The University of the State of New York

The State Education Department
State Review Officer
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No. 18-062

Application of the BOARD OF EDUCATION OF THE SYOSSET CENTRAL SCHOOL DISTRICT for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:
Ingerman Smith, LLP, attorneys for petitioner, by S. Fahad Qamer, Esq.

The Law Offices of Neal H. Rosenberg, attorneys for respondents, by Michael Mastrangelo, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from the decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to respondents' (the parents') son and ordered it to reimburse the parents for their son's tuition costs at Discovery Connections (Discovery) for a portion of the 2015-16 school year. The appeal must be sustained in part.

II. Overview—Administrative Procedures

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

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

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

III. Facts and Procedural History

The parents reported that, during elementary school, the student struggled academically, received a diagnosis of an attention deficit hyperactivity disorder (ADHD), presented with defiant and inattentive behaviors, and in third grade began receiving accommodations pursuant to section 504 of the Rehabilitation Act of 1973 (section 504) (Dist. Exs. 11 at p. 2; 13 at p. 1). From sixth through eighth grade, the student attended a district middle school and continued to receive section 504 supports including preferred seating and testing accommodations (Dist. Exs. 11 at p. 2; 13 at p. 2). The parents reported that the student became increasingly defiant and exhibited antisocial behaviors throughout middle school and demonstrated difficulty with writing, spelling, mathematics, and, at times, science (Dist. Exs. 11 at pp. 2-3; 13 at pp. 1-2).

The student attended ninth grade at a district high school during the 2013-14 school year, continued to receive section 504 accommodations, and received one suspension from school (see Dist. Exs. 3; 11 at p. 3; 13 at pp. 2-3). During the 2014-15 school year (tenth grade), the parents reported that the student continued to show increasingly defiant and antisocial behaviors and was involved in several incidents that resulted in disciplinary consequences including suspension (Tr. pp. 66-68, 137; Dist. Exs. 11 at p. 3; 13 at p. 3). On April 29, 2015, the student received a five-day suspension from school for stealing another student's cell phone and for having "drug paraphernalia" (Tr. pp. 93, 198, 264; Dist. Ex. 13 at p. 3). The incident also resulted in a superintendent's hearing, after which the student was placed on home instruction for the remainder of the 2014-15 school year (Tr. pp. 93, 229, 519, 577). As a result of the superintendent's hearing and the parents' referral of the student to the CSE, in May 2015, the district conducted an educational evaluation and a psychological evaluation of the student (Tr. pp. 355-56; Dist. Exs. 12; 13). On May 29, 2015, the parents placed the student in an out-of-State adolescent wilderness program (see Dist. Ex. 17 at p. 1).

On June 2, 2015, an initial CSE meeting convened and the CSE determined that the student was eligible for special education as a student with an other health-impairment and recommended a daily, 40-minute 12:1 instructional support special class and one 30-minute session per week of individual counseling (Dist. Ex. 4 at p. 9).[1] The June 2015 CSE also recommended modifications including special seating arrangements, refocusing and redirection, and accommodations that included extended time on tests administered in a location with minimal distractions (id. at pp. 9-10). Although the CSE indicated that the student had behaviors that impeded his learning, the committee agreed to wait until the student was "in attendance" to determine if a functional behavioral assessment (FBA) and/or a behavioral intervention plan (BIP) were necessary (id. at pp. 2, 7). The meeting information summary attached to the June 2015 IEP indicated that "the student's private providers recommended a residential placement for the student" but that "[t]he [c]ommitee did not endorse that recommendation, given the student's current levels of performance" (id. at p. 2).

While at the wilderness program, the student ran away and burglarized a nearby cabin (Dist. Ex. 16 at pp. 1, 3). Approximately two days later, the student rejoined the wilderness program, and two weeks after returning to the wilderness program, the student was arrested for burglary and placed in juvenile detention (id.). On August 14, 2015, the student underwent a court-ordered psychological evaluation (id. at p. 1). According to the report, the student met the criteria for diagnoses including: conduct disorder; dysthymic disorder; anxiety disorder; ADHD, primarily inattentive subtype; alcohol abuse; cannabis abuse; and personality disorder (id. at p. 9). The psychologist also made a number of recommendations including that the student be placed in a residential treatment center, noting that the student's behavioral problems had "clearly worsened over the last few years" (id.).

On August 24, 2015, the parents informed the district that the student was unable to successfully complete the wilderness program, reiterated their belief that the student required placement in a residential program, and notified the district of their intent to place the student in a

[1] The student's eligibility for special education programs 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]).

therapeutic residential school and seek tuition reimbursement from the district (Parent Ex. 10 at p. 1). On or about August 26, 2015, the parents enrolled the student at Discovery, an out-of-State residential treatment center (Tr. p. 646; Parent Exs. 5; 6; 7; Dist. Ex. 19 at p. 1).[2]

On September 10, 2015, the CSE reconvened "at the parents' request to review the student's current situation" since the June 2015 CSE meeting (Dist. Ex. 5 at p. 1). The CSE continued to find the student eligible for special education and recommended the same special class and counseling services as in the June 2015 IEP (compare Dist. Ex. 4 at p. 9, with Dist. Ex. 5 at p. 9). The meeting information summary attached to the September 2015 IEP indicated that, although the CSE "did not endorse the parents' request for residential placement," the CSE "agreed to send application packets" to a Board of Cooperative Educational Services (BOCES) for a "day placement" (Dist. Ex. 5 at p. 2).

While the student was on a holiday break from Discovery, the parent took the student for an intake interview at a BOCES program (Tr. pp. 542-43). On January 11, 2016, BOCES sent a letter indicating the student was accepted to a 9:1+2 special class, with two 30-minute sessions of individual counseling and one 30-minute session of group (5:1) counseling per week (Parent Ex. 11 at p. 2).[3]

On January 12, 2016, the CSE convened for a program review and recommended a 15:1 special class placement for math and English language arts (ELA), resource room for one 40-minute session per day, and one 30-minute session of counseling per week in a district high school (Dist. Ex. 6 at pp. 2, 9, 12).[4] The meeting information summary attached to the January 2016 IEP indicated that the parents reported that the student responded successfully to his placement at Discovery and that the CSE agreed the student would return to the district high school starting February 1, 2016 (id. at pp. 1-2). The meeting information summary also indicated that the parents did not believe the BOCES program was appropriate for the student (id. at p. 1).

The student was discharged from Discovery on January 16, 2016 and returned to a district high school in February 2016 (Tr. p. 546; Parent Ex. 7). The student's IEP was amended by

[2] "Discovery Academy" and "Discovery Connections" are used somewhat interchangeably in the hearing record. The principal testified that Discovery Connections was a residential treatment center for up to 12 adolescent male students who struggled with "oppositional defiance," tended to be "treatment resistant" and "disruptive," and required more structure (see Tr. pp. 645-46, 776-78, 783). Discovery Academy—the "parent program" and campus where students in the Discovery Connections program attended school—was a coed "clinical boarding school" program for students who were near the "end of their programming" and who had "a little bit" more freedom in that they were employed in the community and working toward graduation (see Tr. pp. 646-47, 659, 784, 920). The special education coordinator testified that the student in this matter was solely in the Discovery Connections program for the 2015-16 school year (Tr. pp. 919-20, 948). For purposes of this decision, the unilateral placement will generally be referred to as "Discovery," except where it may be necessary to delineate "Discovery Academy" and "Discovery Connections."

[3] The student's start date on the acceptance letter was identified as "Waitlisted" (Parent Ex. 11 at p. 2).

[4] The district received a report from the student's therapist at Discovery on January 12, 2016 indicating that he did not believe the student "attending his home high school would be an issue" (Dist. Ex. 19).

agreement on April 5, 2016 to add an additional 40-minute session of resource room on alternate days (Dist. Ex. 7 at pp. 1, 8).

A subcommittee of the CSE convened on May 10, 2016 for an annual review and, for the 2016-17 school year, recommended placement in a 15:1 special class for math and ELA, resource room for one 40-minute session per day, and one 30-minute session of counseling bi-weekly (Dist. Ex. 8 at p. 8).

