



The University of the State of New York

The State Education Department

State Review Officer

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No. 17-104

Application of a STUDENT WITH A DISABILITY, by her parents, for review of a determination of a hearing officer relating to the provision of educational services by the Board of Education of the Chappaqua Central School District

Appearances:

Law Offices of Regina Skyer and Associates, LLP, attorneys for petitioners, by Jesse Cole Cutler, Esq. and Linda A. Goldman, Esq.

Shaw, Perelson, May & Lambert, LLP, attorneys for the respondent, by Michael K. Lambert, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioners (the parents) appeal from the decision of an impartial hearing officer (IHO) which denied their request to be reimbursed for their daughter's tuition costs at the Eagle Hill School (Eagle Hill) for the 2016-17 school year. The appeal must be dismissed.

II. Overview—Administrative Procedures

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

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

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

III. Facts and Procedural History

The student presents with difficulties in reading, written expression, social/emotional, and fine motor skills (Parent Ex. A; Dist. Exs. 41-43; 48-50; 53-54). She exhibits hand tremors, and has received diagnoses of an attention deficit hyperactivity disorder (ADHD), a specific learning disorder with impairment in reading, a nonverbal learning disability, and a generalized anxiety disorder (Dist. Ex. 42 at p. 14).

As a younger child, the student received early intervention services and subsequently occupational therapy (OT) services through the Committee on Preschool Special Education (CPSE) (Tr. pp. 291, 356-57; Dist. Ex. 4). On April 19, 2013, the CPSE convened and recommended declassification; finding that the student no longer met the criteria to be classified

as a preschool student with a disability and no longer required special education services (Dist. Exs. 4 at p. 1; 5 at p. 1). Further, the CPSE indicated that all of the student's early learning skills were developing appropriately (Dist. Exs. 4 at p. 1; 5 at p. 1).

The student attended kindergarten (2013-14) and first grade (2014-15) in an out-of-district nonpublic school (Tr. pp. 94-95; Dist. Exs. at 15 at p. 1; 64 at p. 5). In January 2014, the parents referred the student to the district's CSE (Dist. Ex. 7).¹ The district's director of special education responded to the parents' referral by email and informed the parents that if they were seeking special education services for the student while she attended the nonpublic school outside of the district, the district of location was responsible for conducting the evaluations and CSE meetings (Dist. Ex. 8).² The director of special education provided the parents with the information to contact the district of location (id.).³

In June 2015, the parents registered the student to attend second grade in the district for the 2015-16 school year (Dist. Ex. 13). On the enrollment form, the parents indicated that it was "very hard" for the student to make meaningful connections and friends as she was sensitive and shy, and that she saw a counselor for her anxiety (id. at p. 3). Additionally, the parents noted that the student had a hand tremor which made writing very difficult (id.).

The student attended a district elementary school for second grade and her teacher referred her for Response to Intervention (RtI) services on October 9, 2015 (Tr. pp. 201-03, 430, 432, 436; Dist. Ex. 62). The student was referred due to reading, written language, spelling phonics, motor skills, articulation, behavioral issues, social/emotional, and parental concerns (Dist. Ex. 62). The district's RtI team met on October 13, 2015 (Tr. pp. 203, 511-15; Dist. Ex. 15 at p. 1).⁴ The minutes from that meeting indicated that the student's teacher was concerned that she did not use strategies, was inconsistent, did not self-monitor, and showed anxiety (Dist. Ex. 15 at p. 1). Additionally, the team noted that the student exhibited a hand tremor and was reading below grade level (id.). The student was recommended for RtI services, specifically three sessions per cycle of small group

¹ The parents indicated that the student was being referred to the CSE because her teacher noted problems in "handwriting, grip, [and] shakiness" (Dist. Ex. 7 at p. 1). The parents also indicated that the student had significant anxiety, which affected her socially and academically, and for which she received private therapy services (id. at pp. 1-2).

² The director of special education referred to Education Law § 3602-c (Dist. Ex. 8 at p. 1). Education Law § 3602-c—commonly referred to as the dual-enrollment statute—requires parents who seek to obtain educational services for students with disabilities placed in nonpublic schools to file a request for such services in the district of location where the nonpublic school is located on or before the first day of June preceding the school year for which the request for services is made (Educ. Law § 3602-c[2]). However, the district of residence retains the obligation to offer a FAPE and to evaluate a student upon a parent's referral of the student for an evaluation (see Scarsdale Union Free Sch. Dist. v. R.C., 2013 WL 563377, at *7-*8 [S.D.N.Y. Feb. 4, 2013]).

³ The hearing record reflects that the parents did not pursue a referral to the CSE of the district of location (Tr. pp. 59-60, 1263).

⁴ The hearing record indicated that the October 13, 2015 meeting was an RtI meeting; however, the form used to record the meeting minutes is called CPST: initial meeting minutes (Tr. pp. 100-01, 201-03, 511-15; Dist. Ex. 15).

reading instruction "during ISG" in class (id.).⁵ ⁶ The RtI goal for the student was that she would be reading at "level K" by January (id.).⁷

On August 31, 2016 the parents contacted the principal and requested a meeting "before school begins if possible" to develop a plan pursuant to section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794[a]) ("section 504") for their daughter ("504 plan") (Dist. Ex. 19). The parents followed up with another email on September 14, 2016 indicating that they had several concerns and would like to meet with the principal, the teacher, and the school psychologist (Dist. Ex. 20). On September 19, 2016 the parents and the student's private psychologist met with the student's third grade teacher, the principal, and the school psychologist to develop a plan to help the student with her organizational difficulties and need for adult support (Tr. p. 120-22, 159, 583-84; Dist. Ex. 43 at p. 1). A 504 plan was not put in place at that time; however, meeting participants discussed the possibility of moving forward with a 504 plan as the school year went on and as they monitored the student's progress (Tr. pp. 124; 584; see Dist. Ex. 43).

Following an assessment on October 16, 2016, the student was determined eligible to continue receiving reading support services for three days out of the six day cycle in a group of 4:1 starting in late October 2016 (Tr. pp. 219-20, 230; Parent E; Dist. Ex. 55). According to the student's third grade teacher, the student was absent or late on many days in November, after which time in mid-November into December she began to notice a regression of skills and unwillingness to engage in activities (Tr. pp. 623-25). In mid-November the teacher began putting materials together to make a referral for RtI services (Tr. pp. 629-30). According to the hearing record, the parents began their referral to the CSE around the same time that the teacher was preparing a formal referral for RtI services (Tr. pp. 625, 629-30; Dist. Ex. 21).

Over five days in October and November 2016, a clinical psychologist (evaluator) conducted a private psychoeducational evaluation of the student (Dist. Ex. 42 at pp. 1, 15). Despite the student's superior intelligence and strong language, reasoning, and logical deductive thinking skills, the evaluator indicated that the student was "having trouble functioning in a mainstream setting because of significant attention and organizational difficulties (in addition to social and academic problems)" (id. at p. 13). The evaluator recommended that the student be placed in a "small, supportive, special education school, geared toward children of at least [a]verage

⁵ The district's schedule was on a six-day cycle (Tr. p. 110). According to the student's second grade regular education teacher, "ISG" referred to "individual and small group time" (Tr. p. 506). The teacher explained that for second grade teachers, it was "a block of time [of] about 30 minutes" where teachers had more time to focus on reinforcing concepts with students, and it also allowed students who received services to leave the classroom and not miss direct teaching time (id.). During second grade, the student was pulled out for reading services during ISG time (Tr. pp. 506-07).

⁶ The hearing record refers to the support recommended by the RtI team as "reading support," "small group reading," "supported services," RtI, and AIS; for the sake of consistency this decision refers to these services as RtI (Tr. pp. 108, 160, 205-06, 354-56, 506; 628, 733; Dist. Ex. 15 at p. 1).

⁷ Administration of the DRA reading assessment to the student in September 2015 yielded an independent reading level of 14, equivalent to Level H, which according to the student's second grade regular education teacher was "just slightly below grade level" (Tr. pp. 198-99, 437, 443; Dist. Ex. 39 at pp. 12-24).

intelligence ... but do not present with primary emotional problems" (id. at p. 14). Additionally, the report indicated that it was "mandatory" that there be ongoing monitoring of the student's social interactions by staff, so that she is not bullied and can learn interpersonal skills as the situations arise (id.).

On November 21, 2016, the parents sent an email to the principal referring the student to the CSE (Dist. Ex. 21). In the email the parents indicated that the student had been having a difficult time since September 2015, and that the "gap [was] widening between [the student] and her peers both academically and emotionally" (id.). Further, the parents indicated that the student had been persistently bullied and her anxiety was increasing (id.). The parents indicated that they attached the fall 2016 psychoeducational evaluation report to the email (id.).⁸ Further, the parents indicated that the email served as consent for the district to conduct any of its own evaluations or assessments, and speak to the private evaluator and therapist (id.).

A letter to the district's director of special education dated November 29, 2016 from the student's private psychologist indicated that the student was bullied during her second and third grade years (Dist. Ex. 43 at p. 1). The private psychologist gave specific descriptions of three specific bullying incidents, one of which took place in October 2016 during third grade (id.). The private psychologist indicated that these incidents had damaged the student's self-esteem and ability to develop peer connections (id. at pp. 1-2). Further, the private psychologist opined that the student "need[ed] significant and swift intervention to help turn around her series of academic and social failures. In particular, [the student] need[ed] a small, highly supportive, special education environment to address her academic and emotional needs" (id. at p. 2).

The district's parent referral to the CSE form was signed by the student's father on December 6, 2016 (Dist. Ex. 23 at p. 2). The reasons for referral were the same as those provided in the November 21, 2016 email (compare Dist. Ex. 21, with Dist. Ex. 23 at p. 1). Following the parent referral to the CSE, the district received consent to conduct an initial evaluation of the student on December 8, 2016 (Dist. Ex. 27).⁹ In a letter dated December 19, 2016, the parents provided the district with notice of the student's unilateral placement at Eagle Hill and their intent to seek funding for that placement (Dist. Ex. 29).

⁸ The parents refer to the fall 2016 private psychoeducational evaluation and the evaluator as a "neuropsychological evaluation" and the "neuropsychologist," respectively (compare Dist. Ex. 21, with Dist. Ex. 42 at pp. 1, 15). For consistency in this decision, the fall 2016 report will be referred to as the psychoeducational evaluation report. In addition to the psychoeducational evaluation report, the parents indicated that they attached another report from a "prior independent evaluation" (see Dist. Ex. 21). This report is not included in the hearing record; however, the psychoeducational evaluation discussed the prior report and indicated the report was conducted when the student was four years old (Dist. Ex. 42 at p. 3).

⁹ The student's father signed a consent form on December 8, 2016 while the student's mother signed a consent form on December 13, 2016 (see Dist. Exs. 27; 28). The parents consented for the district to conduct a physical examination, psychological evaluation, social history, educational evaluation, classroom observation, speech/language evaluation, and OT evaluation (Dist. Exs. 27; 28). Each one of these evaluations were conducted prior to the CSE convening on February 1, 2017 (see Dist. Exs. 45-54).

