any other children with disabilities who require this instruction, to enable them to—(i) [d]evelop an awareness of the environment in which they live; and (ii) [l]earn the skills necessary to move effectively and safely

[27] The parent testified that her understanding of transition services was "any service that . . . acknowledges the student's deficit in a skill area that will allow for post high school transition," including the student's ability to work and/or function in the community (Tr. p. 1789).

[28] The district's interim superintendent authorized a job coach to work with the student during a summer 2015 district counselor-in-training program, after the parent attended a Board of Education meeting and made a request (Tr. pp. 895-97, 1050). According to the parent, the district denied her request for a travel trainer to "teach [the student] how to get to and from" the counselor-in-training program (Tr. pp. 896-97).

from place to place within that environment (e.g., in school, in the home, at work, and in the community)" (34 CFR 300.39[a][2][ii], [b][4]; 8 NYCRR 200.1[ggg]).

In an e-mail to the parent on October 6, 2015, the director of special education provided the federal regulation regarding travel training services, and informed the parent that the student "would not qualify under this regulation," although the district would assign an aide to the student should he become involved with a specific club that traveled to a large city (Dist. Ex. 56 at p. 1; see Parent Ex. GG at p. 3).[29] The parent responded in an e-mail dated October 27, 2015, stating her disagreement that the student be provided with an aide to participate in this club, rather, the parent believed that as the student was preparing to enter college he required instruction in how to navigate New York City, and "training in order to lead a semi independent life after high school" (Parent Ex. GG at p. 3).[30] The parent also disagreed with the director of special education's determination that the student did not qualify for travel training, and indicated that "the very reason [the student] requires this service is because he meets the criteria [the director of special education] provided" (id.). The parent requested the addition of travel training to the student's IEP (id.).

On March 14, 2016, the CSE convened and added one 60-minute session per week of home-based "behavior intervention services" to the student's IEP (compare Dist. Ex. 21 at p. 8, with Dist. Ex. 62 at p. 8).

In a March 22, 2016 neuropsychological evaluation report, the evaluator reported the results of the parent's completion of assessment tools that measured—among other things—the student's ability to adapt readily to changes in the environment, activities of daily living skills, and adaptive behavior abilities (Parent Ex. I at pp. 15-18). Results yielded "clinically significant" or "Low" designations on these measures (id.).

An April 8, 2016 report from the home-based parent counseling and training provider indicated that she worked with the student for one hour per month to "increase independence" (Dist. Ex. 65; see Dist. Ex. 21 at p. 8). According to the report, the student exhibited difficulty with executive functioning skills both at school and at home, and weak time management skills, skills which the service provider stressed were "very important for [the student] to be independent in life both now and once he graduates high school" (Dist. Ex. 65). Her report described the student's extremely weak organizational skills, and his initial responses to suggested interventions

[29] According to the student's mother, the club requires students to take a train and subway to a destination in the city, travel in the city "on their own," and meet at a designated time and location to return home (Tr. p. 1066; Parent Ex. GG at p. 3).

[30] The director of special education testified that at the September 2015 CSE meeting, the CSE discussed the district providing an aide to the student so he could participate in the travel club (Tr. p. 1443). She further testified that the aide would have been trained by the transition coordinator and the school behavior consultant so the aide would be aware of "what to do as far as teaching [the student] to problem-solve in the city," although she also indicated that the aide would "not be providing instruction. [The aide] would be making sure [the student is] safe and navigating" (Tr. pp. 1443, 1473). Although to the director of special education testified that there was "no difference" between the travel trainer the parent requested and the aide for the travel club the district proposed, the district informed the parent in October 2015 that the student did not qualify for travel training per se (Tr. pp. 1443-44; Dist. Ex. 56 at p. 1). The parent's understanding of the aide the district offered for the travel club was that this person would not provide travel training instruction to the student, but rather would be available to the student for "health and safety" purposes (Tr. p. 1068).

such as refusal, frustration, anxiety, hair and finger picking, and occasional demonstration of "non-contextual immature jargon" (id.).