The student graduated from a district high school in June 2017 and was accepted into college for the 2017-18 school year (see Tr. pp. 498, 610; Dist. Exs. 9 at p. 1; 22 at p. 2).

A. Due Process Complaint Notice

By due process complaint notice dated August 16, 2017, the parents asserted that the district denied the student a free appropriate public education (FAPE) "leading up to and including the 2015-16 school year" (Dist. Ex. 1 at pp. 1, 9). The parents claimed that the district violated its child find obligations when it failed to refer the student to the CSE "as early as second grade" (id. at p. 7). The parents also argued that the recommendations made by the June and September 2015 CSEs were inappropriate and not reasonably calculated to offer the student an opportunity to make progress (id.). The parents further contended that the recommendations made by the CSEs were done without parental participation and were predetermined prior to the CSE meetings; moreover, the parents alleged that the CSEs did not consider additional programs or services during the meetings (id. at p. 8). The parents also maintained that the CSEs failed to "seriously consider the input of the [s]tudent's providers" (id.).

With respect to the September 2015 IEP, the parents asserted further procedural and substantive inadequacies (Dist. Ex. 1 at pp. 5-6). Specifically, the parents claimed that: the September 2015 CSE was not composed of all required members; the IEP failed to adequately identify the student's needs as reflected in the evaluations available to the CSE; the present levels of performance failed to accurately reflect the student's behaviors, academic abilities, and learning characteristics; the CSE failed to adequately address the student's behaviors that interfered with his learning and failed to "include" an FBA and BIP in the IEP; the IEP did not include goals related to the student's needs; and the transition plan included in the IEP was "generic, ambiguous" and was not tailored to meet the student's needs (id. at p. 6). The parents acknowledged that, at the conclusion of the September 2015 CSE meeting, the CSE indicated it would apply to BOCES for a day placement; however, the parents argued that they visited the BOCES program and found it inappropriate to meet the student's needs (id. at pp. 5-6).

Regarding the student's unilateral placement, the parents claimed that Discovery was appropriate because it provided the student with instruction specially designed to meet his unique needs (Dist. Ex. 1 at p. 8). In addition, the parents contended that the student made progress at Discovery, which allowed him to transition back to the district high school and graduate (id. at pp. 8-9). As to equitable considerations, the parents argued that they acted reasonably under the circumstances, cooperated with the district in good faith to develop an appropriate recommendation for the student, and did nothing to hinder the CSE from evaluating the student; they also argued that they consented to evaluations and provided proper notice of the student's placement at Discovery and their intention to seek tuition reimbursement (id. at p. 9). For relief,

the parents requested reimbursement of the costs student's placement at Discovery for a portion of the 2015-16 school year (id.).[5]

The district responded to the parents' due process complaint notice on August 18, 2017, generally denying the parents' allegations and identifying the evaluations considered at the CSE meetings for the 2015-16 school year (Dist. Ex. 2).

B. Impartial Hearing Officer Decision

The parties proceeded to an impartial hearing on November 8, 2017, which concluded on January 24, 2018 after four hearing days (see Tr. pp. 1-994).[6] In a decision dated April 27, 2018, the IHO determined that the district failed to offer the student a FAPE because the June 2015 and September 2015 IEPs were substantively inappropriate, that Discovery was an appropriate placement for the student, and that equitable considerations supported an award of tuition reimbursement (IHO Decision at pp. 26, 31-36).

The IHO rejected the parents' claims related to child find (IHO Decision at pp. 30-31). The IHO found that the district was aware of the student's "learning issues" in third grade when he first began receiving section 504 accommodations and that the 504 accommodations were effective through ninth grade since the student progressed, achieved satisfactory grades, and there were no documented behavioral incidents before tenth grade (IHO Decision at p. 30). The IHO also found "no reason to go beyond the two-year statute of limitations" to reach the parents' claims pertaining to child find as the parents did not allege that they were not provided with notice of due process rights, they participated yearly in the student's 504 meetings, and there was little in the record that indicated they "repeatedly requested more services" from the district or that the district withheld information that would have tolled the statute of limitations timelines (id. at pp. 30-31).[7] Furthermore, the IHO rejected the district's argument that the June 2015 IEP was barred by the statute of limitations, finding that it "may be considered since it was the IEP in effect two years before the hearing request was made, and was developed for the 2015/16 school year" (id.).[8]

With respect to the parents' procedural challenges to the June 2015 and September 2015 CSEs, the IHO determined the parents abandoned them at the hearing, except for the parents'

[5] According to the student's mother, the student attended Discovery from approximately August 26, 2015 through January 16, 2016 (Tr. p. 603; Parent Exs. 7; 8).

[6] According to the IHO's decision, a prehearing conference took place on September 29, 2017 (IHO Decision at p. 6; see IHO Ex. III); however, no transcript or written summary of the prehearing conference was included in the hearing record transmitted to the Office of State Review, as required by State regulation (8 NYCRR 200.5[j][3][xi]).

[7] The IHO also found that the issue of child find was "moot" since "the crux" of the due process complaint notice was the district's response to the student's deteriorating behavior during the 2014-15 school year, including the June and September 2015 IEPs (id. at p. 31).

[8] The IHO noted that the program recommendations on the June and September 2015 IEPs were virtually identical and, therefore, he assessed the appropriateness of the two IEPs together (IHO Decision at pp. 31-34).

argument with respect to parental participation, which the IHO found had no merit as the district considered "the clinician's recommendations" even though it chose not to follow those recommendations (IHO Decision at p. 30).

The IHO found that the program recommendations in both the June 2015 and September 2015 IEPs were insufficient to address the student's interfering behaviors (IHO Decision at p. 31). The IHO also noted that he gave more weight to written reports than to district witness testimony, which he found to be "self-serving and not credible" (id. at pp. 31-32).[9] Specifically, the IHO discounted the testimony of the student's science teacher, the school psychologist, and the guidance counselor regarding the seriousness and the extent of the behaviors the student exhibited in school (id.). The IHO did not agree with the district's position that the student's emotional issues were only "'family problems'" and found that they were caused by his "school performance stressors as well as family issues" (id. at pp. 32-33). The IHO found that the student's emotional issues and behavioral outbursts progressed "to the point that he required extreme interventions to address his emotional condition and enable him to be ready to learn" (id. at p. 33). The IHO further agreed with the evaluators and professionals who indicated that the student required a residential placement to address his emotional and behavioral issues (id.). The IHO determined that both the June 2015 and September 2015 IEPs failed to reflect or address the student's significant acting out and interfering behaviors; as a result, the IHO also found that the district should have conducted an FBA (id.). The IHO further found that the program recommendations in the IEPs—specifically a single session of counseling per week and a daily instructional support period—were inadequate to address the student's severe behaviors and underlying emotional issues (id. at p. 34). The IHO determined that the September 2015 CSE's decision to apply for a BOCES placement was an implicit acknowledgment that the placement recommended in the IEP was insufficient to address the student's needs (id.). Moreover, the IHO found that the social/emotional and behavioral goals included in the June 2015 and September 2015 IEPs were vague and insufficient to address the student's emotional issues and interfering behaviors (id.). As a result, the IHO determined that the June 2015 and September 2015 IEPs were substantively inappropriate (id.).

As to the parents' unilateral placement of the student at Discovery, the IHO determined that Discovery was appropriate because it addressed the student's specific emotional and behavioral issues that interfered with his education, including providing intensive individual group and family therapy in a small, structured environment consisting of therapeutic and academic staff (IHO Decision at pp. 34-35). The IHO also determined that Discovery "provided a sufficient academic component" (id. at p. 34). The IHO noted that, while the student's academic progress at Discovery was slow, the therapeutic component was more important (id. at p. 35). Therefore, the IHO determined that the program was appropriate for the student (id.). The IHO also found that equitable considerations supported tuition reimbursement as the parents communicated and cooperated with the CSE, provided the CSE with all private evaluation reports, provided the CSE with consent to communicate with private clinicians and Discovery staff, attended all CSE meetings, and provided notice of their intent to unilaterally enroll the student at Discovery and seek reimbursement (id.). Moreover, the IHO found that the parents' disagreement with the CSE's recommendations did not indicate that they would not have considered other recommendations,

[9] The IHO found that, while neither side produced documentation of what occurred at the superintendent's hearing after an incident in April 2015, the IHO credited the student's mother's testimony that the district informed her that the student was not permitted to return to the district high school (IHO Decision at p. 32).

and, thus, did not preclude relief (id.). The IHO also found the amount requested for tuition was reasonable (id.).