The CSE convened on February 1, 2017 and February 15, 2017 (Parent Ex. A at p. 5; Dist. Exs. 33; 36).¹⁰ The CSE determined that the student was eligible for special education services as a student with an other health-impairment (Parent Ex. A at p. 5; Dist. Ex. 38 at p. 3).¹¹ The CSE recommended that the student receive six one hour sessions per six day cycle of direct consultant teacher services in English language arts (ELA), and one 30-minute session per six day cycle of both individual and small group counseling (Parent Ex. A at p. 17). From March 16 through April 7, 2017, the CSE recommended the student receive one 30-minute per week OT consultation; after April 10, 2017 the OT consultation changed to one 30-minute session per month (*id.* at p. 19). The CSE also recommended a number of supplementary aids and services and program modifications/accommodations, as well as trials of various assistive technology software (*id.* at pp. 17-19).

A. Due Process Complaint Notice

By due process complaint notice dated March 27, 2017, the parents assert that the program recommended by the district failed to address the student's needs, deprived her of educational benefit, and deprived her of a free and appropriate education (FAPE) (Dist. Ex. 1).

The parents asserted that the district did not comply with its child find obligations for the 2015-16 and 2016-17 school years (Dist. Ex. 1 at p. 3). The student returned to the district for second grade, the 2015-16 school year; at that time, the parents asserted that they presented the district with two private evaluations, yet the district did not refer the student for an initial evaluation (*id.* at p. 4).¹² In November 2015, the parents indicated that the student was referred for reading help by the district and asserted that they were discouraged from pursuing an IEP at that time (*id.*). The parents further asserted the district was aware of the student's struggles, including the fact that her social/emotional well-being had deteriorated which exacerbated her anxiety resulting in pharmacological intervention, yet still did not refer the student for an initial evaluation (*id.*). For the 2016-17 school year, the parents asserted that they observed the student struggling to transition to third grade and had a meeting with school to discuss their concerns regarding the student (*id.* at p. 5). The parents claimed that although the student's issues continued, the district did not refer the student for an initial evaluation (*id.*). The parents argued that the student was struggling academically and socially; and that they provided documentation to the school in order to support their concerns (*id.*). They claimed that the school had an opportunity to investigate their concerns, but failed to refer the student for an initial evaluation, violating their child find obligations (*id.*).¹³

¹⁰ The CSE convened twice; however, only one IEP was created (*see* Parent Ex. A; Dist. Ex. 3).

¹¹ The student's eligibility for special education and related services as a student with an other health-impairment is not in dispute (*see* 34 CFR 300.8[c][9]; 8 NYCRR 200.1[zz][10]).

¹² These two evaluations are not in the record; however, the parents noted that they attached a copy of one of the reports when they initially referred the student to the CSE on November 21, 2016 (Dist. Ex. 21).

¹³ The parents also contended that the district failed to respond to their August 2016 request to have a meeting to develop a 504 plan for the student (Dist. Ex. 1 at p. 5).

The parents further asserted that the district failed to fully evaluate the student in all areas of suspected disability as the district did not complete an FBA, assistive technology evaluation, or an OT evaluation (Dist. Ex. 1 at p. 5). The parents asserted that the district was aware of the student's OT and social, emotional, behavioral needs, but failed to assess her in these areas (id.). The parents asserted that the failure to assess the student in these areas of need denied her an educational opportunity and denied the parents the right to meaningfully participate in the development of the student's IEP or assess its appropriateness (id.).

The parents asserted that the district failed to recommend a program that was reasonably calculated to enable the student to receive an educational benefit (Dist. Ex. 1 at pp. 5-7). The parents contend that the CSE's recommendation of a program in the general education setting with a consultant teacher was not supported by the evaluative information before the CSE (id. at p. 6). The parents asserted that the recommended program would have provided the student with minimal support, rendering it inappropriate and therefore, deprived the student of a FAPE (id. at p. 7). Further, the parents asserted that the annual goals in the IEP were insufficient as they did not align with the student's areas of need; more specifically, the goals did not address the student's reading deficit and only two annual goals addressed the student's reading and writing needs (id.).

The parents asserted that they were denied the right to meaningfully participate in the development of the student's IEP (Dist. Ex. 1 at pp. 7-8). The parents asserted that the district minimized their participation for years and when the parents brought their concerns to the district, the district "failed to respond appropriately, or at all" (id. at p. 7). The parents listed the concerns they brought to the school regarding the student, which included that they believed the student was being bullied (id.). The parents asserted that there was no evidence that their input was meaningfully considered by the CSE (id.). Further, the parents asserted that the IEP was predetermined and that the CSE disregarded evaluative information recommending "a small, highly specialized environment with similarly functioning students" for the student (id. at p. 8). Additionally, the parents indicated that the CSE failed to include the assistant principal in the meeting and failed to consider her observations of the student (id. at p. 6). Moreover, the parents contended that the district "failed to provide a rationale as to why a small, highly specialized environment was inappropriate to meet [the student's] needs" (id. at p. 8).

The parents asserted that the district failed to consider the continuum of services, including the parents preferred placement (Dist. Ex. 1 at p. 8). The parents argued that "the CSE must consider various alternative placement along a continuum ranging from the least restrictive to the most restrictive" and the district was "obligated to review all options that could support" the student (id.). However, the CSE failed to discuss other special education options and failed to provide the parents with a rationale as to why the other programs were not considered (id.).

Lastly, the parents asserted that the district failed to comply with the 60-day timeline for conducting an initial evaluation (Dist. Ex. 1 at pp. 8-9). The parents asserted that they initially referred the student on November 21, 2016 and provided consent in their initial referral (id. at p. 9). Based on this fact, the parents argued that the date of compliance was "on or about" February 17, 2017 (id.). They contended "the district failed to adhere to this requirement by not reviewing all evaluations, conducting any necessary evaluations ... holding an IEP meeting, developing an IEP and making an appropriate program recommendation" (id.). Further, the parents indicated that the district did not provide them with a copy of the IEP, prior written notice, and consent for

the initial provision of special education services on February 1, 2017 as the district alleged (*id.*). The parents asserted that a review of these documents show that they described meetings which took place after February 1, 2017, which demonstrates that the district's actions were "inequitable" in an effort to avoid liability (*id.*).

The parents request that they be granted relief in the form of reimbursement for the cost of the unilateral placement at Eagle Hill for a portion of the 2016-17 school year and "for the costs that they have incurred during the prior academic years due to the [d]istrict's failure to evaluate [the student] and provide her with special education services during the prior academic years" (Dist. Ex. 1 at p. 10).

B. Impartial Hearing Officer Decision

The IHO decision was dated October 16, 2017 (IHO Decision at p. 55). The decision was rendered after six days of hearings held in May, June, and July 2017 (*id.* at p. 1).¹⁴

Initially, the IHO addressed the parents request for relief finding that the parents did not present any evidence of costs incurred during previous academic years, and therefore, the IHO limited her determination to the claims related to the relief the parents were seeking, "whether the [p]arents are entitled to tuition reimbursement for the 2016/2017 school year" (IHO Decision at pp. 5-6). Additionally, before reaching her analysis, the IHO made extensive findings of fact, including a finding regarding discrepancies between district exhibits and exhibits presented by the parents (*id.* at pp. 6-45). In particular, the IHO compared District Exhibit 55 with Parent Exhibit E and found District Exhibit 55 was reviewed by the CSE and was not "demonstrably different" than the exhibit presented by the parents as an earlier version of the same document (*id.* at p. 41). The IHO determined "[i]f anything, the document has more information about [the student's] functioning" (*id.*). Regarding November 2016 conference notes prepared by the student's third grade teacher, the IHO found that the parents' and district exhibits were different, with the parents' exhibit containing more information about the student, but also determined that the third grade teacher was not "intentionally withholding information regarding [the student's] functioning in the classroom" and that the third grade teacher "was aware of and in agreement with some of the concerns described by the parents" (*id.* at p. 43). Further, the IHO found that the student's father's testimony was not credible and gave his testimony "less than full weight" (*id.* at p. 16).

The IHO found that the district did not violate its child find obligations for either the 2015-16 or 2016-17 school years (IHO Decision at pp. 48-50). The IHO found that it is "undisputed that [the student] had a generally successful year at the end of second grade" (*id.* at p. 49). In addition, the IHO found that based on the student's "relative success" during the 2015-16 school year and the plan discussed during the September 19, 2016 meeting, it was "reasonable for the parents and [d]istrict staff to conclude that the effort to recreate the success [the student] had in second grade may be successful" (*id.* at p. 50).

¹⁴ A pre-hearing conference was held by telephone on April 24, 2017 (Tr. pp. 1-21). Additionally, a telephone conference was held on June 21, 2017 to address the parents' request for subpoenas to compel the production of documents (IHO Exs. 1- 3). There are no minutes for the June 21, 2017 telephone conference; however, the IHO issued an interim order following the conference (*see* IHO Ex. 3).

The IHO found that the district fully evaluated the student in all areas of suspected disability as the student did not exhibit behaviors that interfered with learning prior to the CSE meeting, and accordingly, it was reasonable for the CSE to recommend a functional behavioral assessment (FBA) should the student return to the district (IHO Decision at pp. 50-51). The IHO further found that there was no evidence the student needed a full assistive technology evaluation (id. at p. 51).

The IHO found that the program developed for the student was reasonably calculated to provide her with an educational benefit for the remainder of the 2016-17 school year (IHO Decision at pp. 51-53). The IHO found that the IEP "appropriately reflect[ed] the consideration of all the current evaluations, teacher, related service provider, private providers and parent input to accurately describe the student's academic, management, physical, and social/emotional functioning" (id. at p. 51). The IHO noted that the CSE recommended daily direct instruction that provided the scaffolding and structure the private psychoeducational evaluation recommended (id. at p. 52). Further, the IHO determined the recommended individual and small group counseling would have appropriately addressed the student's confidence and need for reinforcement (id.). The IHO found that the goals were developed to address the student's deficit areas and that the CSE recommended a program in which the student's "goals could be implemented" (id. at p. 53). Moreover, the IHO found that the student's "success during her second grade year demonstrated that with the proper support, she was capable of making adequate yearly progress in her local community school" (id.).

The IHO found that there was no support for the contention that the parents were denied the right to meaningfully participate in the development of the student's IEP or the parents' claim that the IEP was predetermined (id. at p. 53-54). Regarding the parents' claim that the district failed to consider the entire continuum of special education services, the IHO found that "it is evident that the [d]istrict offered [the student] an appropriate program and placement and there was no basis for requiring the [d]istrict to send [the student] to an out of district program, special private school" (id. at p. 54). The IHO found that "[d]isagreement with the parents' preferred private placement is not synonymous with denying them participation in the development of an appropriate programs or evidence that the parents' preferred placement was not considered" (id.).

The IHO found that the district complied with the 60-day timeline (IHO Decision at p. 54). The IHO noted that State regulation provides that a district has 60 school days from receipt of the parents' consent to evaluate the student and to arrange for special education services (id. at pp. 54-55). In this case, the IHO found that consent was obtained on December 8, 2016 and the CSE recommendation was acted upon on March 15, 2017, fifty-five days later (id. at p. 55). Even if there had been a delay, the IHO found that it would have been de minimis and would not have warranted finding the district's program inappropriate (id.).