According to the May 17, 2016 IEP, the CSE had available information about the student including the March 2016 neuropsychological evaluation report and the April 2016 parent counseling and training progress report (Dist. Ex. 69 at p. 2). The May 17, 2016 prior written notice indicated that during the May 2016 CSE meeting, the district's transition coordinator explained how transition services have been incorporated into the student's IEP since 9th grade, and updated the student's measurable post-secondary goals and coordinated set of transition activities in the IEP (Dist. Ex. 70 at pp. 2-3; see Dist. Ex. 69 at pp. 7, 12-13). The May 2016 prior written notice further indicated that during the CSE meeting the parent expressed concerns about the student's adaptive daily living skills within the home and his need for travel training (Dist. Ex. 70 at p. 2). The CSE encouraged the parent to access the support of the district's transition coordinator and agreed to provide a job coach at the district's 6-week summer recreation CIT program (Dist. Ex. 70 at p. 2).[31] The student's mother declined the job coach for summer 2016 as being insufficient to address the student's independent living skill needs, and instead indicated her intent for the student to attend a summer program at NYIT-VIP at district expense (Tr. p. 1684; Dist. Ex. 70 at pp. 2-3). The district denied the parent's request at that time as the CSE determined the student was not eligible for ESY (12-month) services, and because NYIT-VIP was not an approved nonpublic school special education program (Dist. Ex. 70 at p. 2).

Statements in the May 2016 IEP present levels of performance related to the student's transition planning included that his participation in "AP" classes would help him meet his postsecondary goal of "attending a four year college since he understands the rigor it takes to succeed at a high level of expectation," and that he wanted to learn more about a career relating to political science (Dist. Ex. 69 at p. 4-5). The IEP also reflected the student's participation in the district's CIT program for two weeks over the prior summer with the support of a job coach and reported the student found it to be enjoyable and wanted to participate for the next summer (id. at p. 5). Regarding the student's communication skills, the IEP indicated that the student benefitted from explicit instruction in social language skills and that he needed to improve his carryover of skills to have successful and positive social interactions in natural social contexts (id.).

The student's IEP post-secondary goals were to attend a four-year college, earn a degree in history or political science, pursue competitive employment in either of those fields, and live independently (Dist. Ex. 69 at p. 7). The CSE identified the student's transition needs as relating to improving writing skills, answering higher level inferential questions, improving note-taking skills, identifying colleges with programs in his area of interest that provide the support needed for him to be successful, planning the college application process, and developing his ability to independently use technology resources (id.). The IEP contained three annual goals relating to improving the student's ability to take notes from a variety of sources, being prepared for (having all the required materials) and arriving to class on time, and planning appropriately for upcoming

[31] The director of special education testified that the parents indicated that the student "could not get to and from the [counselor-in-training] program on his own," but that she offered to provide travel training if that need was an "obstacle in his ability to attend" the program (Tr. pp. 1463-65). The parent denied that the CSE offered a travel trainer for the counselor-in-training program (Tr. pp. 1686-87). An offer of travel training services does not appear on the May 2016 prior written notice, so it cannot be said that contemporaneous documentation supports the district's version of events over the parent's (Dist. Ex. 70).

assignments and long-term projects (id. at pp. 7-8). One annual goal was designed to improve the student's ability to "self-reflect" on his own social behavior in an "actual social scenario" (id. at p. 8).