The IHO awarded the parents reimbursement for the cost of the student's tuition at Discovery for the period from August 26, 2015 through January 16, 2016 (IHO Decision at p. 36).

IV. Appeal for State-Level Review

The district appeals and asserts multiple grounds for review of the IHO's decision. Initially, the district asserts that the IHO erred in finding that consideration of the June 2015 IEP was not barred by the statute of limitations. The district asserts that the June 2015 CSE meeting was held more than two years prior to the date of the filing of the due process complaint notice, and that the "consideration of any issues arising from the CSE meeting or in the IEP developed at the meeting should be barred by the statute of limitations."

Next, the district maintains that the IHO erred in finding that the district did not recommend an appropriate program for the 2015-16 school year to address the student's social/emotional, academic, and executive functioning issues. The district asserts that an instructional support class with counseling was appropriate to address the student's "executive functioning deficits and his social/emotional issues." Specifically, the district contends that the evidence in the hearing record supports once weekly counseling sessions for the student to address the student's "decision-making skills, social judgment and self-monitoring skills." As to the instructional support class, the district maintains that it was appropriate because it would have addressed the student's executive functioning, organizational, and attentional needs. Contrary to the IHO's determination, the district also claims that there is no indication in the hearing record that the student engaged in behaviors at school to such an extent that the recommended program was inappropriate.[10]

The district contends that the IHO erroneously ruled that the student was not permitted to return to the high school following the April 2015 incident; the district argues that both the parents and the district agreed to continue home instruction for the student for the remainder of the 2014-15 school year following his suspension. The district claims that the IHO also erred in finding that the social/emotional and behavioral goals in the June 2015 and September 2015 IEPs were vague and insufficient to address the student's emotional issues and interfering behaviors. The district contends that the IHO's finding is not supported by the hearing record and he failed to state the reasons for ruling that the goals were vague.

The district claims that the IHO incorrectly found that the district should have conducted an FBA. The district notes that the parent signed consent for the initial evaluation in May 2015, shortly after the student was suspended in April 2015 and that, because the student was not attending school, an FBA could not be completed to determine the functions of the student's behaviors at school. The district further asserts that the June 2015 CSE recommended that an FBA be conducted when the student returned to school for the 2015-16 school year.

[10] The district also contends that the IHO mischaracterized the events that occurred during the 2014-15 school year; for example, the district questions the IHO's statement that the student "stole" a teacher's wheelchair, pointing out that district staff testified that he "took" or "used" the teacher's wheelchair.

The district asserts that the IHO erred in finding that the student required a therapeutic residential placement. The district contends that the student was able to function in a general education setting with support and that a residential placement would have been too restrictive. The district further asserts that there were only a few incidents at school during the 2014-15 school year and they did not demonstrate the student had severe emotional issues requiring a residential placement.

The district also maintains that the IHO erred in finding that the September 2015 CSE's decision to apply to a BOCES program implicitly acknowledged that the program recommended on the IEP was inappropriate. The district argues that the CSE agreed to apply to BOCES as a compromise to the parents and that the classroom ratio and frequency of counseling offered by the BOCES program was not known at the time.

Regarding the appropriateness of Discovery, the district claims that the IHO erred as Discovery was overly restrictive for the student. Further, the district claims there was no evidence in the hearing record that Discovery met any of the student's needs or evidence that Discovery provided the student social/emotional or academic benefits. As to equitable considerations, the district claims the IHO erred in finding that equitable considerations favored tuition reimbursement, as the parents were not open to considering any other program aside from a residential placement. Further, the district points out that the parents did not agree to the district's program because they were "mandated to place [the student] in a residential facility."

In an answer, the parents generally admit and deny the district's allegations and argue that the IHO's decision should be upheld 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]).[11]

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. Statute of Limitations

The district appeals and asserts the IHO erred in finding that consideration of the June 2015 IEP was not barred by the statute of limitations.[12] The IDEA requires that, unless a state establishes a different limitations period under state law, a party must request a due process hearing within two years of when the party knew or should have known of the alleged action that forms the basis of the complaint (20 U.S.C. § 1415[f][3][C]; see also 20 U.S.C. § 1415[b][6][B]; Educ. Law § 4404[1][a]; 34 CFR 300.511[e]; 8 NYCRR 200.5[j][1][i]). New York State has affirmatively adopted the two-year period found in the IDEA (Educ. Law § 4404[1][a]; 8 NYCRR 200.5[j][1][i]).

The parents' claims related to the June 2015 IEP include allegations that the CSE's recommendations were made without meaningful parent participation, that the program was predetermined, that the CSE did not consider other program options, that the CSE did not consider

[11] 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).

[12] Neither party has appealed from the IHO's determinations related to child find, including that those claims were barred by the statute of limitations; accordingly, they have become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514 [a]; 8 NYCRR 200.5 [j][5][v]; see 8 NYCRR 279.8 [c][4] ["Any issue not identified in a party's request for review, answer, or answer with cross-appeal shall be deemed abandoned and will not be addressed by a State Review Officer"]).

input from the student's providers, and that overall the recommendations made by the CSE were substantively inappropriate and inadequate (Dist. Ex. 1 at pp. 7-8).[13] The parents' claims are such that they each likely accrued at the time of the June 2015 CSE meeting or when the parents received a copy of the resultant IEP (see Bd. of Educ. of N. Rockland Cent. Sch. Dist. v. C.M., 2018 WL 3650185, at *2 [2d Cir. Aug. 1, 2018] [claim accrued when district denied parent's request for a residential placement]). The student's mother testified that the June 2015 CSE reviewed the entire IEP, including the recommendations, at the meeting and that she received a packet at the time of the meeting (Tr. pp. 525-26, 583-85). As the parents were aware of the June 2015 CSE recommendations as of the date of the meeting, and those recommendations form the basis of the parents' complaint, their claims with respect to the June 2015 CSE meeting and June 2015 IEP accrued in June 2015.

The parents argue for upholding the IHO's reasoning that because the June 2015 IEP was the IEP in effect at the start of the 2015-16 school year—within two years from the filing of the due process complaint notice on August 16, 2017—it is not barred by the statute of limitations. While the date of the CSE meeting may not be determinative for statute of limitations purposes where the parent challenged the IEP and the implementation of the IEP (K.P. v. Juzwic, 891 F. Supp. 703, 716-17 [D. Conn. 1995]), as noted above, the parents' claims all relate to the development of the June 2015 IEP and its recommendations, not to implementation (see Dist. Ex. 1). Accordingly, this does not impact on the accrual date of June 2015.

The IHO found no reason to "'toll'" the statute of limitations (IHO Decision at pp. 30-31); in other words, no reason to apply the exceptions. The parents have not appealed this determination or otherwise raised any exceptions to the statute of limitations.[14]

For the above reasons, the IHO's determination is reversed and the parents' claims related to the June 2015 CSE and resultant IEP are barred by the statute of limitations. However, the student was enrolled at Discovery on August 26, 2015, approximately eleven school days before the CSE reconvened on September 10, 2015 to recommend a placement for the 2015-16 school year (Tr. pp. 603-04; Parent Exs. 7; 8; Dist. Ex. 5). The September 2015 CSE meeting was held within two years from the filing of the due process complaint notice on August 16, 2017. As a result, even though the parents' claims related to the June 2015 IEP are barred by the statute of limitations, the parents' claims related to the September 2015 CSE meeting and resultant IEP can still form the basis for an award of tuition reimbursement for the student's placement at Discovery

[13] Neither party has appealed from the IHO's determination that the parents' allegations that they were denied meaningful participation in the June and September 2015 CSE meetings was meritless (IHO Decision at p. 30), accordingly, this finding has become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514 [a]; 8 NYCRR 200.5 [j][5][v]; see 8 NYCRR 279.8 [c][4]).