Based on her findings, the IHO denied the parents' request for tuition reimbursement at Eagle Hill for the 2016-17 school year (IHO Decision at p. 55).

IV. Appeal for State-Level Review

The parents appeal. In their request for review, the parents assert that the IHO's decision should be overturned and the district should be ordered to compensate the parents based on child

find violations for the 2015-16 and 2016-2017 school years and reimburse them for the costs incurred in connection to the placement of the student at Eagle Hill for the 2016-17 school year.

The parents argue that the district violated its child find obligations for the 2015-16 and 2016-17 school years. The parents assert that when the student entered the district in the 2015-16 school year, there were "clear and objective indications that [the student] was experiencing difficulties" and the student had previously been identified as a student with a disability. They contend that the district failed to evaluate the student at that time or consider the possibility the student required special education. The parents assert the district waited to refer the student, in violation of its affirmative duty, despite evidence that the student was placed on anti-anxiety medication due to fears regarding academic performance, bullying, and social alienation. The parents assert that the district "effectively cut them out" of the process of moving forward with a referral and that that circumstances involving a student being bullied may trigger a school's child find obligations. The parents argue that the school did not "effectively act upon knowledge of" the student's ADHD or anxiety, which coupled with notice that the student was being bullied, should have triggered child find "regardless of whether the bullying was real or perceived." The parents also argue that the district did little to address alleged bullying of the student, which adversely impacted her educational opportunities.

The parents argue that the district denied the student a FAPE as it did not timely complete an initial evaluation of the student within 60 days; it failed to fully evaluate the student in all areas of suspected disability and improperly postponed conducting an FBA and an assistive technology evaluation until after the CSE meeting; it failed to timely complete an FBA or develop a behavior intervention plan (BIP); the CSE did not meaningfully consider the private psychoeducational evaluation; the parents were denied meaningful participation in the development of the IEP and the program was predetermined; the annual goals listed in the IEP did not align with the student's areas of need; the CSE failed to consider the appropriateness of a small specialized educational setting for the student despite being asked to do so; and the district took grossly inadequate actions to protect the student from episodes of bullying, emotional harassment, and social alienation by her peers. In addition, the parents allege that the recommended program did not offer the student a FAPE because it was substantively inadequate and would not have enabled the student to make progress appropriate to her circumstances.

The parents further assert that the unilateral placement at Eagle Hill was appropriate and that equitable considerations do not bar reimbursement.

The district filed an answer responding to the allegations contained in the request for review, and assert that the parents' request for review should be dismissed in its entirety.

V. Applicable Standards

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

T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP" (Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). The Supreme Court has indicated that "[t]he IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement" (Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. ___, 137 S. Ct. 988, 999 [2017]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ. of the Chappaqua Cent. Sch. Dist., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). "The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created" (Endrew F., 137 S. Ct. at 1001). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v.

Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Endrew F., 137 S. Ct. at 1001 [holding that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"]; Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).¹⁵

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. Procedural Matters—Scope of Review

I note that the parents' request for review does not identify the findings and conclusions made by the IHO that are being challenged on appeal with the level of clarity contemplated by regulation. State regulation provides that a request for review "shall clearly specify the reasons for challenging the [IHO's] decision, identify the findings, conclusions, and orders to which exceptions are taken, or the failure or refusal to make a finding, and shall indicate what relief

¹⁵ The Supreme Court has stated that even if it is unreasonable to expect a student to attend a regular education setting and achieve on grade level, the educational program set forth in the student's IEP "must be appropriately ambitious in light of his [or her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives" (Endrew F., 137 S. Ct. at 1000).

should be granted by the [SRO] to the petitioner" (8 NYCRR 279.4[a]). Additionally, despite the IHO decision containing extensive findings of fact (see IHO Decision at pp. 6-45), including a determination that the parent's "reluctant testimony is credited with less than full weight" (id. at pp. 15-16), the request for review does not specifically identify adverse findings made by the IHO that are being challenged, but instead largely restates a number of claims asserted by the parents in their due process complaint notice and adjudicated during the hearing. Although the request for review sets forth a statement of facts, it does not identify with any specificity which, if any, of the IHO's specific findings of fact were incorrect. Despite the request for review falling short of the form requirements set by regulation, the issues raised in the request for review will be addressed. The parents are cautioned, however, that a future failure to comply sufficiently with the relevant practice requirements may potentially result in rejection of a request for review without further consideration.

B. Child Find

The parents assert that the district violated its child find obligations for the 2015-16 and 2016-17 school years. The parents contend that there were "clear and objective indications that [the student] was experiencing difficulties" when she enrolled in a district public school for second grade and that the district waited to evaluate the student, violating its child find obligations. Additionally, the parents assert that the district did not effectively acknowledge the student's known ADHD and anxiety which, coupled with notice of incidents of bullying the student experienced, should have triggered its child find obligations.

The IHO found that the district did not violate its child find obligations for either the 2015-16 or 2016-17 school years. The IHO found that the student had a successful year during the 2015-16 school year and it was reasonable for the district to believe it could recreate that success during the 2016-17 school year.

The purpose of the "child find" provisions of the IDEA are to identify, locate, and evaluate students who are suspected of being a student with a disability and thereby may be in need of special education and related services, but for whom no determination of eligibility as a student with a disability has been made (see Handberry v. Thompson, 446 F.3d 335, 347-48 [2d Cir. 2006]; E.T. v. Bd. of Educ., 2012 WL 5936537, at *11 [S.D.N.Y. Nov. 26, 2012]; A.P. v. Woodstock Bd. of Educ., 572 F. Supp. 2d 221, 225 [D. Conn. 2008], aff'd, 370 Fed. App'x 202 [2d Cir. Mar. 23, 2010]; see also 20 U.S.C. § 1412[a][3][A]; 34 CFR 300.111; 8 NYCRR 200.2[a][1], [7]). The IDEA places an ongoing, affirmative duty on State and local educational agencies to identify, locate, and evaluate students with disabilities residing in the State "to ensure that they receive needed special education services" (20 U.S.C. § 1412[a][3]; 34 CFR 300.111[a][1][i]; Forest Grove, 557 U.S. at 245; E.T., 2012 WL 5936537, at *11; see 20 U.S.C. § 1412[a][10][A][ii]; see also 8 NYCRR 200.2[a][1], [7]; New Paltz Cent. Sch. Dist. v. St. Pierre, 307 F. Supp. 2d 394, 400 n.13 [N.D.N.Y. 2004]). The "child find" requirements apply to "children who are suspected of being a child with a disability . . . and in need of special education, even though they are advancing from grade to grade" (34 CFR 300.111[c][1]; see 8 NYCRR 200.2[a][1], [7]; D.K. v. Abington Sch. Dist., 696 F.3d 233, 249 [3d Cir. 2012]; J.S. v. Scarsdale Union Free Sch. Dist., 826 F. Supp. 2d 635, 660 [S.D.N.Y. Nov. 18, 2011]). To satisfy the requirements, a board of education must have procedures in place that will enable it to identify, locate, and evaluate such children (34 CFR 300.111[a][1]; 8 NYCRR 200.2[a][1], [7]).

Because the child find obligation is an affirmative one, the IDEA does not require parents to request that the district evaluate their child (see Reid v. District of Columbia, 401 F.3d 516, 518 [D.C. Cir. 2005] [noting that "[s]chool districts may not ignore disabled students' needs, nor may they await parental demands before providing special instruction"]; see also Application of the Bd. of Educ., Appeal No. 11-153; Application of a Student Suspected of Having a Disability, Appeal Nos. 11-092 & 11-094).¹⁶ A district's child find duty is triggered when the district has "reason to suspect a disability and reason to suspect that special education services may be needed to address that disability" (J.S., 826 F. Supp. 2d at 660, quoting New Paltz Cent. Sch. Dist., 307 F. Supp. 2d at 400 n.13). Additionally, the "standard for triggering the Child Find duty is suspicion of a disability rather than factual knowledge of a qualifying disability" (Reg'l Sch. Dist. No. 9 Bd. of Educ. v. Mr. and Mrs. M., 2009 WL 2514064, at *12 [D. Conn. Aug. 7, 2009]). To support a finding that a child find violation has occurred, "the [d]istrict must have 'overlooked clear signs of disability' or been 'negligent by failing to order testing,' or there must have been 'no rational justification for deciding not to evaluate'" (J.S., 826 F. Supp. 2d at 661, quoting Bd. of Educ. v. L.M., 478 F.3d 307, 313 [6th Cir. 2007]; see A.P., 572 F. Supp. 2d at 225).

Related to child find is the referral process. State regulation requires that a student suspected of having a disability "shall be referred in writing" to the chairperson of the district's CSE—or to a "building administrator" of the school in which the student attends—for an "individual evaluation and determination of eligibility for special education programs and services" (8 NYCRR 200.4[a]).¹⁷ If a "building administrator" or "any other employee" of a district receives a written request for referral of a student for an initial evaluation, that individual is required to immediately forward the request to the CSE chairperson and the district must, within 10 days of receipt of the referral, request the parent's consent to initiate the evaluation of the student (see 8 NYCRR 200.4[a][2][ii], [a][2][iv][a], [a][3]-[a][5]; see also 34 CFR 300.300[a]). State regulation also provides that, upon receiving a referral, a building administrator may request a meeting with the parent and the student (if appropriate) to determine whether the student would benefit from additional general education support services as an alternative to special education, including speech-language services, academic intervention services (AIS), and any other services designed to address the learning needs of the student (see 8 NYCRR 200.4[a][9]). Any such meeting must be conducted within 10 school days of the building administrator's receipt of the referral and must not impede the CSE from continuing its duties and functions (see 8 NYCRR 200.4[a][9][iii][a]-[b]).

Additionally, because students with disabilities are disproportionately affected by bullying, circumstances involving a student being bullied who has not previously been identified as a child

¹⁶ However, a student may be referred by a student's parent or person in parental relationship (see 34 CFR 300.301[b]; 8 NYCRR 200.4[a][1][i]; see also 8 NYCRR 200.1[ii][1]-[4]). State regulations do not prescribe the form that a referral by a parent must take, but do require that it be in writing (8 NYCRR 200.4[a]; Application of a Child Suspected of Having a Disability, Appeal No. 05-069; Application of a Child Suspected of Having a Disability, Appeal No. 99-69).

¹⁷ A district "must initiate a referral and promptly request parental consent to evaluate the student" to determine whether the student needs "special education services and programs if a student has not made adequate progress after an appropriate period of time when provided instruction" in a school district's RtI programs (8 NYCRR 200.4[a]; see also 8 NYCRR 100.2[ii]).

with a disability under the IDEA may trigger a school's child find obligations under the IDEA (Dear Colleague Letter, 61 IDELR 263 [OSERS/OSEP Aug. 2013]; see Krebs v. New Kensington-Arnold Sch. Dist., 2016 WL 6820402, at *6 [W.D. Pa. Nov. 17, 2016] [denying a motion to dismiss the parent's child find claim relating to allegations that the district failed to evaluate a student despite having knowledge of her declining grades, self-harming behaviors, "multiple diagnoses and harassment at the hands of her peers"]). Accordingly, incidents with respect to alleged bullying prior to the student being referred for an initial evaluation are addressed here to the extent that they may have triggered the district's duty to identify, locate, and evaluate the student.