The coordinated set of transition activities included in the May 2016 IEP indicated that the student would complete coursework necessary to attain a Regents high school diploma, continue to advocate for himself and participate in the classroom, and improve note-taking, organization, and technology skills (Dist. Ex. 69 at p. 12). The IEP further reflected that the student would receive counseling to demonstrate coping and executive functioning skills, speech-language services to improve social communication skills, and assistive technology services to assist with using his laptop and organization (id.). Community experiences included participation in autism awareness activities and investigation of extracurricular activities of interest to the student (id.). Regarding employment and adult living objectives, the IEP indicated the student would update his career plan, participate in career exploration activities, identify how applying to ACCES-VR could assist him, and participate in the college application process (id.).[32]

In conjunction with the special education supports and services closer aligned to address the student's academic needs and post-secondary goal of attending college, the May 2016 IEP also provided one hour monthly of home-based parent counseling and training, and 90 minutes per week of behavior intervention services (Dist. Ex. 69 at pp. 8-11). According to the director of special education, the parent training and counseling was to help support the family in "getting [the student] to do certain things," such as cutting his nails, and addressing daily living and executive functioning skills (Tr. pp. 1857-58). She further testified that the home-based behavior intervention services were provided directly to the student to address "daily living skills, build independent skills, organizational skills, [and] executive functioning skills," which the parents had identified as a need at home (Tr. p. 1448; see Tr. pp. 1824-25). The hearing record shows that the May 2016 CSE increased the behavior intervention services from 60 minutes per week per the March 2016 IEP, to 90 minutes per week per the May 2016 IEP, due to discussions at the CSE meeting that the home-based provider did not have enough time to work with the student (Tr. pp. 1858-59; compare Dist. Ex. 62 at p. 8, with Dist. Ex. 69 at p. 8).

The director of special education testified that for students going to college, the district's direct transition services "would more gear them towards college as far as providing support within their courses," which was true for this student, who was provided with direct consultant teacher services in the AP courses he took, speech-language therapy to address social language and social skill needs, as well as assistive technology services to improve his use of technology resources (Tr. pp. 1855-57; Dist. Ex. 69 at pp. 8-9).

The district's efforts with regard to the transition services described above are undoubtedly tailored to the student and commendable. However, as discussed below, the failure to assess the

[32] ACCES-VR is a state agency that provides transition, vocational rehabilitation, independent living, and business services to people ages 16 years or older with disabilities (Tr. p. 1267; Dist. Ex. 60; see http://www.acces.nysed.gov/vr). District information about ACESS-VR indicated that plans provided by the agency are "flexible and tailored to the needs and career path of each individual student," and support students in preparation for and "going to college" (Tr. p. 1364, 1375; Dist. Ex. 60). The district received the completed ACCES-VR application for the student in June 2016 (Tr. pp. 1269-70, 1334; Dist. Ex. 51). Other than driving lessons, the hearing record does not indicate the student received other services via ACCES-VR (Tr. p. 1836).

student for, and provide the student with, travel training and instruction in the skills necessary to be independent in the community—under the unique circumstances of this case—resulted in a failure to address the student's deficits in areas fundamental to the student's success in moving from school to post-school activities. The facts of this case regarding this student's particular combination of needs (i.e. high cognitive functioning college-bound student with deficits in daily living skills involving safety) is somewhat unusual when compared to more typical litigated cases that involving post-secondary transition planning issues.[33]

At the hearing, the parent discussed the student's lack of safety awareness when walking near streets, and traveling to familiar locations (Tr. pp. 1741-44). The parent testified that at the May 2016 CSE meeting she expressed her concern that the student could not do things independently, including not having the skills to walk to and from a job site, getting to school on his own, or being in the community by himself (Tr. pp. 1680, 1682-83, 1725-26).