[14] Two exceptions to the statute of limitations may apply to the timelines for requesting impartial hearings. The first exception applies if a parent was prevented from filing a due process complaint notice due to the district withholding information from the parent that the district was required to provide (20 U.S.C. § 1415[f][3][D][ii]; 34 CFR 300.511[f][2]; 8 NYCRR 200.5[j][1][i]). A second exception may apply if a parent was prevented from filing a due process complaint notice due to a "specific misrepresentation" by the district that it had resolved the issues forming the basis for the due process complaint notice (20 U.S.C. § 1415[f][3][D]; 34 CFR 300.511[f]; 8 NYCRR 200.5[j][1][i] R.B., 2011 WL 4375694, at *6).

for the period after September 10, 2015.

B. September 2015 IEP

While neither the district nor the parents raise claims with respect to the content of the evaluative information or the present levels of performance in the September 2015 IEP (with the exception of the claim relating to the FBA, discussed below), a discussion thereof is necessary to determine the student's needs and whether the recommendations the September 2015 CSE made were appropriate. Meeting information reflects that the September 2015 CSE considered a July 9, 2015 discharge report from the wilderness program, a psychiatric update dated July 28, 2015, and the court-ordered psychological evaluation report dated August 14, 2015 (Dist. Ex. 5 at pp. 1, 3; see Dist. Exs. 15; 16; 17).[15] The school psychologist who participated in the September 2015 CSE meeting testified that, prior to the meeting, she reviewed the May 2015 private neuropsychological evaluation report, the district's May 2015 psychological and educational evaluation reports, and the May 2015 letter from the student's private social worker (Tr. pp. 78-81; see Dist. Exs. 11-14).

The May 2015 neuropsychological evaluation report indicated that intellectually and academically the student functioned within the average range (Dist. Ex. 11 at pp. 5-6, 10). With respect to executive functioning skills, the evaluator indicated the student's "capacity to make rapid decisions and use his short-term memory [is] adequate, but saliently vulnerable" (id. at p. 5). The evaluator further noted that the student's delays in processing information "within his environment" may "lead to incorrect answers and missed opportunity," but, at worst, may lead to "disproportionate emotions and responses that could be dangerous" (id.). The student also exhibited a pattern of difficulty making decisions and processing information involving multiple steps, which impacted daily judgment and decision-making abilities (id.). Regarding the student's "social and emotional behavior," the evaluator noted that the student acknowledged that he had previously been suspended for "bad" behavior, often felt like he had done something wrong, had emotional outbursts, and had some habits that were considered harmful (id. at p. 6). Although the student also expressed being sad and at times feeling like he was slow-moving and not excited about anything, the evaluator noted that these were not areas of statistical or clinical significance (id.). However, the evaluator concluded that, although the student's symptoms of ADHD were at times well managed, "when his stress levels [we]re elevated due to feeling insecure, inadequate and misunderstood by peers and family, he [wa]s at significant risk for antisocial behavior" (id. at p. 7). She further noted that the student's recent level of high risk and negative behaviors were secondary to his feelings of inadequacy as a student and strained relationships and challenging dynamics at home (id.). Further, the evaluator indicated that, despite the family's active engagement in therapy, biological complexities of adolescence and the student's executive dysfunction, combined with environmental discord, "greatly" increased the student's risk for sensation seeking, peer approval, poor judgment, and self-medication (id.).

[15] The September 2015 IEP also referenced a May 22, 2015 report card, a May 22, 2015 student record review including SED testing results, and a May 22, 2015 district transcript, as well as May 22, 2015 discipline reports, and a July 31, 2015 "clinical assessment" that were not offered into evidence (Dist. Ex. 5 at p. 3). While the specific May 2015 report card and district transcript referenced in the September 2015 CSE were not offered into evidence at the impartial hearing, the student's entire high school transcript and report cards for grades 9-12 are part of the hearing record (Dist. Ex. 21).

Regarding recommendations, the evaluator indicated that the student required an IEP based on the student's emotional factors that impacted his learning and educational setting (Dist. Ex. 11 at p. 7). The evaluator noted that, as the evaluation was being completed, the student's behaviors had shown "intense regression" despite medication management and psychotherapy and opined that the student's needs were greater than traditional weekly outpatient therapy, although she believed the student was not yet a candidate for a short-term partial hospitalization program (id. at pp. 7-8). The evaluator opined that returning the student to his high school and remaining in his high-risk surrounding was "toxic," noting that the student required a residential educational setting where therapeutic support and mental health services were integrated into his day-to-day life (id. at p. 8).[16]

The September 2015 CSE also had available to it the district's May 2015 psychological and educational evaluation reports (Dist. Exs. 12; 13). The school psychologist who conducted the May 2015 psychological evaluation reported cognitive assessment results in conjunction with results from the May 2015 neuropsychological evaluation, which showed the student's performance on cognitive tasks ranged from low average to superior (Dist. Ex. 13 at p. 7). Review of the May 2015 educational evaluation report reflects a total achievement score in the average range, and results that are generally consistent with results from the May 2015 private neuropsychological academic achievement testing (compare Dist. Ex. 11 at p. 10, with Dist. Ex. 12 at pp. 3, 4). Assessments of social/emotional and behavioral functioning showed that the student rated himself in the at-risk range on scales measuring attention problems and self-esteem, and in the clinically significant range on a scale measuring self-reliance indicating areas of concern because the student did not "have confidence in his decision making, dependability and ability to solve problems" (Dist. Ex. 13 at p. 6). The student also self-reported very elevated ratings for inattention and elevated ratings on scales measuring hyperactivity/impulsivity, learning problems, and aggression (id. at p. 7). Teacher ratings yielded scores in the very elevated range for inattention and hyperactivity/impulsivity—consistent with his diagnosis of ADHD and teacher observations of the student's behavior in class—and generally in the elevated range on scales measuring defiance/aggression and learning problems/executive functioning (id.). Parent questionnaire results rated the student in the clinically significant range for scales measuring hyperactivity, conduct problems, anxiety, depression, withdrawal, attention problems, adaptability, and activities of daily living (id.). On scales measuring social skills, leadership, and aggression the parent rated the student's abilities in the at-risk range (id.). The evaluator noted that the parent's rating scores for the externalizing problems composite, internalizing problems composite, behavioral symptoms index, and adaptive skills index fell in the clinically significant range (id.). The May 2015 psychological evaluation report also noted the parent's concerns regarding the student's behavior at home and at school, his socialization and low self-esteem, that his mood impacted his behavior, and that he could be withdrawn, impulsive, and uncooperative (id.).

[16] The May 2015 neuropsychological evaluation report indicated that the ideal setting should include, among other things: a small student-to-teacher ratio; college preparatory curriculum that provides therapeutic support; a setting that promotes self-advocacy to help the student "elaborate and clarify his academic and social needs, happiness and discontent"; and "small group counseling-advanced social skills, by credentialed therapist" with a family therapy component to the program (Dist. Ex. 11 at p. 8). Additionally, the May 2015 neuropsychological evaluation report recommended that the student and family continue to engage in counseling while waiting for the residential program to begin and that the private therapist, school team, and psychiatrist should remain in close contact (id. at pp. 8-9).