1. 2015-16 School Year

In regard to the student's academic performance at the start of the 2015-16 school year (second grade), the student was reading at a Level H according to the Developmental Reading Assessment (DRA) (Tr. pp. 198-99, 443; Dist. Ex. 39; at pp. 12-24).¹⁸ The student's second grade teacher testified that she referred the student to the school's RtI team because the student was reading slightly below grade level, she lacked word solving strategies, her reading was choppy, and she used finger pointing which affected her rate (Tr. pp. 443-44). The second grade teacher noted that the student's "desire" to read was there, "but she clearly needed skill work" (Tr. p. 444). The October 2015 RtI team determined that the student was eligible for small group reading services (Dist. Ex. 15). The second grade teacher testified that the student received RtI because although the student did not demonstrate a significant weakness, they "wanted to be proactive" (Tr. p. 446). At the end of second grade, the student was reading at a Level M, which the second grade teacher and the reading teacher described as being at grade level (Tr. pp. 215-17, 461). The hearing record shows that the student made progress in the areas of reading, spelling, and writing during the 2015-16 school year (Tr. pp. 468-85; Dist. Exs. 17; 39 at p. 92; 56 at pp. 1-2). Specifically, the second grade teacher testified that the student made "progress in all areas of her learning," including "substantial progress" in reading and writing (Tr. pp. 468-85, 503). She further testified that the student "had a very successful second grade year," and did not believe the student should have been referred to the CSE during the school year (Tr. pp. 503-04). Similarly, the reading teacher testified that there was no basis to refer the student to the CSE due to her reading abilities during the 2015-16 school year (Tr. pp. 217-18).

The second grade teacher testified that the student transitioned well into the class at the beginning of the school year, and although she was quiet and "needed to be invited into situations," was never at a loss to volunteer and share her thoughts or advocate for herself (Tr. p. 437). Socially, during second grade the teacher testified that the student was shy around children and, as the teacher, she needed to purposely set up situations for the student to interact (Tr. p. 437). The second grade teacher acknowledged that the student was hesitant to initiate social interactions, but when she was given support to initiate, "she could really hold her own in terms of being part of a little group" (Tr. p. 440). Additionally, the student "could be verbal, she could state her opinions, [and] she could compromise" (*id.*). The second grade teacher opined that "within the classroom

¹⁸ According to the principal, the classroom teachers used the Teachers College (TC) assessment, which she indicated aligned with Fountas & Pinnell, and the reading teacher used the DRA as an alternate assessment to the one used in the classroom (Tr. p. 100). The reading teacher specified that the TC assessment used a letter system and the DRA used a number system to identify a student's reading level (Tr. p. 193). A correlation chart was used to identify the equivalents for each assessment (Tr. pp. 193-96; Dist. Exs. 18; 63).

when the situations were monitored, controlled, [the student] managed quite well" (*id.*). The second grade teacher testified that she was careful about the partners she picked for the student, and on occasion the student was "invited back to lunch with friends," where she was "very chatty and very vibrant" (Tr. pp. 439-40).

In regard to the alleged bullying, the hearing record demonstrates that there were two incidents that occurred at the end of the 2015-16 school year (Tr. pp. 113, 151-52, 998; Parent Ex. D; Dist. Ex. 43; 64 at p. 5). The principal testified that she fully investigated the first incident reported by the parents to have occurred on the bus; the principal rode the bus for two days and interviewed students and the bus driver (Tr. pp. 113-14). The principal testified that "there were no further incidents with those children" and she was unaware of any other incidents during the 2015-16 school year (Tr. p. 114). Despite this testimony, the hearing record reflects that the parents sent the principal an email on May 12, 2016 regarding an additional incident of the student being "teased" on the bus (Dist. Ex. D). The second grade teacher testified that she was unaware of any incidents of alleged bullying during the school year (Tr. p. 502).

Overall, the hearing record demonstrates that the student made progress with the RtI services she received, and there was no reason for the district to suspect the student needed special education services during the 2015-16 school year (*see* Tr. pp. 215-18, 461, 503-04). The principal, second grade and reading teachers' testimony reflects that the student had a successful school year (Tr. pp. 111-12, 504; *see* Tr. p. 217). This sentiment was confirmed by the parents as well, when they emailed the second grade teacher at the end of June 2016, thanking her for a "completely successful year" (Dist. Ex. 16 at p. 39). Furthermore, the two incidents of alleged bullying during the 2015-16 school year did not trigger the district's duty to identify, locate, and evaluate the student as the hearing record shows the student made progress, and do not support a finding that the district overlooked clear signs of a disability, was negligent by failing to order testing, or that there was no rational justification for deciding not to evaluate the student (*J.S.*, 826 F. Supp. 2d at 661). Based on the hearing record, the district did not violate its child find responsibilities for the 2015-16 school year.

2. 2016-17 School Year

As for the 2016-17 (third grade) school year, the reading teacher testified that she continued to provide the student with reading support due to her performance on an assessment conducted in October 2016 (Tr. p. 220). The reading teacher noted that the student was assessed at an independent reading Level M at the beginning of third grade; and on December 21, 2016, achieved an independent reading Level N, which the reading teacher testified was meeting grade level expectations (Tr. pp. 223-25; *see* Dist. Ex. 40 at pp. 28-37). The reading teacher opined that there was no reason to refer the student to the CSE during third grade in connection to her reading abilities, although the reading teacher acknowledged that the third grade teacher discussed concerns about the student's reading with her (Tr. pp. 226, 251-52). The reading teacher testified that the third grade teacher's concerns were not related to the student's comprehension or decoding

skills, but were instead related to the student's engagement in class, as the student was choosing not to read during independent reading time (Tr. p. 252).¹⁹

The third grade teacher testified that the student had a difficult time acclimating at the beginning of the school year, and that on September 19, 2016, the parents, private psychologist, principal, school psychologist, and third grade teacher met and developed a plan to help improve the student's transition to third grade (Tr. pp. 575, 581-84; see Tr. p. 124; Dist. Ex. 43 at p. 1). The third grade teacher testified that by October 2016, the student was "visibly much more comfortable" and had "settled in" (Tr. pp. 575-76, 581-84). Socially, the third grade teacher testified that in September 2016 the student was quiet and withdrawn, but in October 2016, the student's peer interactions were "more typical," collaborative, and that the student "looked like a typical third grader" (Tr. pp. 576-77). She recalled that into October 2016 "things just steadily improved with [the student], both socially and academically. She was really in a good place" (Tr. p. 586).

However, by mid-November 2016 after "quite a few" absences, the third grade teacher noticed that the student would "display being upset," and was "agitated with peers," which affected her performance and willingness to perform (Tr. pp. 587-88). She testified that in November 2016 she spoke with the student's reading teacher and began pulling materials together to refer the student for RtI services (Tr. pp. 589, 629; see Parent Ex. K). The third grade teacher was concerned about the student's willingness to participate and engage because the student was only reading books independently at a much lower level than what she had previously been able to read (Tr. pp. 624-26; see Dist. Ex. 49 at p. 2).²⁰ On November 21, 2016, the parents emailed the principal and requested an "immediate CSE review" to develop an IEP and special education recommendations (Dist. Ex. 21).

The hearing record indicates that the IHO correctly determined that there were five incidents of alleged bullying reported by the parents during the 2016-17 school year (IHO Decision at p. 24).²¹ Three of these incidents occurred within approximately three weeks of the parents' November 21, 2016 email referring the student to the CSE (Tr. pp. 129, 132-34, 164-66, 590; Dist. Exs. 43 at p. 1; 60 at pp. 1-2; see Dist. Ex. 21). The other incidents occurred after the student was referred to the CSE (Tr. pp. 135-36, 166-67; Dist. Ex. 60). The third grade teacher and principal testified that they investigated each claim of alleged bullying (Tr. pp. 164-66, 174, 601-02). The district had an aide watch the student at lunch and during recess to determine whether the student was being bullied (Tr. pp. 653-654, 662-63). Further, the hearing record demonstrates that the

¹⁹ I note that the reading teacher testified that the student was always engaged during their sessions (Tr. p. 253).

²⁰ The third grade teacher emailed the reading teacher on November 14, 2016 stating that she had "a student who seems to be regressing" and requested the reading teacher assess her as the student was "refusing" to read at Level M and was "saying they are too hard for her" (Parent Ex. K at p. 2). The reading teacher responded to the email on the same day that she received the RtI referral forms and replied that she would assess the student the next day (id. at p. 1).

²¹ As noted above, these findings of fact made by the IHO have not been challenged by the parents in their request for review.

student did not understand social cues and misunderstood or misinterpreted some of the incidents that occurred at school (Tr. pp. 603, 644, 654-55; Dist. Ex. 42 at p. 1).

As to the child find allegations for the 2016-17 school year, the hearing record shows that the student's performance was inconsistent during the first months of school. However, the district was taking steps to support the student. The third grade teacher had referred the student for RtI, which was a reasonable course of action considering the success the student had receiving reading support during the 2015-16 school year. Further, the school was monitoring and investigating the claims of bullying. Moreover, the district's initial actions with respect to the student's academic and social difficulties, as well as the alleged bullying incidents and the district's subsequent related investigation, occurred close in time to the parents' referral to the CSE. Had the student's developing academic and social issues during the 2016-17 continued without further action by the district, or had the district ignored such issues prior to the parents' referral, a violation of the district's child-find obligations might have accrued; however, as the relevant events were largely contemporaneous with the parents' referral, the hearing record does not support finding that the district failed to meet its child find obligations during the 2016-17 school year.

C. Timeliness of Evaluations

A referral may be made by a student's parent or person in parental relationship (34 CFR 300.301[b]; 8 NYCRR 200.4[a][1][i]; see also 8 NYCRR 200.1[ii][1]-[4]). State regulations do not prescribe the form that a referral by a parent must take, but do require that it be in writing (8 NYCRR 200.4[a]; Application of a Child Suspected of Having a Disability, Appeal No. 05-069; Application of a Child Suspected of Having a Disability, Appeal No. 99-69). Subject to certain exceptions, a school district must obtain informed parental consent in writing prior to conducting an initial evaluation or reevaluation (34 CFR 300.300[c]; 8 NYCRR 200.5[b][1][i]; see Letter to Sarzynski, 51 IDELR 193 [OSEP 2008]).

Once a referral is received by the CSE chairperson, the chairperson must immediately provide the parents with prior written notice, including a description of the proposed evaluation or reevaluation and the uses to be made of the information (8 NYCRR 200.4[a][6]; 200.5[a][5]).

After parental consent has been obtained by a district, the "initial evaluation shall be completed within 60 days of receipt of consent" (8 NYCRR 200.4[b]; see also 8 NYCRR 200.4[b][7]). "Within 60 school days from receipt of consent to evaluate for a student not previously identified as having a disability ... the board of education shall arrange for appropriate special programs and services" (8 NYCRR 200.4[b][e][1]).