The hearing record shows that the district did not appear to have conducted any assessments of the student' travel training needs, nor did it—in light of the neuropsychology evaluation report results regarding the student's low adaptive behavior skills scores—conduct additional assessments of the student's functional skill needs prior to the May 2016 CSE meeting (Tr. p. 1470-72). Although the director of special education testified that the adaptive rating scales were completed by a district staff member, she did not know the results of those measures, nor does the hearing record indicate that a CSE convened to review the results and consider modifications to the student's IEP (Tr. pp. 1466-67).[34] The district's transition coordinator testified that she was not aware whether or not the student had any skills to travel (Tr. pp. 1264, 1350). She was also unaware of the student's vocational skills, as vocational testing was not something the district typically conducted with "Regents bound" students (Tr. pp. 1352-53, 1359). According to the transition coordinator, the district did not conduct a Level III vocational assessment of the student, which would have measured his skills in a job setting, as it was determined not to be "necessary or appropriate for his goals of attending college" (Tr. pp. 1369-70). She testified that the district conducted evaluations of the student that were more focused on college and career because that was the student's plan (Tr. p. 1353). However, the transition coordinator stated that she did not know what level the student's independent living skills were at, considering his goal to attend a four-year college and live independently (Tr. p. 1361). The parent testified that the Level II vocational assessment and career clusters interest survey conducted in June 2015 did not assess functional skills such as the student's ability to follow directions, sustain attention while completing a chore, or his ability to perform tasks, and that she was seeking a more "interactive" test of the student's skills (Tr. pp. 1047-49; see Dist. Exs. 15; 16). Although the postsecondary goal of attaining a Regents diploma is something that appears to be within the student's reach from an academic perspective (see Tr. p. 1852-53; Dist. Exs. 26; 32; Parent Ex. M), whether the student attends college or seeks post-school employment, the student will need to be able to safely navigate the community. Because the student had exhibited deficits in independent living skills and specifically in safety awareness for traveling, which went unaddressed in prior school years, the

[33] At this time, I am aware of only one due process proceeding in California with similar facts in which a student who had college-bound career objectives combined with claims of weaknesses in adaptive and daily living skills (see Bellflower Unified Sch. Dist., 69 IDELR 196 (SEA CA 2017).

[34] Additionally, the parent testified that she received the student's OT evaluation report in October 2016 (Tr. p. 1720; see Dist. Ex. 70 at p. 1).

district's recommended program for the 2016-17 school year, even considering the increase in homebased behavior intervention services, was insufficient to address the student's needs. In particular, the district's failure to address travel training when combined with the deficits in the student's academic program, contributed to a denial of a FAPE to the student for the 2016-17 school year.

Lastly on this topic, on August 30, 2016, the student's mother met with the director of special education and the assistant superintendent to discuss her request that the student be provided with travel training (Tr. pp. 1829-30). The student's mother and the director of special education testified that her request for travel training was discussed (Tr. pp. 1829-31, 1865-67). According to the director of special education, the assistant superintendent "was willing" to provide the student with travel training through a local life skills program "at a district level outside of the CSE" (Tr. pp. 1866-67). The student's mother testified that travel training was not offered during that meeting, rather, the assistant superintendent indicated that he would "look into" travel training options (Tr. pp. 1830-31). In mid-October 2016, a representative from an agency that provides travel training programs contacted the parent on behalf of the director of special education (Tr. pp. 1829, 1831). The parent was under the impression that the student did not qualify for travel training and requested clarification about what the district was offering in an e-mail to the director of special education (Tr. pp. 1831-33; Parent Ex. AAA). The hearing record does not indicate that the CSE reconvened to discuss adding the travel training services discussed during the August 30, 2016 meeting to the student's IEP. The offer of travel training outside of the student's IEP and after the parent had unilaterally placed the student in the NYIT-VIP cannot be used to rehabilitate the IEP after the fact and does not alter the outcome (see R.E. v. New York City Dept. of Educ., 694 F.3d 167, 188 [2d Cir. 2012] ["an IEP must be evaluated prospectively as of the time it was created"]).