The September 2015 CSE also considered the July 2015 wilderness program discharge summary prepared by the student's clinician (Dist. Ex. 17). During his time at the wilderness program, the student received group therapy twice per week, weekly individual "psychotherapy and family intervention" sessions, and daily group therapy with "trained wilderness staff" (id. at p. 1). With respect to conduct, the student was given feedback by staff, peers, and the therapist when his communication and/or behaviors were inappropriate, offensive, or threatening and, although the student was at times receptive to feedback and had taken steps to modify his behavior, the clinician noted that the student continued to struggle in this area (id. at p. 2). The discharge summary indicated that the student required "considerable" staff intervention, including limit setting and logical consequences to restore appropriate behaviors and interactions (id.). According to the clinician, the student "displayed continued behavioral inconsistency coinciding with emotional reactivity" requiring future treatment to address these areas and, although the student demonstrated some progress regarding anger and defiance, "he showed significant difficulty maintaining consistency in this area" (id.).[17] In addition, the discharge summary indicated that, despite the student's progress and skill development, he struggled to maintain focus and concentration, often failed to complete tasks and assignments, and demonstrated highly impulsive behavior that he had difficulty managing (id.). The clinician also remarked that the student's erratic behavior from day to day required the immediate attention of staff to keep him safe (id.). Further, the discharge summary indicated the student was highly susceptible to external pressures and had not yet internalized the ability to implement learned coping strategies without a structured setting (id.). Upon the student's discharge from the wilderness program on July 9, 2015, the clinician opined that returning to the student's home environment, even with intensive outpatient therapy or school accommodations, would "most certainly" result in significant regression and a return to his previous level of functioning (id.). Therefore, according to the clinician, to achieve long-term gains, the student "must be in a residential or therapeutic boarding school setting" to practice and internalize the tools he began to learn at the wilderness program (id.).[18]

In a psychiatric update dated July 28, 2015, the psychiatrist, who had treated the student from January 2010 to December 2014, offered his diagnostic impression of the student that included diagnoses of ADHD, oppositional defiant disorder of childhood-adolescence with emerging conduct disorder and antisocial traits, generalized anxiety disorder with obsessive-compulsive traits and secondary depression, and learning disability (Dist. Ex. 15 at p. 1; see Dist. Ex. 5 at p. 1). The update noted that the student presented with problems in concentration, focus, distractibility, and lack of organization skills affecting executive functioning ability, and that various medications used to target the student's ADHD symptoms met with minimal positive results (Dist. Ex. 15 at p. 1). The psychiatrist further reported that the student had become increasingly oppositional and defiant in his interactions with his family, exhibited poor coping skills, impulsivity, and low frustration tolerance affecting family, social, and peer relationships, and that over the past year his pattern of behavior had "intruded into the basic rights of others and

[17] The discharge summary also indicated that the student was resistant to interventions aimed at addressing practical skills valuable to healthy development and relationship management and struggled to practice those principles over the course of his stay (Dist. Ex. 17 at p. 1).

[18] Regarding counseling, the wilderness clinician recommended that the student receive individual, group, and family therapy and noted the student's need for supervision and additional support while developing new skills and attitudes about substance abuse (Dist. Ex. 17 at p. 2).

have violated societal norms" (id.). According to the update, the student's behaviors included lying, stealing, possible substance abuse, deceitfulness, aggression, damage to property, and runaway behaviors (id.). The psychiatrist indicated that the student had "made minimal emotional and behavioral gains over the past years," and that his "negative behaviors associated with impulsivity and inability to regulate his antisocial behaviors indicate that he requires a more structured and consistent school setting" (id. at pp. 1-2). Therefore, the psychiatrist recommended that the student be placed in a residential therapeutic school to control and regulate the student's negative interactions (id.).

As part of the August 2015 court-ordered psychological evaluation, a clinical psychologist conducted extensive interviews with the student and his parents related to family, school, social, and behavioral functioning, executive functioning, criminal history, psychological treatment and medication history, and mental status (Dist. Ex. 16 at pp. 1-7). The psychologist also administered measures of the student's cognitive skills,[19] potential psychopathology (personal, social, and behavioral problems), "behavioral markers of common adolescent psychological problems," suicidal ideation, and substance abuse (id. at pp. 1, 7-8). The evaluation report indicated that overall the student's self-report did not indicate significant levels of psychopathology, or high levels of anxiety, paranoia, anger problems, substance abuse issues, or social dysfunction (id. at pp. 7-8). However, the student's responses did suggest mildly elevated depressive symptoms, and assessment results also suggested poor insight, struggles with impulsivity, inattention, and hyperactivity, and a lack of problem solving skills (id. at p. 8). The evaluator also identified that the student had marked deficits regarding social awareness, empathy, and remorse (id. at p. 10). Further, the evaluator noted that the student was at times avoidant of social demands to the point of causing others pain and difficulty and indicated that these social deficits required "extensive clinical attention" (id.). Additionally, the student was "developing pervasive and dysfunctional personality patterns that, if left unchecked, could develop into a full personality disorder by adulthood" (id. at p. 11). Therefore, the evaluator recommended "[p]ersonality restructuring aimed at helping [the student] to understand how his attitudes are self-destructive and how altering them can be self-serving and more beneficial for others" (id.). The evaluator offered the student diagnoses including conduct disorder, dysthymic disorder, anxiety disorder, ADHD, alcohol abuse, cannabis abuse, and personality disorder (developing features of antisocial personality as well as other pervasive and dysfunctional personality patterns) (id. at p. 9). Noting that the student's behavioral problems "have clearly worsened over the past few years," the evaluator also recommended that the student be placed in a residential treatment center that focused on general behavioral and delinquency problems, and social deficits (id. at p. 10).[20]

Turning to the September 2015 IEP, the present levels of academic performance indicated that the student's reading, mathematics, and writing skills were in the average range and that he had demonstrated grade level abilities (Dist. Ex. 5 at p. 6). With respect to study skills, the IEP

[19] Results of the August 2015 brief cognitive assessment yielded scores in the average range, consistent with prior measures of the student's intellectual skills (compare Dist. Ex. 11 at p. 10 and Dist. Ex. 13 at p. 3, with Dist. Ex. 16 at p. 7).

[20] The evaluator also noted that the severity of the student's criminal behavior had worsened and recommended that the student "remain in juvenile probation" at least until he satisfactorily completed treatment (Dist. Ex. 16 at p. 10).

indicated that, as a result of his difficulties with attention, the student needed time to review lessons presented in class to ensure that he understood the content (id.). Teachers also reported that the student had difficulty completing class and home assignments consistently, was easily distracted, and struggled to follow lessons (id.). Regarding communication skills, the IEP reflected that the student needed prompts and encouragement to expand upon information and offer explanations (id.). The IEP also noted that the student had difficulty listening to instruction and identifying key details, which hindered his ability to follow through with "task execution" (id.). With respect to basic cognitive/daily living skills, the IEP indicated that the student demonstrated "executive functioning inconsistencies," and struggled with decision-making and multistep information processing (id.). The IEP also noted that the student's short-term memory was less developed, which challenged his ability to understand and respond to new, complex information (id.). The CSE determined that the student needed to learn strategies for improving skills related to decision-making, information processing, and short-term memory (id.). The IEP noted that improving these skills would help the student "understand classroom expectations and improve his ability to complete his homework and classwork consistently" (id.). The CSE also identified that the student needed assistance with maintaining attention, listening to detail, and identifying key details during class lessons, and that reviewing lessons and materials would aid his comprehension of academic content (id.).

With respect to social development, the September 2015 IEP reflected information from the August 2015 psychological evaluation report, including that the results of the standardized emotional assessment did not indicate the student exhibited significant levels of psychopathology, but that he received diagnoses of conduct disorder, dysthymic disorder, anxiety disorder, ADHD, alcohol abuse, cannabis abuse, and personality disorder (compare Dist. Exs. 5 at pp. 6-7, with 16 at pp. 7-9). The IEP also noted that the May 2015 neuropsychological evaluation did not reveal any areas of clinical significance on standardized emotional assessments, but that the evaluator indicated the student lacked insight into his internal emotions and that his executive dysfunction, combined with current psychosocial stressors, put the student at great risk for peer approval, sensation-seeking, poor judgment, and self-medication (Dist. Ex. 5 at p. 7; see Dist. Ex. 11 at p. 7). The IEP acknowledged that the student had recently exhibited "various inappropriate and destructive behaviors" both in and out of school (Dist. Ex. 5 at p. 7). The CSE determined that the student needed to improve his social judgement, decision making skills, and control, which would assist with preventing future inappropriate behaviors (id.). According to the IEP, the student's physical and motor abilities were within age-appropriate expectations and he received medication to help manage the symptoms of ADHD, his dysthymic disorder, and anxiety (id.).