State regulations define consent: "(1) the parent has been fully informed, in his or her native language or other mode of communication, of all information relevant to the activity for which consent is sought, and has been notified of the records of the student which will be released and to whom they will be released; (2) the parent understands and agrees in writing to the activity for which consent is sought; and (3) the parent is made aware that the consent is voluntary on the part of the parent and may be revoked at any time except that, if a parent revokes consent, that revocation is not retroactive (*i.e.*, it does not negate an action that has occurred after the consent was given and before the consent was revoked)" (8 NYCRR 200.1[1]); see also 34 CFR 300.9).

In this case, the parents referred the student to the CSE on November 21, 2016 via email (Dist. Ex. 21). The formal district form referring the student to the CSE was dated December 6, 2016 (see Dist. Ex. 22). The district sent the "Proposed Referral for Evaluation and Request for Consent" on December 8, 2016 and again on December 9, 2016 via email (Dist. Exs. 25; 26). The parents signed the consent form on December 8, 2016, which was received by the district on December 9, 2016 (Dist. Ex. 27). The district then initiated the evaluation of the student and conducted a classroom observation of the student on December 9, 2016 (Dist. Ex. 46). The CSE first convened on February 1, 2017 after all of the evaluations for which the district requested parental consent to perform were completed (Dist. Exs. 27; 44-54).

The parents argue that they consented to the initial evaluation of the student in their November 21, 2016 email (see Dist. Ex. 21). However, this does not meet the requirements of consent as defined by both the state and federal regulations as the parents had not yet been provided prior written notice and the district had not yet notified the parents as to what evaluations would be conducted (see 8 NYCRR 200.1[l] and 34 CFR 300.9). Informed parental consent was received by the district on December 9, 2016 (Dist. Ex. 27). Since, consent was not received until December 9, 2016, the CSE complied with the requirement to evaluate the student within 60 days from receipt of consent (see 8 NYCRR 200.4[b], [b][7]). Further, the IHO found that fifty-five school days elapsed between the CSE's receipt of parental consent and approval of the February 2017 IEP by the district's board of education on March 15, 2017 (IHO Decision at p. 55; see Parent Ex. B at p. 2).²² Accordingly, the IHO determined that even if there was a delay arranging for the services recommended in the February 2017 IEP, such a delay would not have resulted in a denial of FAPE (IHO Decision at p. 55). It is noted that the district should have promptly sought parental consent following the November 21, 2016 email instead of waiting until the parents filled out the formal request for referral form. However, this delay was also de minimis and did not deny the student a FAPE. Further, even if there was a delay in evaluating the student, it did not rise to the level of a denial of FAPE as it did not impede the student's right to a FAPE, significantly impede the parents' opportunity to participate in the decision-making process, or cause a deprivation of educational benefits.

D. Evaluative Information

The parents argue that the CSE did not fully evaluate the student because it did not conduct an assistive technology evaluation or an FBA prior to the February 2017 CSE meeting. Further, the parents argue that the student's needs related to OT and her social/emotional needs were not fully evaluated. Review of the evaluative information available to the February 2017 CSEs does not support a finding that the CSE failed to evaluate the student in the specific areas the parents allege (see IHO Decision at p. 50).

An initial evaluation of a student must include a physical examination, a psychological evaluation, a social history, a classroom observation of the student and any other "appropriate assessments or evaluations," as necessary to determine factors contributing to the student's

²² In their request for review, the parents did not allege that the IHO's calculation was incorrect, nor did the parents present evidence to contradict the IHO's factual finding. Therefore, the IHO's determination that the February 2017 IEP would have been implemented within 60 school days of parental consent is final and binding on the parties.

disability (8 NYCRR 200.4[b][1]). A CSE may direct that additional evaluations or assessments be conducted in order to appropriately assess the student in all areas related to the suspected disabilities (8 NYCRR 200.4[b][3]). Any evaluation of a student with a disability must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parent, that may assist in determining, among other things, the content of the student's IEP (20 U.S.C. § 1414[b][2][A], [B]; 34 CFR 300.304[b][1][ii]; see Letter to Clarke, 48 IDELR 77 [OSEP 2007]). A district must ensure that a student is appropriately assessed in all areas related to the suspected disability, including, where appropriate, social and emotional status (20 U.S.C. § 1414[b][3][B]; 34 CFR 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]). An evaluation of a student must be sufficiently comprehensive to identify all of the student's special education and related services needs, whether or not commonly linked to the disability category in which the student has been classified (34 CFR 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]).

The hearing record indicated that the February 2017 CSE had before it and considered a March 2011 neurological evaluation report; a second grade progress report, report card, and conference notes; a June 2015 letter from one of the student's private psychologists; the fall 2016 private psychoeducational evaluation report; a November 2016 letter from the student's then-current private psychologist; a November 2016 conference report; a December 2016 OT evaluation report; a December 2016 teacher report; a December 2016 psychological evaluation report; a December 2016 social history, including results from an administration of the BASC 3; two December 2016 classroom observations; a December 2016 medical report of physical examination; medical health records including a school health office report; a December 2016 educational evaluation report; a January 2017 speech-language evaluation report; a January 2017 writing sample; a January 2017 report card; a January 2017 psychological evaluation report; and a January 2017 literacy and learning support history (Tr. pp. 304-12; Parent Ex. A at pp. 8-9; Dist. Exs. 41-57).²³ The February 2017 IEP also indicated that the CSE received oral reports from the student's then-current third grade teacher, her second-grade teacher, and her parents (Tr. pp. 503, 592-93; Parent Ex. A at pp. 5-9).

In this matter, the parents limit their complaints regarding the evaluative information available to the February 2017 CSEs to the lack of an assistive technology evaluation, an OT evaluation, and an FBA or other evaluative measure assessing the student's social/emotional needs. Accordingly, the below analysis focuses on the information available to the February 2017 CSE related to the parent's specific allegations on appeal, rather than a detailed description of the totality of evaluative information available to the CSE.

1. OT and Assistive Technology

With regard to the parents' argument that the CSE failed to fully evaluate the student in the areas of OT and assistive technology, the hearing record indicated that the evaluator who conducted the fall 2016 psychoeducational evaluation administered visual perception, visual-motor and grapho-motor assessments, and the district conducted a December 2016 OT evaluation,

²³ The February 2017 IEP also refers to a March 2011 neurological evaluation report, and a psychological report, reading report, writing sample, attendance report, and report card dated January 25, 2017; none of which appear to have been included in the hearing record (see Parent Ex. A at pp. 8-9).

which was utilized by the February 2017 CSE in recommending assistive technology software programs and OT consultations (Tr. pp. 757-74, 785; Parent Ex. A at pp. 7-8, 19; Dist. Exs. 42 at pp. 7-9; 53).

The fall 2016 psychoeducational evaluation report provided information from formal and informal assessments of the student's visual perception and visual-motor skills; specifically indicating that while the student could "make visual discriminations (e.g. matching geometric shapes) and perceive visual relationships," she struggled with subtleties (distinguishing specific features from an array of look-alikes), gestalt closure, and making sense of partial, visual information (Dist. Ex. 42 at p. 7). The evaluator indicated that these visual weaknesses could affect the student's ability to process information "in real time," "fill in the gaps," and notice unspoken factors in social situations, suggesting the presence of a nonverbal learning disability (id. at pp. 7-8, 14). Additionally, the evaluator reported that the student was sensitive to "visual overload" and her organizational difficulties also interfered with the efficiency of her performance, in that she overlooked many targets and worked at a relatively slow pace (id. at p. 8). The psychoeducational evaluation report indicated that grapho-motor tasks were "laborious" due to the student's hand tremor; however, when she took her time, her handwriting was legible and reasonably neat (id.). With regard to visual memory, the evaluation report indicated that the student's visual memory skills were inconsistent, and her recall declined when she had a limited amount of time to peruse material, or after a delay (id. at p. 9).

The district's December 2016 OT evaluation report indicated that an administration of subtests from the Bruininks-Oseretsky Test of Motor Proficiency, Second Edition (BOT-2), Fine Motor Form yielded scores in the average range for fine motor integration; however, her scores were in the below average range in fine motor precision and in the well below average range in manual dexterity and upper-limb coordination (Dist. Ex. 53 at p. 2). The evaluator described that the student had the most difficulty drawing lines through a curved path, drawing within a crooked path, catching a ball with one hand, dribbling a ball with alternating hands, and hitting a target then throwing a ball (id.). Furthermore, the evaluator indicated that the student's hand tremor significantly impacted her scores on the subtests for manual coordination (manual dexterity and upper-limb coordination) (id. at pp. 2-3). The occupational therapist also administered a three-minute typing test to the student (id. at p. 3). The student reportedly achieved three words per minute with 83 percent accuracy (id.). The occupational therapist noted that the student typed primarily with her left hand, and did not use her right hand when suggested to do so (id.). The December 2016 OT evaluation report indicated that the student was able to produce legible writing, although effortful, and recommended using weighted pencils, erasable pens, and assistive technology "tools," such as word prediction and/or voice to text software to help facilitate written communication (id.).²⁴

The occupational therapist who administered the OT evaluation testified that although the student did not do well on two subtests, she did not think direct OT would help the student with the areas her hand tremor was affecting (Tr. pp. 763-65). Additionally, she testified that the student's tremor was neurologically based, and opined that the best course of action would be to

²⁴ Additionally, as part of the district's December 2016 psychological evaluation, the student was administered subtests assessing her "spatial ability" and visual memory skills (Dist. Ex. 48 at pp. 2, 4-5).

provide her with opportunities to trial some assistive technology using the computer such as voice-to-text software with word prediction software to see if her written output increased (Tr. pp. 767-69, 772). The occupational therapist further testified that she recommended a weekly OT consultation to teach the student how to use the software and to monitor progress, and then move to a monthly consult if she was successful using the software (Tr. p. 773; Parent. Ex. A at p. 19). Furthermore, the occupational therapist testified that she recommended assistive technology programs because the student's ADHD, hand tremor, and anxiety were impacting her writing ability, which the recommended programs could address (Tr. pp. 783-85). Finally, the occupational therapist testified that initially the student would receive direct service in the consultations to teach her how to use the program (Tr. p. 785).

As discussed above, the February 2017 CSE had available, and considered, evaluative information about the student's visual perception and visual-motor skills, fine motor precision and integration, manual dexterity, upper-limb coordination, and grapho-motor skills, and on appeal the parents do not specify how the district failed to "fully evaluate [the student] in terms of her [o]ccupational [t]herapy . . . needs" (Dist. Exs. 42 at pp. 7-9; 53). While the parents are correct that the district did not conduct a specific assistive technology evaluation per se, the district's OT evaluation identified the student's bilateral hand tremor and difficulty with manual coordination skills related to writing, assessed her keyboarding skills, and provided specific recommendations for assistive technology tools and software to improve her written communication (Dist. Ex. 53). The February 2017 IEP provided the student with trials of specific assistive technology software programs to be implemented during weekly OT consultation sessions, to facilitate the student's use of that software (Parent Ex. A at p. 19). Therefore, based on the above, the hearing record demonstrates that the CSE had sufficient evaluative information about the student's needs related to OT and assistive technology at the time of the February 2017 CSE meetings.