2. Unilateral Placement

Having found that the district failed to offer the student a FAPE for the 2016-17 school year, I turn to the appropriateness of the parents' unilateral placement of the student at NYIT-VIP's seven-week summer program, also known as the "Introduction to Independence Program" (see Tr. pp. 1506). The district challenges the placement on the grounds that the parents failed to show that the school provided specially designed instruction appropriate to the needs of the student, that the student did not require a residential setting, and that the student was not appropriately grouped with other students with similar needs. The parents counter that the IHO correctly found that NYIT-VIP offered appropriate services. Contrary to the district's position, the evidence in the hearing record supports that NYIT-VIP constituted an appropriate placement in light of the district's denial of a FAPE for the 2016-17 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 offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak, 142 F.3d at 129; 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 have its own IEP for the student (Carter, 510 U.S. 7). 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. v. Bd. of Educ., 459 F.3d at 364 [2d Cir. 2006] see Rowley, 458 U.S. at 207). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). When determining whether a unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether that placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see Gagliardo, 489 F.3d at 115; Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] [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 education instruction specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; 34 CFR 300.39[a][1]; Educ. Law § 4401[1]; 8 NYCRR 200.1[ww]; Rowley, 458 U.S. at 188-89; 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 the special education services needed by the student]; Frank G., 459 F.3d at 365; see 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]).

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 testimony by the executive director of the NYIT-VIP, the program is comprised of four programs including one that provides support for students working towards a college degree (Tr. pp. 1498, 1502-05). The program relevant to the student in the instant case, the "Introduction to Independence Program," is for students 16 years of age and older (Tr. p. 1503). The purpose of the program is to give students a chance to be away from home and to develop their independence in making their own choices and decisions (Tr. p. 1504). The program has operated for approximately 30 years and its curriculum addresses the core areas of banking, executive functioning, travel training, and social communication skills needed for independent living and transition to adulthood (Tr. pp. 1563-64).

The executive director of NYIT-VIP described the Introduction to Independence Program as a seven week long/seven day per week residential program, for which an application process involved submission of an application, along with an IEP and evaluation reports, as well as a personal interview, a family interview, and a letter of reference (Tr. pp. 1503, 1506-07, 1535-37; see Tr. p. 1586). Students admitted to the program live in a residence hall on campus and go to community-based work placements with a job coach four days per week for a half day (Tr. pp. 1503, 1509). The other half days, students attend classes that address executive functioning, travel training, arts and humanities, and banking (Tr. p. 1503). Students have an academic coach connected with the executive functioning class and a bank coach connected to the banking class (Tr. p. 1509). Students also have an independent living coach and a social coach to address what happens on the job, in the classroom, and during regular 1:1 meetings scheduled one time per week at a minimum (Tr. pp. 1509, 1519). Students may also seek out their respective coaches as needed (Tr. p. 1509). In addition to at least one weekly visit in the residence hall by the independent living coach, trained resident advisors that live in the residence hall are on duty in the residence hall after hours, evenings, and weekends (Tr. pp. 1580-81). Residence advisors check students' rooms regularly to ensure compliance with residence hall rules regarding ADL skills (Tr. pp. 1507, 1519-22). They plan activities and are there for guidance, supervision, and safety of students during the evenings and on weekends (Tr. pp. 1580-81). After hours, students can knock on the residence advisor's door for assistance (Tr. p. 1581). Travel training is linked to a trip that occurs each Friday, whereby each trip usually involves traveling into New York City, using buses, trains, and subways to get to a destination within the city, engage in some activity or entertainment, and return to campus (Tr. p. 1503-04). Students plan trips in advance in class, and map out routes using public transportation (id.).

The executive director testified that the summer 2016 Introduction to Independence Program was comprised of 32 students, most of whom were going into the work force after high school, some of whom were college bound, and some of whom participated in the alternate assessment (Tr. pp. 1506, 1532-33). Most students enrolled in the Introduction to Independence Program have received a diagnosis of autism, but such a diagnosis is not a requirement for admission (Tr. p. 1532). Specific to the student in the instant case, he worked in small groups and individually with different instructors, including two special education teachers (Tr. pp. 1545-47). The student's program was not based on academic achievement, but rather individualized based on his executive functioning and social skill needs, whereby he met with his various coaches on a scheduled and an as needed basis (Tr. pp. 1509, 1519, 1521-23, 1560-61; see Parent Ex. PP). The program afforded the student combined opportunities to talk about needed practical life skills in class, as well as practicing those skills in real life situations to help him improve in those areas (Tr. p. 1561).