1. Functional Behavioral Assessment

Although the parents did not challenge the content of the evaluative information available to the September 2015 CSE, they did allege, and the IHO agreed, that the September 2015 CSE should have had an FBA of the student conducted prior to the CSE meeting (IHO Decision at pp. 33-34; Dist. Ex. 1 at p. 6). The district claims that the IHO incorrectly found that an FBA should have been conducted because the student was not attending school at the time the parent signed consent for the initial evaluation in May 2015 and an FBA could not have been completed to determine the functions of the student's behaviors at school until the student returned to school. Contrary to the district's claims, the evidence in the hearing record shows that the district should have, at the very least, initiated an FBA prior to the September 2015 CSE meeting.

Under the IDEA, a CSE may be required to consider special factors in the development of a student's IEP. Among the special factors in the case of a student whose behavior impedes his or her learning or that of others, the CSE shall consider positive behavioral interventions and supports, and other strategies, to address that behavior (20 U.S.C. § 1414[d][3][B][i]; 34 CFR 300.324[a][2][i]; see 8 NYCRR 200.4[d][3][i]; see also E.H. v. Bd. of Educ. of Schenendehowa Cent. Sch. Dist., 361 Fed. App'x 156, 160 [2d Cir. Oct. 16, 2009]; A.C., 553 F.3d at 172). State procedures for considering the special factor of a student's behavior that impedes his or her learning or that of others may also require that the CSE consider developing a BIP for a student that is based upon an FBA (8 NYCRR 200.4[d][3][i], 200.22[a], [b]). Additionally, a district is required to conduct an FBA in an initial evaluation for students who engage in behaviors that impede their learning or that of other students (8 NYCRR 200.4[b][1][v]). 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]).

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" (R.E., 694 F.3d at 190; see L.O. v. New York City Dep't of Educ., 822 F.3d 95, 112-13 [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, substantive review is impaired because it is impossible to know what information an FBA would have provided, and particular care must be taken to determine whether the CSE had sufficient information to appropriately address the student's problem behaviors (R.E., 694 F.3d at 190).

Initially, much of the district's rationale for not conducting an FBA focuses on the student's behavior during the 2014-15 school year. With the exception of the incident that resulted in the superintendent's hearing, which the CSE chairperson noted "came to a concerning level," the chairperson testified that the other incidents the student exhibited at school were within the "scope of typical adolescent behaviors at the high school" and characterized them as "typical adolescent . . . poor choices" (Tr. pp. 347, 390-91; see Dist. Exs. 4 at p. 1; 5 at p. 1). According to the CSE chairperson, teacher reports indicated that the student's behavior in the classroom was "inconsistent" related to his lack of executive functioning skills, but that he was "never" disrespectful, a chronic liar, or aggressive and did not present with "any kind of at-risk behaviors"

(Tr. pp. 347-48). The school psychologist testified generally that the student's teachers reported that the student was well behaved in class, and the student's biology teacher in the 2014-15 school year testified that "I never had any behavior problems with him in the classroom at all," other than making inappropriate jokes on occasion (see Tr. pp. 115, 408-11).

Other evidence suggests, however, that district staff were aware of the seriousness of the student's behaviors. For instance, the CSE chairperson testified that the parents referred the student to the CSE during the penalty phase of the superintendent's hearing due to their concern regarding the student's behavior and emotional state, and that it was "fair to say that the district was aware" of the concerns the student was generating and was "moving in that direction," in that the district's instructional support team was also bring up concerns about the student's performance in school (Tr. pp. 345, 355-57). Moreover, contrary to the school psychologist's testimony, it appears that the student's teachers reported greater concern for the student overall during the 2014-15 school year. According to the results of the May 2015 psychological evaluation, several of the student's teachers rated the student's social/emotional functioning in the very elevated range on scales that measured inattention, hyperactivity/impulsivity, and defiance/aggression, and in the elevated range on scales related to learning problems/executive functioning (Dist. Ex. 13 at p. 7).

Beyond the question of whether the student's in-school behaviors during the 2014-15 school year warranted an FBA as part of the initial evaluation in May 2015, the information in the hearing record shows that, during the time leading up to the September 2015 CSE meeting, the CSE had additional information indicating that the student's behaviors interfered with learning. The June 2015 CSE discussed the student's need for an FBA and decided "to wait until the student [wa]s in attendance to determine if a FBA/BIP [wa]s necessary" (Dist. Ex. 4 at p. 2). The September 2015 IEP indicated that the student needed "strategies, including positive behavioral interventions, supports and other strategies to address behaviors that impede the student's learning or that of others" but that he did not need a BIP (Dist. Ex. 5 at p. 7). Most significantly, the student's behaviors had resulted in his removal from school at the end of the 2014-15 school year (Tr. pp. 93, 136-38, 142, 233-34). Additionally, the September 2015 CSE considered a July 9, 2015 discharge report from the wilderness program, a psychiatric update dated July 28, 2015, and the court-ordered psychological evaluation report dated August 14, 2015, which, as discussed within the evaluative information above, all indicated that the student was exhibiting increasing behaviors (see Dist. Exs. 15; 16; 17). As noted in the August 14, 2015 psychological evaluation report, the student's "defiance and behavioral problems were well-documented" (Dist. Ex. 16 at p. 7; see Dist. Exs. 11-17).

The district argues that it was not possible to conduct an FBA at the time of the September 2015 CSE because the student was not attending a district school. Although the September 2015 IEP does not reflect discussion about whether an FBA was required, the school psychologist testified that the September 2015 CSE discussed that the student would "potentially" need an FBA if, after his return to the district, staff "continued to see some inappropriate behaviors" (see Tr. p. 157; Dist. Ex. 5). She further indicated that, if the student had one more "incident of inappropriate behavior" upon his return to the district, an FBA would have been conducted "regardless" of the type of incident (Tr. pp. 158-59, 172). She also testified that a student is required to be in school in order for an FBA to be conducted (Tr. pp. 178-79).

The district's position highlights a tension that exists between the environment-focused nature of an FBA and its relationship to when an FBA should be conducted. State guidance suggests that the decision of timing and the environment in which an FBA should be conducted is a matter under State policy that has been left to the CSE to decide ("Guide to Quality Individualized Education Program [IEP] Development and Implementation," at p. 22, Office of Special Educ. [Dec. 2010] [noting the student's need for a BIP must be documented in the IEP, and, prior to the development of the BIP, an FBA either "has [been] or will be conducted"] [emphasis added], available at http://www.p12.nysed.gov/specialed/publications/iepguidance/IEPguideDec2010.pdf). As an FBA is defined as the process of determining why a student engages in behaviors that impede learning and how the student's behavior relates to the environment (8 NYCRR 200.1[r]), it is understandable that a district may want to wait for the student to transfer school environments prior to completing the evaluation (Bd. of Educ. of Wappingers Cent. School Dist. v M.N., 2017 WL 4641219, at *12 [S.D.N.Y. Oct. 13, 2017] [finding that, where the district evaluated the student at his out-of-State residential program and the out-of-State placement differed from the possible district placements, "the sole fact that [the district] did not conduct an FBA prior to the implementation of an IEP does not amount to a denial of FAPE"]).[21] On the other hand, in its opinion in R.E., the Second Circuit Court of Appeals unambiguously stated that "the entire 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" (694 F.3d at 190 [emphasis added]; see L.O., 822 F.3d at 111), evincing a view that an FBA must, in order to be procedurally compliant, always be drafted prior to or at the time of the development of the IEP, which must, by definition be completed before a student is placed.[22]

Accordingly, under the present circumstances, the district's position that it had to wait for the student to return to the district to complete an FBA is not necessarily consistent with the Second Circuit's interpretation of the district's responsibilities. Moreover, in terms of the logistics of conducting an FBA of the student while the student was attending the out-of-State wilderness program, it is unclear why an FBA could not have at least been initiated prior to the transfer of the

[21] Once, in a summary order only, the Second Circuit explicitly addressed the timing for conducting an FBA in light of parallel IDEA and State regulatory standards then in effect, holding that it does not follow that in every circumstance an FBA must be conducted and a BIP developed at the same time as the IEP (see Cabouli v. Chappaqua Cent. Sch. Dist., 202 Fed. App'x 519, 522 [2d Cir. Oct. 27, 2006] [noting that it may be appropriate in some circumstances to address a student's behaviors in an IEP by noting that an FBA and BIP will be developed after a student is enrolled at the proposed district placement]). However, that decision was issued prior to and could not have addressed the timing factor in light of the State's subsequent promulgation of program standards in 8 NYCRR 200.22 and the addition of explicit definitions for the terms FBA and BIP to 8 NYCRR 200.1. Although FBAs and BIPs have become frequently litigated issues in New York in the special education context, none of the case law of which I am aware in New York has discussed in any significant detail either the timing factor or the environmental factor of the FBA, although a handful of cases have recognized and mentioned that such factors exist with respect to FBAs and BIPs (see, e.g., Bd. of Educ. of Wappingers Cent. School Dist., 2017 WL 4641219, at *12; B.K. v. New York City Dep't of Educ., 12 F. Supp. 3d 343, 365 [E.D.N.Y. 2014]; J.C.S. v. Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, at *13 [S.D.N.Y. Aug. 5, 2013]; M.M. v. New York City Dept. of Educ. Region 9 (Dist. 2), 583 F. Supp. 2d 498, 510; [S.D.N.Y. 2008]).