2. FBA and BIP

The parents argue that the district failed to timely complete an FBA identifying and assessing the student's "problem behaviors" or develop a BIP, and assert that the CSE did not fully evaluate the student's social/emotional needs. However, a review of the hearing record shows that the February 2017 CSEs had available and considered several evaluative documents that provided pertinent information about the student's social/emotional and behavioral skills within the district's classroom; specifically, two classroom observations completed in December 2016 and a December 2016 classroom report, as well as oral reports from the student's teachers at the CSE meetings, projective assessment results, and the results of a behavior rating scale administered to the student's second and third grade teachers (Parent Ex. A at pp. 5-9; Dist. Exs. 42 at pp. 3, 5, 12-14; 46; 48 at pp. 1-2, 5-7, 11-12; 49; 51).

State regulation requires that an initial evaluation include a variety of assessment tools and strategies, identifies specific assessments that must be conducted as a part of an initial evaluation, and also requires "other appropriate assessments or evaluations, including [an FBA] for a student whose behavior impedes his or her learning or that of others, as necessary to ascertain the physical, mental, behavioral and emotional factors which contribute to the suspected disabilities" (8 NYCRR 200.4[b][1]). 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

(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 (R.E., 694 F.3d at 190).

According to the December 9, 2016 classroom observation completed by the district school psychologist, the student was observed in her classroom during math, where she worked quietly by herself until her partner returned to the classroom (Dist. Ex. 46). When her partner returned, the student proceeded to help him with the math work, occasionally reminding him to focus (id.). A classroom observation from December 21, 2016 completed by the assistant principal, indicated that the student was able to clearly express her wants and dislikes to the teacher; however, only made attempts to engage in the assigned reading task when the classroom teacher was in close proximity (Dist. Ex. 51 at p. 1). The classroom observation indicated that the student displayed off-task behaviors during the time she was expected to independently read, specifying that she engaged in flipping through her book, picking at an eraser in her desk, and putting her head down on the desk (id. at p. 2). Additionally, the December 21, 2016 classroom observation indicated that the student had difficulty sustaining attention in work tasks or play activities; specifically describing that the student retrieved a water bottle from her cubby, returned and stood next to her desk looking around the classroom drinking water for several minutes, then began talking to the student next to her, and distracting that student by "squishing" water in her cheeks and laughing (id. at p. 3). She refocused on her book when the teacher approached her table (id.). Finally, the teacher approached the student to help her decide how many pages to read before the end of the class; however, the student was resistant and stated "I don't want to do this. I don't care" (id. at p. 4). The teacher's report included in the classroom observation indicated that the student was at times unwilling to engage in a task, and that her skills had regressed due to behavior (id.).

According to the December 2016 third grade teacher's classroom report, at the beginning of the school year the student was "quiet and seemed uncomfortable," but after a few weeks, "appeared to settle into her new classroom community" (Dist. Ex. 49 at p. 1). Although the student

exhibited strong literal and inferential comprehension during class discussions about texts read aloud in class, she often refused to give a verbal or written response to questions, experienced difficulty any time she was asked to read a text independently and/or respond to questions in writing, and struggled with reading stamina and engagement (id.). Strategies used to try to address these difficulties included trying different locations in the classroom for independent reading, giving the student book introductions to increase interest in specific titles, and setting volume goals (read a certain number of pages in a reading period); however, the student had not shown improvement in this area and often repeated that she did not like reading and did not care (id. at pp. 1-2). The classroom report also noted that the student was most successful in reading when working one-on-one with a teacher or in a small group of two to three students, and that she required a high level of adult guidance to stay engaged (id. at p. 2). In writing, the classroom report indicated the student's effort, output, and progress had been inconsistent; however, in October 2016 she met grade level expectations for structure and was just below grade level in "elaboration and conventions" (id. at pp. 2-3). The teacher noted that at times the student refused to engage in writing discussions with the teacher or produced very little written work; at other times she approached writing with "an open willingness and produce[d] many sentences very quickly" (id. at p. 3). Accommodations including writing prompts and the use of a laptop for typing were unsuccessful (id.). Socially, the classroom report indicated that the student was a "kind," "friendly child" who enjoyed the company of her classmates, although her ability to collaborate with them was inconsistent (id. at pp. 3-4). During unstructured time, the student was observed "always with her classmates talking and smiling" (id. at p. 4). The classroom report described instances where the student "shut[] down" when faced with a difficulty, and the teacher opined that although the student had the ability to perform at grade level, subsequent to many absences in November 2016 the teacher noticed "a regression of skills," and an unwillingness to engage in activities (id.). In December 2016, the student's reluctance to engage became "more intense" and she showed more oppositional behaviors, which according to the teacher "were never demonstrated before" (id.).

Additionally, standardized evaluative information about the student's social/emotional and behavioral needs from the fall 2016 psychoeducational and December 2016 psychological evaluation reports was available to the February 2017 CSEs (Parent Ex. A at pp. 5-13; Dist. Exs. 42 at pp. 5, 12-14; 48 at pp. 5-12). The evaluator who conducted the psychoeducational evaluation used a variety of measures to assess the student's skills including her behavior and social-emotional functioning (Dist. Ex. 42 at pp. 2-3, 12-13). In response to projective testing, the evaluator reported that the student could become anxious at times, contributing to her perceiving others as "mean" and "unsafe" (id. at p. 12). The student's responses also indicated that she did not regard herself as "smart," she felt overwhelmed and unable to achieve at a level consistent with her strong intellect, and she felt "lonely, friendless, and inadequate" (id.). Furthermore, the evaluator opined that the student's nonverbal learning disability affected her social perception, and that even with her linguistic strengths, the student had trouble "getting to the point," which limited her ability to speak up when she felt anxious and/or agitated (id. at p. 13). Additionally, the psychoeducational evaluation report indicated that the student "struggle[d] with peer relationships and ha[d] trouble reading social cues," that "her annoying reactions have sometimes alienated others," and despite a desire to have friends, she had been "socially marginalized and bullied" (id. at pp. 1, 14).

The district's December 2016 psychological evaluation report contained results from administrations of the Behavior Assessment System for Children, Third Edition (BASC-3), used

to assess the student's "behavior in school" and at home (Dist. Ex. 48 at pp. 5-11). Specifically, the teacher rating scale from the student's second grade teacher indicated scores within the average range with the exception of the internalizing problems composite and anxiety subscale, which were in the clinically significant range, and at-risk scores in the areas of somatization, withdrawal, and leadership (id. at pp. 6-7). The teacher rating scale from the student's then-current third grade teacher indicated composite scores within the average range, and withdrawal, adaptability and study skills scale scores within the at-risk range (id. at pp. 5-6). Specifically, the third grade teacher responded that "[s]ometimes" the student isolated herself from others, had trouble making new friends, accepted things as they were, recovered quickly from setbacks, adjusted well to new teachers, turned things in on time, read, completed homework, and tried to do well in school (id. at p. 6). The third grade teacher reported that the student "[n]ever" was easily calmed when angry, had good study skills, or was well organized (id.).²⁵

The evaluation report further indicated that the student stated reading was difficult because she "spaces out" and had trouble staying focused, writing was "not as hard as reading," and math was "[o]kay, very quick, and not hard" (Dist. Ex. 48 at p. 11). The student further stated that she had difficulty because she had "ADHD and [d]yslexia" (id.). When asked to discuss "significant incidents of difficulties with other students" that occurred at school, the student mentioned two occurrences from the prior school year and one from the 2016-17 school year (id.). The school psychologist concluded that the student had "very high expectations for herself and demonstrated low frustration tolerance when tasks become too challenging" (id. at p. 12). Additionally, the report indicated that the student preferred to avoid difficult tasks rather than persevere and tolerate the increased stress levels (id.). The December 2016 psychological evaluation report summarized that the student's "anxiety, levels of attentional variability, hand tremor, overall health related to her asthma, and being very emotionally sensitive are all issues which are likely to be impacting her academic performance in the classroom" (id.).

Although the February 2017 CSE recommended an FBA and a BIP for the student once she returned to the school district, as described above, it already had evaluative information about the student's problem behaviors that were discussed during the CSE meeting and reflected in the IEP (i.e. attention difficulties and difficulty with/refusal to complete work including reading and writing; easily frustrated by social situations and academic tasks, difficulty interpreting social interactions with peers), and the contextual factors that contributed to the behaviors (i.e. the introduction of tasks perceived as challenging and independent reading and writing work time; less structured social time such as recess) (Parent Ex. A at pp. 6-7, 15-16). According to the chairperson for both February 2017 CSE meetings (CSE chairperson) an FBA was recommended because the student was reluctant to engage in academic tasks and demonstrated variability in

²⁵ The BASC-3 parent ratings indicated scores in the average range in the areas of anxiety, depression and somatization; scores in the clinically significant range in the areas of hyperactivity, withdrawal, activities of daily living, and functional communication; and scores in the at-risk range in the areas of aggression, conduct problems, atypicality, attention problems, adaptability, social skills, and leadership (Dist. Ex. 48 at p. 7). Results of the BASC-3 Self-Report of Personality, completed by the student, indicated composite scores within the average range, with the hyperactivity scale score in the at-risk range and relations with parents within the "[h]igh" range (Dist. Ex. 48 at pp. 9-11).

attention and anxiety, so the CSE wanted to "get a better sense of how we could support her behaviors in the classroom to support her performance and engagement" (Tr. p. 419).

The February 2017 IEP reflected the student's diagnoses of anxiety and ADHD, and the present levels of academic performance indicated that her performance on reading and writing tasks was inconsistent, in that at times she was reluctant to attempt classroom assignments when faced with tasks she perceived as challenging (Parent Ex. A at pp. 14-15).²⁶ As a result, the student at times requested teacher assistance with tasks she was capable of completing without adult support (*id.* at p. 15). The CSE identified that the student needed to increase her stamina and sustained attention for academic tasks, and initiate writing assignments after having the opportunity to use a graphic organizer (*id.*). The IEP social development present levels of performance indicated that the student enjoyed the company of her classmates, had appropriate relationships with adults, and was kind and articulate (*id.*). The IEP further described that the student's ability to collaborate with classmates was inconsistent, she was reluctant to attempt tasks she found challenging, could become easily frustrated and anxious, and would "shut down" when faced with difficulty (*id.*). The CSE identified that the student needed to develop appropriate coping strategies when feeling anxious or overwhelmed, flexibility, and problem-solving skills (*id.*).