The hearing record reflects the student struggled with organization, attention to detail, preparation for class, inflexibility in class and at job sites, and hygiene and self-care (Tr. pp. 1512-15, 1522-23). When experiencing these difficulties, the student's coaches immediately addressed the concerns and followed up with the student later (Tr. pp. 1514-15). Coaches talked to the student, role-played situations with him, acknowledged/discussed how he was feeling at the time and why that was important to him, and tried to have the student develop alternative ways to respond in a more appropriate manner (Tr. p. 1515). Additional strategies NYIT-VIP staff used with the student included checklists, verbal self-coaching, guidance, and enforcement (i.e., natural consequence of not being permitted to get on van to work because student did not complete personal hygiene responsibilities), and specific direct counseling pertaining to developing

alternative behaviors (Tr. pp. 1515, 1522, 1657-58). Consistent with the student's identified postsecondary goal to attend college, an NYIT-VIP goal indicated, "Student will demonstrate appropriate college classroom behavior" (Parent Ex. UU at p. 5). Multiple objectives within the areas of banking and budgeting, culture and humanities, executive functioning, and social skills addressed the student's need to develop appropriate college behavior skills (Parent Ex. UU at pp. 3, 5-8, 10-11). Despite the student's struggles and no specific mention of mastery of any particular skill, testimony by the executive director of NYIT-VIP, the independent behavior analyst who conducted the February 2016 FBA and visited NYIT-VIP during the 2016 summer program, and the parent, in conjunction with documentary evidence included in the hearing record, demonstrate the student made some progress in all areas (Tr. pp. 1516, 1528, 1638, 1644-47, 1657-58, 1672-73, 1676-77, 1734-36, 1742-43; Parent Exs. UU; VV; WW; XX).

In light of the above, I find the district's argument that NYIT-VIP did not provide specially designed instruction appropriate to the needs of the student, as well as the claim that the student was not appropriately grouped with other students with similar needs, to be unconvincing and I decline to reverse the IHO's finding on the asserted bases.

a. Least Restrictive Environment

The district also claims that the student did not require the residential setting NYIT-VIP provided in order to make educational progress; however, for the reasons set forth below I decline to disturb the IHO's finding on that basis. Generally, although the restrictiveness of the parents' unilateral placement is a factor that may be considered in determining whether the parents are entitled to an award of tuition reimbursement (Rafferty v. Cranston Public Sch. Comm., 315 F.3d 21, 26-27 [1st Cir. 2002]; M.S., 231 F.3d at 105), parents are not held as strictly to the standard of placement in the LRE as are school districts (see Carter, 510 U.S. at 14-15; C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 839 (2d Cir. 2014) [indicating that "while the restrictiveness of a private placement is a factor, by no means is it dispositive"]; D.D-S. v. Southold Union Free Sch. Dist., 506 Fed. App'x 80, 82 [2d Cir. Dec. 26, 2012]).

Although there is little evidence in the hearing record showing that the student required a residential placement in order to receive educational benefit, the hearing record does indicate that the residential component of NYIT-VIP addressed the student's ADL, vocational, social, executive functioning, and travel training needs (see Parent Exs. PP, RR, SS; UU). The program afforded the student combined opportunities to talk about needed practical life skills in class, as well as practicing those skills in real life situations to help him improve in those areas (Tr. p. 1561). As noted, in addition to at least one weekly visit by the independent living coach, resident advisors were in the residence hall after hours, evenings, and weekends to check students' rooms regularly to ensure compliance with residence hall rules with regard to ADL skills (Tr. pp. 1507, 1519-21; Parent Ex. UU at p. 9). Vocationally, the student worked in the community with a job coach and experienced natural consequences of not being permitted to go to work if he neglected his personal hygiene, something that was addressed in the residence hall (Tr. p.1731; Parent Ex. VV).