[22] In R.E. and L.O., the Court indicates that, if a student has interfering behaviors, a BIP must be developed, citing 8 NYCRR 200.22 (R.E., 694 F.3d at 190; L.O., 822 F.3d at 111; see A.M. v. New York City Dep't of Educ., 845 F.3d 523, 535 [2d Cir. 2017]; however, the text of the regulation actually indicates that the CSE "shall consider the development of a [BIP]" (8 NYCRR § 200.22[b]), which language is less absolute.

student back to the district school, because, as noted above, an FBA is not composed solely of direct observation of the student but should also be based on "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's record and other sources including any relevant information provided by the student's parent" (8 NYCRR 200.22[a][2]).

Under the circumstance of this case, the district's failure to conduct an FBA prior to the September 2015 CSE may have been a procedural violation but it is unnecessary to make that determination or otherwise opine on whether such a violation would, on its own, necessarily rise to the level of a denial of a FAPE (see R.E., 694 F.3d at 190), since, as discussed below, the September 2015 CSE's recommendations were not supportive enough and did not sufficiently address the student's social/emotional and behavioral needs and, therefore, substantively failed to offer the student a FAPE for the 2015-16 school year.

2. Annual Goals

The district argues on appeal that the IHO erred in finding that the student's social/emotional and behavioral annual goals were insufficient and vague; the district also claims that the IHO's finding is not supported by evidence from the hearing record and that he failed to state the reasons for ruling that the goals were vague.

An IEP must include a written statement of measurable annual goals, including academic and functional goals designed to meet the student's needs that result from the student's disability to enable the student to be involved in and make progress in the general education curriculum; and meet each of the student's other educational needs that result from the student's disability (see 20 U.S.C. § 1414[d][1][A][i][II]; 34 CFR 300.320[a][2][i]; 8 NYCRR 200.4[d][2][iii]). Each annual goal shall include the evaluative criteria, evaluation procedures and schedules to be used to measure progress toward meeting the annual goal during the period beginning with placement and ending with the next scheduled review by the committee (8 NYCRR 200.4[d][2][iii][b]; see 20 U.S.C. § 1414[d][1][A][i][III]; 34 CFR 300.320[a][3]).

A review of the September 2015 IEP shows that it included five annual goals: three study skills goals and two social/emotional and behavioral goals (Dist. Ex. 5 at pp. 8-9). The first social/emotional goal states that the student will "identify and comply with teacher directives, classroom rules/expectations and school rules throughout the school day" (id. at p. 9). The second social/emotional goal states that, when the student is "faced with a social conflict with peers or adults, [he] will use positive strategies . . . to resolve the conflict," including assertive communication, problem solving, and seeking appropriate assistance (id.).

With respect to the first goal, the school psychologist testified that the goal was for the student to "identify and comply with teacher directions, classroom rules and expectations" as well as school rules throughout the day (Tr. pp. 105, 108).[23] The school psychologist further indicated that the goal was to help the student "monitor and maintain appropriate behavior in school," and

[23] I note that testimony with respect to these goals often references the June 2015 IEP; however, the social/emotional and behavioral goals included in both the June and September IEPs are identical (see Tr. pp. 33-34, 403; compare Dist. Ex. 4 at p. 8, with Dist. Ex. 5 at p. 9).

address his poor judgment and problem-solving skills (Tr. pp. 108, 156). According to the school psychologist, the first goal did not include specific strategies because "each teacher in their classroom has different rules and expectations," and that, while the school has a code of contact, there are also "class specific, teacher specific" rules in place (Tr. p. 160). The school psychologist noted that all students were responsible to the code of conduct (id.). She also noted that progress toward this goal would be measured by the number of behavioral incidents the student had (see Tr. p. 161). According to the school psychologist, the second goal, referencing "conflict," related to the student's inability to appropriately use social skills, the need to teach him "positive strategies to appropriately socialize," and the need to improve social interactions with peers, as this lack of ability was a concern of both the parents and evaluators (Tr. pp. 108, 156; see Dist. Exs. 11 at p. 3; 16 at pp. 10-11).

Specific to the IHO's finding that the social/emotional and behavioral annual goals were "vague," as described above, each goal addressed student-specific needs identified in the present levels of performance: improving controlled and compliant behavior and also social judgement and decision-making skills (see Dist. Ex. 5 at pp. 7, 9). Additionally, both social/emotional and behavioral goals include required evaluative criteria (e.g. 90 percent success over 10 weeks, 75 percent success over 10 weeks), evaluation procedures (e.g. teacher and therapist observations), and schedules to measure progress (e.g. quarterly). Therefore, review of the September 2015 IEP does not support the IHO's finding that the social/emotional and behavioral goals were vague. Rather, the evidence in the hearing record leads to the overall conclusion that the annual goals in the September 2015 IEP were sufficiently specific and measurable to guide instruction and to evaluate the student's progress over the course of the school year (see, e.g., R.B. v. New York City Dep't of Educ., 2016 WL 2939167 at *5-*6 [S.D.N.Y. May 19, 2016] [finding that the goals included in the IEP were sufficiently measurable as they provided enough detail to identify "the relevant benchmarks and educational objectives and also provided appropriate bases to measure and track [the student's] progress towards those goals"]). However, although the two social/emotional goals included in the September 2015 IEP were aligned with some of the student's specific identified needs, as discussed below, the overall program and placement was insufficient to address the student's social/emotional and behavioral needs.

3. 12:1 Instructional Support Special Class and Counseling Services

The district claims the IHO erred in finding that it failed to recommend an appropriate program for the 2015-16 school year to address the student's executive functioning and social/emotional needs. The district also asserts that the IHO erred in finding that the student required a residential placement to address his emotional needs, because that setting was "overly restrictive." Finally, the district also alleges that the IHO's determination that the CSE's decision to apply to a BOCES program was an "implicit" acknowledgement that the September 2015 IEP recommendations were not appropriate was an error.

As discussed at length previously, the evaluative information available to the September 2015 CSE indicated that the student required support for the following: executive functioning difficulties that impacted his learning; inattention and impulsivity that negatively affected his ability to complete assignments; deficits related to weakness in study skills requiring the need to review lessons; and difficulties processing multistep information, which limited his ability to understand and respond to new complex information (Dist. Exs. 5 at pp. 6-7; 11 at pp. 5-7; 15 at

p. 1; 16 at pp. 3, 5, 8-10; 17 at p. 2). To address the student's executive functioning needs, the September 2015 CSE recommended a daily, 40-minute 12:1 instructional support special class (Dist. Ex 5 at p. 9). According to the school psychologist, the instructional support class was for students who "might be struggling academically," which helped them maintain organizational skills (Tr. p. 101).