To meet the student's needs, identified in the evaluative information, discussed during the February 2017 CSE meeting, and reflected in the IEP, the February 2017 CSE developed annual goals to increase the student's ability to sustain work on non-preferred academic tasks and improve written language skills, and included two annual goals designed to improve the student's ability to identify and use appropriate coping strategies such as perspective taking, breathing, self-talk and problem-solving strategies, and to demonstrate flexibility and problem solving by generating two appropriate solutions for a problem in social situations (Parent Ex. A at pp. 16-17). Furthermore, the February 2017 CSE determined that the student required "academic strategies and program modifications [] to help her manage her anxiety, ADHD and low frustration tolerance during the school day" and the IEP contained the following accommodations and modifications to support the student's social/emotional development: breaks to help with anxiety in class and to manage social and academic expectations; preferential seating, including for reading and writing tasks; visual models to build stamina for non-preferred academic tasks; alternate location for when the student felt overwhelmed or frustrated; tasks broken in to steps to assist with anxiety; and having the student restate directions, and utilize checklists to outline her expectations especially for reading and writing assignments (*id.* at pp. 16-19).

"The 'purpose of an FBA is to ensure that the IEP's drafters have sufficient information about the student's behaviors to craft a plan that will appropriately address those behaviors.'" (L.O., 822 F.3d at 111, quoting R.E., 694 F.3d at 190). Review of the hearing record indicated that the February 2017 CSE had before it enough evaluative information to determine the student's social/emotional and behavioral needs in order to develop an appropriate program (Tr. pp. 305-12; Parent Ex. A at p. 8-9; Dist. Exs. 42-51; 53-57). As noted above, the February 2017 IEP identified the student's behaviors (difficulty with attention, refusal to complete work, and frustration with

²⁶ The parents do not dispute the accuracy of the present levels of performance contained in the February 2017 IEP.

social situations and academic tasks), and identified contextual factors that contributed to the behaviors (introduction of tasks perceived as challenging, independent reading and writing time, and less structured social time such as recess) (Parent Ex. A at pp. 14-15). Additionally, assuming without deciding that the failure to complete an FBA in this instance is a procedural violation, it would not rise to the level of denial of a FAPE because the February 2017 IEP provided adequate accommodations, supports, and services to address the student's identified needs. For example, the CSE identified that the student needed to develop appropriate coping strategies when feeling anxious or overwhelmed, flexibility, and problem-solving skills, and included an annual goal to use appropriate coping strategies such as perspective taking, breathing, self-talk and problem-solving strategies, and to demonstrate flexibility and problem solving by generating two appropriate solutions for a problem in social situations (Parent Ex. A at pp. 14-17). As identified above, the February 2017 IEP also included strategies and program modifications to support the student's social/emotional development, including breaks; preferential seating; visual models; alternate location for when the student felt overwhelmed or frustrated; tasks broken in to steps; and checklists to outline expectations, especially for reading and writing assignments (*id.* at pp. 16-19). Additionally, as discussed further below, the program recommendation including direct consultant teacher services with the related service of counseling was partially designed "to help teach this student [to] manage her anxiety to promote greater independence in the classroom" (*id.* at pp. 16, 17). Accordingly, the district's failure to conduct an FBA prior to the February 2017 CSE meetings did not result in a denial of FAPE (*M.W. v. New York City Dept. of Educ.*, 725 F.3d 131, 140 [2d Cir. 2013]["[f]ailure to conduct an FBA . . . does not render an IEP legally inadequate under the IDEA so long as the IEP adequately identifies a student's behavioral impediments and implements strategies to address that behavior"]).

E. February 2017 IEP

The parents assert that the February 2017 IEP annual goals did not align with the student's areas of need and the CSE failed to provide an annual goal to address the student's reluctance to read (*see* Dist. Ex. 1 at p. 7). The parents also assert that the student experienced prior regression in a general education setting, and that a general education placement with direct consultant teacher services and counseling was inadequate to meet her needs. Additionally, the parents assert that their right to meaningfully participate in the CSE process was denied because the private evaluator's recommendation for placement in a special class was not adopted.

While the adequacy of the student's present levels of performance as described in the February 2017 IEP are not in dispute, a discussion thereof provides context for the issue to be resolved—namely, whether the general education placement with direct consultant teacher and related services was appropriate and reasonably calculated to provide the student with educational benefit. As discussed above, the February 2017 CSE had before it and considered numerous evaluative reports about the student's cognitive, academic, social/emotional, and physical needs, along with verbal reports from the student's second and third grade teacher and her parents at the CSE meeting (Tr. pp. 304-12; Parent Ex. A at pp. 8-9; Dist. Exs. 41-57). Further review of the evaluative information before the February 2017 CSE shows that it is commensurate with the information contained in the February 2017 IEP (*compare* Parent Ex. A at pp. 5-15, *with* Dist. Exs. 41-57).

The February 2017 IEP present levels of performance indicated that the student's cognitive skills were within the average to the moderately above average range (Parent Ex. A at p. 13). With respect to the student's reading, the IEP indicated that she achieved scores within the average range on all reading tests of the Woodcock-Johnson IV Tests of Achievement (WJ IV ACH), but described that during testing the student became easily frustrated on tests that were timed, exhibited increased movement, and omitted or inserted words when reading aloud (id. at p. 14). In the classroom, the present level of performance in reading indicated that the student was reading at level N in September 2016 (benchmark is M for that time of year) and was at level O ("within the range of current grade level expectations") at the time of the February 2017 CSE meeting (id.). The February 2017 IEP noted that the student's reading performance could be inconsistent in the classroom; however, she exhibited strong literal and inferential comprehension when contributing to class discussions (id.). Furthermore, the IEP indicated that the student exhibited literal or no understanding when asked to write a response to questions about reading, she experienced difficulty any time she was asked to read independently and/or respond to questions in writing, and her reading stamina needed strengthening (id.).

Concerning the student's writing ability, the February 2017 IEP indicated that she achieved scores in the average range on all writing tests of the WJ IV ACH, and she was able to spell many familiar sight words, and used phonetic approximations for unknown words (Parent Ex. A at p. 14). Additionally, at times the student became "hyper-focused" on a particular word, and became easily distracted by the timer on one particular test (id.). In the classroom, the student's progress in writing had been inconsistent, and at times she produced very little writing (id.). Finally, the IEP indicated that the student needed to strengthen her ability to elaborate, and increase her overall volume of writing, and that she benefitted from extra oral rehearsal before writing to increase her production (id.).

With respect to the student's academic functioning in the area of mathematics, the February 2017 IEP described that she achieved scores in the average to superior range on the WJ IV ACH, and specified that she was able to solve addition, subtraction, and multiplication facts accurately, solved many story problems mentally, but used scrap paper to solve more complex story problems (Parent Ex. A at p. 14). In the classroom, the student was described as having a strong grasp of the math concepts taught in class, good fact fluency, and that she enjoyed helping classmates who needed support (id.). When encouraged to reread and check her work she corrected errors independently (id.). The IEP indicated that the student had difficulty with multiple-step word problems, and often completed only part of the problem (id.). However, the student reportedly had confidence as a mathematician, and consistently and willingly engaged in math lessons (id.).

Regarding the student's communication skills, the February 2017 IEP indicated that she exhibited a slight distortion of the "s" and "z" sounds in connected speech, occasionally used a rapid rate of speech, and demonstrated hesitations, sentence revisions, interjections, and repetitions of whole words or phrases; however, these speech patterns did not affect the student's intelligibility (Parent Ex. A at p. 14). Additionally, the IEP reported that the student's understanding of sentence structure, language concepts, and vocabulary relationships were in the above average range, and she demonstrated considerable strength in her auditory memory skills (id.). The February 2017 IEP also reported that the student performed within the average range on standardized tests measuring following directions, expressive grammar, sentence formulation, and pragmatic skills; however, she did not always demonstrate the ability to tailor a message based on audience variables

and did not always demonstrate the ability to shift flexibly from one person's perspective to another (id.).

The February 2017 IEP present levels of social development indicated that the student was kind, articulate and friendly; enjoyed the company of her classmates; and had appropriate relationships with the adults she worked with; however, in the classroom her ability to collaborate with classmates was inconsistent (Parent Ex. A at p. 15). The IEP indicated that the student excelled in math, but in other curriculum areas she would "shut down" when faced with difficulty (id.). Finally, the February 2017 IEP indicated that the student would often ask for help with tasks she was able to do independently, was often reluctant to attempt tasks she found challenging, and could become easily frustrated and anxious (id.).

According to the February 2017 IEP present levels of physical development, the student had received diagnoses of ADHD, anxiety, and bilateral hand tremor (Parent Ex. A at p. 15). The results of the December 2017 OT evaluation indicated that the student achieved BOT-2 composite scores in the average range for fine motor manual control, and in the well below average range for manual coordination (id.). The IEP also indicated that the student's hand tremor significantly impacted the manual dexterity and upper-limb coordination subtests (id.). Finally, the IEP reported that the student was able to produce legible writing; however, it seemed to require a lot of effort and she used inconsistent pressure when completing pencil/paper tasks (id.). The February 2017 IEP also reported that on a three-minute keyboarding tests, the student typed three words per minute with 83 percent accuracy, typed primarily with her left hand, and did not use her right hand even after prompting (id.).

The February 2017 IEP also detailed the nature and degree to which environmental human or material resources were necessary to address the student's management needs (Parent Ex. A at p. 15). Specifically, the IEP noted that the student was anxious and would "shut down" when overwhelmed, she was often reluctant to engage in academic tasks she perceived as challenging, and her stamina and ability to persevere with tasks she perceived as difficult need strengthening (id.).

1. Annual Goals

Turning next to the parents' contention that the annual goals were not aligned with the student's areas of need, the February 2017 IEP contained four annual goals designed to address the student's study, writing, and social/emotional skill deficits (Parent Ex. A at pp. 16-17). Specifically, in study skills, the annual goal was designed to improve the student's ability to sustain work in non-preferred tasks (independent reading, writing) before requiring a break given visual supports (id. at p. 16). In writing, the annual goal was designed to improve the student's ability to independently initiate an extended response for up to four sentences after oral rehearsal and development of a graphic organizer (id. at pp. 16-17). To address the student's social/emotional needs, the February 2017 IEP contained two annual goals designed to address the student's ability to identify and use appropriate coping strategies (perspective taking, breathing, self-talk, and problem-solving strategies) when she experienced feelings of stress, anxiety, frustration or anger; and given a social scenario, demonstrate flexibility and problem solving skills by generating 1-2 appropriate solutions for a problem (id.). According to the student's then-current teacher, the annual goals addressed the behaviors she was witnessing in her classroom (Tr. pp. 599-603).

Comparison of the present levels of performance and the annual goals shows that the goals address and are aligned to the student's identified needs (compare Parent Ex. A at pp. 14-15, with Parent Ex. A at pp. 16-17).

To the extent the parents argued in their due process complaint notice that the February 2017 IEP did not include annual goals to address the student's inconsistent reading performance in the classroom, specifically identifying the student's difficulty engaging in independent reading, review of the IEP shows otherwise (see Dist. Ex. 1 at p. 7; Req. for Rev. ¶ 22).²⁷ As described above, the IEP provided annual goals to address these needs, namely, to improve the student's ability to sustain work on a non-preferred task such as reading, and improve coping skills when experiencing feelings such as anxiety and frustration, which the student reportedly felt when asked to engage in reading activities (Parent Ex. A at pp. 16-17; see Dist. Exs. 48 at p. 12; 49 at pp. 1-2). Therefore, the February 2017 IEP did provide annual goals to address the student's difficulty engaging in reading, as well as other supports and services discussed below to meet this need (Parent Ex. A at p. 17).