Testimony by the executive director of the NYIT-VIP indicated that the summer program focused on developing the skills of independence and transition to adulthood (Tr. p. 1560). Documentary evidence reflects residence hall expectations for success of the student, specific to skill areas involving effort, accountability, and respect (Parent Ex. SS at p. 2). In consideration of the expectations, instruction, and support the student received at NYIT-VIP, and his progress made

in all areas, the parents' unilateral summer placement was not overly restrictive for the student and the supervised residence-hall setting provided an appropriate location for the student to develop skills he required. Accordingly, LRE considerations alone provide an insufficient basis to reverse the IHO's finding that the parents' unilateral placement of the student at NYIT-VIP during the 2016-17 school year was appropriate (C.L., 744 F.3d at 837; Gagliardo, 489 F.3d at 112; see Frank G., 459 F.3d at 364-65; Berger, 348 F.3d at 523).

3. Equitable Considerations

Equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; R.E., 694 F.3d at 185, 194; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 68 [2d Cir. 2000]; see Carter, 510 U.S. at 16 [noting that "[c]ourts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable"]). The IDEA also provides that reimbursement may be reduced or denied when parents fail to raise the appropriateness of an IEP in a timely manner, fail to make their child available for evaluation by the district, or upon a finding of unreasonableness with respect to the actions taken by the parents (20 U.S.C. § 1412[a][10][C][iii]; 34 CFR 300.148[d]; E.M. v. New York City Dep't of Educ., 758 F.3d 442, 461 [2d Cir. 2014] [identifying factors relevant to equitable considerations, including whether the withdrawal of the student from public school was justified, whether the parent provided adequate notice, whether the amount of the private school tuition was reasonable, possible scholarships or other financial aid from the private school, and any fraud or collusion on the part of the parent or private school]; C.L., 744 F.3d at 840 [noting that "[i]mportant to the equitable consideration is whether the parents obstructed or were uncooperative in the school district's efforts to meet its obligations under the IDEA"]; see L.K. v. New York City Dep't of Educ., 2017 WL 219103, at *2 [2d Cir. Jan. 19, 2017]).

The IDEA allows that reimbursement may be reduced or denied if parents did not provide notice of the unilateral placement either at the most recent CSE meeting prior to removing the student from public school, or by written notice 10 business days before such removal, "that they were rejecting the placement proposed by the public agency to provide a [FAPE] to their child, including stating their concerns and their intent to enroll their child in a private school at public expense" (20 U.S.C. § 1412[a][10][C][iii][I]; see 34 CFR 300.148[d][1]). This statutory provision "serves the important purpose of giving the school system an opportunity, before the child is removed, to assemble a team, evaluate the child, devise an appropriate plan, and determine whether a [FAPE] can be provided in the public schools" (Greenland Sch. Dist. v. Amy N., 358 F.3d 150, 160 [1st Cir. 2004]). Although a reduction in reimbursement is discretionary, courts have upheld the denial of reimbursement in cases where it was shown that parents failed to comply with this statutory provision (Greenland Sch. Dist., 358 F.3d at 160; Ms. M. v. Portland Sch. Comm., 360 F.3d 267 [1st Cir. 2004]; Berger, 348 F.3d at 523-24; Rafferty, 315 F.3d at 27; see Frank G., 459 F.3d at 376; Voluntown, 226 F.3d at 68).

Here, although the IHO made findings with respect to equitable considerations raised concerning reimbursement for services obtained by the parents during the 2015-16 school year, none of those findings implicate the 2016-17 school year (see IHO Decision at pp. 40-41). Similarly, all of the specific assertions regarding equitable considerations raised in the district's pleadings and memorandum before me with respect to the district's appeal and the parents' cross-

appeal concern only facts pertinent to the 2015-16 school year (see Req. for Rev. ¶¶ 32-36; Answer to Cross-Appeal ¶¶ 1-15; Dist. Mem. of Law at pp. 20-21; Dist. Mem. of Law in Support of Answer at pp. 1-7).