2. Program Recommendation

Next, the parents argue that the February 2017 CSE's recommended program was not reasonably calculated to provide the student with educational benefits because it was not supportive enough, and the student had exhibited "regression" in a general education setting. The parents also contend that the CSE failed to consider the private evaluator's recommendations or the continuum of services and that they were denied the right to meaningfully participate in the CSE process.

The parents' claims related to participation in the CSE process and predetermination relate to their claim that the CSE failed to consider the recommendation for a special class contained within the fall 2016 private psychoeducational evaluation (Req. for Rev. ¶¶ 19-21; Parent Mem. of Law at pp. 27-28). The private evaluator recommended that the student "should be placed in a small, supportive, special education school;" she also recommended that the student "needs to be taught throughout the day within small classes" and "requires a nurturant classroom with considerable structure, support, and predictability" (Dist. Ex. 42 at p. 14).

It is well settled that a CSE must consider privately-obtained evaluations, provided that such evaluations meet the district's criteria, in any decision made with respect to the provision of a FAPE to a student (34 CFR 300.502[c]; 8 NYCRR 200.5[g][1][vi]). However, "consideration" does not require substantive discussion, that every member of the CSE read the document, or that the CSE accord the private evaluation any particular weight (T.S. v. Bd. of Educ., 10 F.3d 87, 89-90 [2d Cir. 1993]; G.D. v. Westmoreland Sch. Dist., 930 F.2d 942, 947 [1st Cir. 1991]; but see A.M. v. New York City Dep't of Educ., 845 F.3d 523, 544-45 (2d Cir. 2017)[recommendations

²⁷ The student's third grade reading teacher opined that the student did not require special education support based on her reading skills or abilities because she was reading on grade level (Tr. pp. 226-28; Dist. Ex. 49 at p. 1). The CSE chairperson testified that the February 2017 CSE did not develop reading annual goals because the student "was able to access grade-level text appropriately, and the reading testing was showing that she was developing appropriate skills" (Tr. p. 334). Acknowledging that the student was "falling short" on some areas of standardized testing, she further testified that "functionally [the student] was able to access text appropriately" (id.).

included in private evaluation created a consensus as to what the student required where the district did not conduct any evaluations of its own to call into question the opinions and recommendations contained in the private evaluations]).

As noted above, the February 2017 CSEs had a wealth of evaluative information and developed detailed present levels of performance which have not been challenged on appeal (see Parent Ex. A at pp. 8-15; Dist. Exs. 41-57). In addition, the February 2017 IEP meeting information and prior written notice indicated that the CSE reviewed the results of the fall 2016 private psychological evaluation (Parent Ex. A at pp. 1-2, 6-7).

Regarding the parents' argument that the CSE failed to consider the private evaluator's recommendations or a continuum of services, the hearing record shows that at the February 2017 CSE meetings, the parents requested the CSE consider the private evaluator's recommendation for the student to be placed in a "small special education school" (Tr. pp. 336, 422, 426-28, 1011-13, 1336-37; Dist. Ex. 42 at p. 14). During the February 2017 CSE meetings district staff and the student's service providers determined that the student's needs could be supported at the local neighborhood school (Parent Ex. A at pp. 3, 7; see Tr. pp. 336, 420-24). The CSE chairperson testified that she did not recall anyone at the meeting expressing disagreement with the recommended consultant teacher services or counseling services (Tr. pp. 338-39). Further, other than the student's parents, no one at the CSE meeting agreed with the recommendation of the private evaluator for a special class placement (Tr. p. 421; see Parent Ex. A at pp. 3, 7). The CSE chairperson testified that in determining the appropriate placement, the CSE needed to consider the student's least restrictive environment and that once the CSE determined the student's needs could be met at the student's neighborhood school with the support of consultant teacher services and counseling, the CSE did not have to consider more restrictive placement options (Tr. pp. 422-24). Consistent with this representation, once a CSE determines that a particular placement is the least restrictive environment in which a student can be educated, it is generally not required to thereafter consider other more restrictive placements along the continuum (see E.P. v. New York City Dep't of Educ., 2015 WL 4882523, at *8 [E.D.N.Y. Aug. 14, 2015]; B.K. v. New York City Dep't of Educ., 12 F. Supp. 3d 343, 359 [E.D.N.Y. 2014]; E.F. v. New York City Dep't of Educ., 2013 WL 4495676, at *15 [E.D.N.Y. 2014]; but see E.H. v. New York City Dep't of Educ., 164 F. Supp. 3d 539, 552 [S.D.N.Y. 2016][CSE was required to consider the parent's point of view that the student needed to be educated in the setting he was attending]). Under the circumstances presented, the CSE's consideration of the private evaluation, and decision not to further discuss more restrictive settings once it determined the student could be educated in a general education setting, did not impede the parents' ability to participate in the development of the February 2017 IEP.

As discussed previously, the February 2017 CSE recommended a general education placement with six one-hour sessions per six day cycle of direct consultant teacher services in ELA in the classroom, and one 30-minute session per six day cycle each of individual and small group counseling (Parent Ex. A at p. 17).²⁸ Additionally, the CSE recommended the following supplementary aids and services, program modifications, and accommodations for the

²⁸ State regulation defines direct consultant teacher services as "specially designed individualized or group instruction provided by a certified special education teacher . . . to a student with a disability to aid such student to benefit from the student's regular education classes (8 NYCRR 200.1[m][1]).

student: breaks to help with anxiety in class and to manage social and academic expectations; preferential seating, including for reading and writing tasks; visual models to build stamina for non-preferred academic tasks; alternate location for when the student felt overwhelmed or frustrated; tasks broken in to steps to assist with anxiety; and having the student restate directions, and utilize checklists to outline her expectations especially for reading and writing assignments (id. at pp. 16-19). The February 2017 CSE also recommended assistive technology devices and or services including trials of word prediction, text to speech and speech to text software to determine their effectiveness on the student's production of written communication, to be facilitated initially by a weekly OT consultation (id. at p. 19).

According to the CSE chairperson, based on the discussion during the February 2017 CSE meetings, the student was developing age appropriate and grade appropriate skills, and testing did not identify concerns regarding her ability level (Tr. pp. 323, 327). She further testified that the CSE focused more on the student's performance in school rather than on her ability level in order to determine areas of need (Tr. pp. 326-330). Specifically, during the CSE meetings school staff and teachers expressed concerns about the impact the student's attention and anxiety had on her ability to demonstrate the skills she was acquiring in the classroom (Tr. p. 326). The CSE chairperson testified that the CSE determined that the student's goals could be met within her neighborhood school with direct consultant teacher services, counseling, and OT consultation (Tr. pp. 335-36; Parent Ex. A at pp. 17, 19). Regarding the consultant teacher services recommendation, the CSE chairperson testified that the special education teacher would work with the student in her classroom to support the acquisition of the goals and access to the instruction taking place (Tr. p. 337). When asked if the CSE discussed whether or not one hour of consultant teacher services in ELA per day was sufficient to help the student meet her goals, the CSE chairperson replied that the special education teacher had made that recommendation based upon the student's needs, goals, and "level of disability" that the CSE had discussed, determining that level of service would be appropriate (Tr. pp. 337-38). She further indicated that the "key elements of the IEP that really address [the student's] needs are the special instruction that would take place in the classroom during the times when she was experiencing challenge, particularly for writing" (Tr. p. 347). According to the CSE chairperson, the CSE recommended both individual and group sessions of counseling, to provide the student the opportunity to meet with the counselor individually to develop skills, and in a group with other students where she could apply those skills, as well as to address the student's social/emotional needs that were of parent concern (Tr. pp. 337-39). The CSE chairperson testified that weekly OT consultation was recommended, because the occupational therapist wanted to "support the trials of the assistive technology software that were recommended" (Tr. p. 344).

Finally, regarding the parents' claim that the student demonstrated regression in a general education placement, the CSE chairperson testified that the student "really responded to the interventions provided to her in second grade" (Tr. p. 348). As previously discussed, the student was very successful during the 2015-16 school year when she attended a general education classroom and received three 30-minute sessions per six day cycle of RtI services in reading (Tr. pp. 111, 504; Dist. Ex. 16 at p. 39). In October 2016, with a similar level of support (three 30-minute sessions per six day cycle of AIS in reading), the student began to show signs of regression and increased oppositional behaviors (see Tr. pp. 219-32, 579-89, 593-97; Dist. Ex. 55). However, the February 2017 CSE recommended a program that would provide a more intensive level of support than what the student had previously received; notably 60 minutes of direct consultant

teacher services per day during ELA, individual and group counseling, and assistive technology software programs with OT consultations to support reading and writing (Parent Ex. A at pp. 17-19). Additionally, the CSE chairperson testified that the "key elements of the IEP" that really addressed the student's needs were the special instruction that would take place in the classroom, counseling, program modifications and access to assistive technology programs (Tr. pp. 347-48). The student's then-current teacher testified that she felt the IEP was appropriate because it was a multi-pronged approach to help her, and that the support inside and outside of the classroom would address her struggles (Tr. p. 609).

Overall, the February 2017 CSE further determined that the student needed special education and related services "to help teach this student [to] manage her anxiety to promote greater independence in the classroom," and recommended six one-hour sessions per six day cycle of direct consultant teacher services in ELA, and one 30-minute session per six day cycle each of individual and small group counseling to "meet the student's needs related to writing, completing work in the classroom, managing frustration and engaging in social interactions" (Parent Ex. A at pp. 7, 16-17). The CSE chairperson testified that the special education consultant teacher would work with the student in her classroom and support the acquisition of her annual goals and ability to access instruction (Tr. p. 337). The special education teacher, who conducted the December 2016 educational evaluation, testified that school-based counseling would be appropriate to address the student's anxiety and "emotional vulnerability" noted during testing (Tr. pp. 725-26; Dist. Ex. 50). The CSE chairperson testified that counseling was recommended based on the social/emotional goals developed during the February 2017 CSE meeting, and that it was important for the student to meet with a counselor individually to develop some skills, then have an opportunity to apply those skills in a group with other children (Tr. pp. 338-39). Additionally, the February 2017 CSE recommended OT consultation to implement trials of software programs to further reduce the student's academic frustration and anxiety (Tr. pp. 343-45; Parent Ex. A at pp. 6-7, 14-19).

Therefore, review of the hearing record as a whole supports the IHO's determination that the program developed by the February 2017 CSE was reasonably calculated to provide the student with an educational benefit for the remainder of the school year.

VII. Conclusion

Having determined that the district did not violate its child find obligations and established the appropriateness of its recommendation for the 2016-17 school year, it is not necessary to determine whether Eagle Hill was an appropriate unilateral placement or whether equitable considerations support the parents' claim, and the necessary inquiry is at an end (see T.P., 554 F.3d at 254; M.C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]).

THE APPEAL IS DISMISSED.

**Dated: Albany, New York
January 4, 2018**

**CAROL H. HAUGE
STATE REVIEW OFFICER**