After reviewing the hearing record, the evidence, viewed as a whole, shows that the parents cooperated with the CSE, did not impede or otherwise obstruct the CSE's ability to develop an appropriate special education program for the student, made the student available for evaluations prior to the May 2016 CSE meeting, and did not fail to raise the appropriateness of an IEP in a timely manner or act unreasonably (E.M., 758 F.3d at 461; C.L., 744 F.3d at 840 [holding that the parents' "pursuit of a private placement was not a basis for denying their [request for] tuition reimbursement, even assuming . . . that the parents never intended to keep [the student] in public school"]). The parents raised concerns at the May 2016 CSE meeting with respect to the student's need for travel training and later raised that claim in their due process complaint notice (Tr. pp. 1332, 1725-26; Dist. Ex. 70 at p. 2). The parents also gave timely notice to the district of their intent to unilaterally place the student at NYIT-VIP for summer 2016 at district expense (Dist. Ex. 70 at pp. 2-3).

In light of the above, I find that equitable considerations favor tuition reimbursement for the costs of the student's attendance at NYIT-VIP's Introduction to Independence Program during the 2016-17 school year.

VII. Conclusion

In sum, I concur with the IHO that the district failed to provide the student with a FAPE during the 2015-16 school year by failing to adequately address the student's need for a BIP, the IHO's determination that the math program recommended for the student during the 2015-16 year was inappropriate and the IHO's award of tuition reimbursement for the cost of the student's attendance at the Fusion geometry course during the 2015-16 school year. With respect to the 2016-17 school year, because I find that the district failed to offer the travel training the student required, and the parents' unilateral placement appropriately addressed the student's needs in that area, as well as other needs, and equitable considerations favor reimbursement, I sustain the parents' cross-appeal.

Overall, although the parties have faced challenges in identifying and delivering the special education services needed by the student to meet his postsecondary goals, both parties should be commended for the thoughtful, compassionate, and diligent efforts they have made to ensure that the student received appropriate and effective special education services and supports to address his unique needs. The hearing record presents a student for whom it is especially challenging to design appropriate instruction for due to his complicated and diverse array of significant academic strengths and functional challenges, especially, in light of the appropriately ambitious and challenging objectives the student's educators, his parents, and the student himself have set out (see Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 137 S. Ct. 988, 992 [2017] ["that child's educational program must be appropriately ambitious in light of his circumstances … goals may differ, but every child should have the chance to meet challenging objectives"]). The impression generated by the documentary and testimonial evidence in this hearing record is one of special education programs and services, including the unilateral services that the parents decided to obtain, that were uniquely tailored and frequently effective, and the CSE, the parents, and the district deserve credit for that. I urge the parties to continue working together to address the

student's needs and help him achieve his goals for the remainder of his eligibility for special education services (see Educ. Law §§ 3202[1], 4401[1], 4402[5][b]; 8 NYCRR 100.5[b][7][iii], 100.9[e], 200.1[zz] [in New York State, a student who is otherwise eligible as a student with a disability, may continue to obtain services under the IDEA until he or she receives either a local or Regents high school diploma, or until the conclusion of the 10-month school year in which he or she turns age 21]).

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS SUSTAINED.

IT IS ORDERED that the impartial hearing officer's decision, dated February 21, 2017, is modified, by reversing that part which found the district offered the student a FAPE for the 2016-17 school year; and

IT IS FURTHER ORDERED that the district shall reimburse the parents for the full cost of the student's tuition at NYIT-VIP for summer 2016.

Dated: **Albany, New York**
June 1, 2017

JUSTYN P. BATES
STATE REVIEW OFFICER