The student's guidance counselor testified that, although at the time of the CSE meetings she did not believe the student needed an instructional support class because "academically [the student] was . . . okay," she opined that the class would help the student keep organized and focused throughout the school day (Tr. pp. 181, 185, 205, 254-55). The school psychologist also testified that academically the student was doing well and indicated that the district would be able to support his executive functioning deficits in the instructional support special class (see Tr. pp. 100-01, 117-18). The CSE chairperson testified that the instructional support special class was appropriate to address the student's "underlying executive functioning issues, the organizational issues, [and] the attentional issues" (Tr. pp. 351-52). Additionally, the September 2015 IEP provided the student with special seating arrangements near the source of instruction, and refocusing, redirection, and prompts for on-task behavior as needed throughout the school day in his classrooms (Dist. Ex. 5 at p. 9). The IEP also provided testing accommodations to the student including extended time, and test administration in a location with minimal distractions (id. at p. 10). To the extent that the instructional support special class, in conjunction with the other supports provided in the September 2015 IEP, addressed the student's deficits related to executive functioning, organizational issues, and attentional issues, the September 2015 CSE's recommendation was appropriate.

However, the hearing record also indicates the student had extensive social/emotional and behavioral needs, which the September 2015 CSE's recommendations did not adequately address. The May 2015 private neuropsychological evaluation report identified that when his stress levels were elevated the student was at significant risk for antisocial behavior, and he had exhibited "high-risk and destructive" behaviors (Dist. Ex. 11 at p. 7). In the May 2015 district psychological evaluation report, teachers noted that the student had issues with impulsivity, aggression, defiance, and inattention, and the student himself noted that he experienced elevated levels of inattention, hyperactivity/impulsivity, and aggression (Dist. Ex. 13 at p. 7). In July 2015 the student's former private psychiatrist reported that the student was becoming increasingly oppositional and defiant with respect to his family and academic functioning (Dist. Ex. 15 at p. 1). The private psychiatrist also noted that the student demonstrated repetitive and persistent behaviors that were deceitful, aggressive, and in serious violation of societal rules (id.). The August 2015 psychological evaluation report indicated that the student struggled with impulsivity, inattention, and hyperactivity, that he had a "marked deficit in regard to social awareness, empathy and remorse" and that he was at times avoidant of social demands to the point of causing others pain (Dist. Ex. 16 at pp. 8, 10). Moreover, the evaluator reported that the student's behavioral problems had worsened over the past few years (id. at p. 10).

The September 2015 CSE recommended that the student receive one 30-minute session of individual counseling per week to address his social/emotional and behavioral needs (Dist. Ex. 5 at p. 9).

The school psychologist testified that, prior to the September 2015 CSE meeting, she spoke with the student's Discovery therapist to get an understanding of the student's level of functioning and to discuss his emotional and behavioral issues to assist with developing the IEP for the 2015-16 school year (Tr. pp. 115-18; see Tr. p. 801). According to the school psychologist, counseling was recommended to address the student's decision-making and problem-solving skills, social judgment, and self-monitoring needs (Tr. pp. 105, 111). The CSE chairperson also testified that counseling was put into place to "try to get at the heart of some of the social/emotional concerns that were being suggested from the parents' reports" (Tr. p. 352). The school psychologist also testified that, for the 2015-16 school year, one session per week of counseling was sufficient because, during the 2014-15 school year, the district documented that "counseling was helping improve" the student's grades (Tr. pp. 101-02, 118).

The district points to the benefits of intermittent informal counseling during the 2014-15 school year as evidence that the counseling sessions were working and suggests that it would be reasonable to suspect that formal weekly counseling during the 2015-16 school year would have "work[ed] even better" for the student. The hearing record is unclear how much counseling the student received during the 2014-15 school year (see Tr. pp. 66, 76, 78, 131-32). Although the district asserts that the counseling the student received during the 2014-15 school year was successful (see Tr. pp. 96, 102, 118, 131, 234, 239), this argument is belied by the fact that the student was placed on home instruction for the remainder of the 2014-15 school year following the April 2015 incident, after he had received counseling for previous behavioral incidents (see Tr. pp. 66-69, 76, 78, 93, 135-38, 234, 239).

In addition, the evaluative information and subsequent recommendations available to the September 2015 CSE indicated that one counseling session per week would have been inadequate to address the student's social/emotional and behavioral needs and that more extensive supports and services were necessary. The May 2015 neuropsychological evaluation report indicated that the student's behavioral regression was so intense that he required greater than weekly outpatient therapy, despite already receiving psychotherapy and medication administration (Dist. Ex. 11 at pp. 2, 7-8). The evaluator also determined that the student required an IEP based on the student's emotional factors that impacted his learning and educational setting, and a "residential educational setting" where therapeutic support and mental health services were integrated into his day to day life (id. at pp. 7-8). The wilderness program discharge summary indicated that, as of July 2015, the student continued to be "highly susceptible" to external pressures and had not yet internalized coping strategies and that, therefore, he "must be in a residential or therapeutic boarding school setting" to prevent regression of the progress made at the wilderness program and achieve long-term gains (Dist. Ex. 17 at p. 2). In July 2015, due to ongoing social/emotional and behavioral difficulties, the student's former psychiatrist recommended that the student be placed in a therapeutic residential school (Dist. Ex. 15 at pp. 1-2). Moreover, the August 2015 psychological evaluation identified that the student exhibited mood problems, difficulty with impulsivity and lack of judgement, and social deficits that required "extensive clinical attention" and placement in a "residential treatment center" (Dist. Ex. 16 at pp. 8-10).

While the CSE was not required to adopt the recommendations of the private evaluators (J.C.S. v. Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, at *11 [S.D.N.Y. Aug. 5, 2013]; at *11 [holding that "the law does not require an IEP to adopt the particular recommendation of an expert; it only requires that that recommendation be considered in developing the IEP"];

Watson v. Kingston City Sch. Dist., 325 F. Supp. 2d 141, 145 [N.D.N.Y. 2004] [holding that a CSE's recommendation is not necessarily rendered inappropriate by "[t]he mere fact that a separately hired expert has recommended different programming"], aff'd, 142 Fed. App'x 9 [2d Cir. July 25, 2005]), given the consensus in the documentation from the student's private providers and evaluators about the student's social/emotional and behavioral needs, the CSE did not sufficiently explain why the recommended program would be appropriate (see A.M. v. New York City Dep't of Educ., 845 F.3d 523, 544-45 [2d Cir. 2017]).. Therefore, review of the hearing record supports the IHO's finding that the September 2015 CSE's recommendation of one counseling session per week was inadequate to address the student's behaviors and underlying emotional issues and denied the student a FAPE for a portion of the 2015-16 school year (see IHO Decision at p. 34).

Finally, having already determined that the program offered in the September 2015 IEP did not address the student's social/emotional needs and that the district did not offer the student a FAPE, it is unnecessary to address the district's remaining claims that the IHO erred in finding that the student required a "structured, therapeutic environment in a residential facility" and in finding that the September 2015 CSE's decision to apply to a BOCES program implicitly acknowledged that the program recommended on the IEP was inappropriate. Nevertheless, further comment on the latter finding of the IHO is warranted. Meeting information attached to the September 2015 IEP reflects that the CSE "agreed to send application packets to . . . BOCES for a day placement" (Dist. Ex. 5 at p. 2). The school psychologist testified that the district was willing to "compromise with the parents and make outside applications to BOCES placements" in the event the student came back to the district and was not able to "participate in the public school setting" (Tr. pp. 112-13). While the school psychologist testified that the district applied to the BOCES to "pacify the parents," she also noted that an application was made to ensure that, if the student required such a placement in the future, the district would be "prepared" to make such a recommendation (Tr. pp. 163-64). The CSE chairperson also testified that, after rejecting the parents' request for a residential placement, in an effort to consider other placements on the continuum, the CSE took "a look at an out-of-district placement as a possibility" when it sent an application to the BOCES (Tr. pp. 387-88). However, he further testified that the "recommendation stood" as the instructional support class and counseling on the September 2015 IEP (Tr. p. 338).

The September 2015 CSE's willingness to consider a BOCES placement in response to the parents' request for a more supportive placement should not be weighed against the CSE's ultimate recommendation, as it is the district's responsibility to recommend an appropriate placement while also ensuring that district members of the CSE conduct themselves in a manner consistent with the cooperative process envisioned by Congress as the "core of the [IDEA]" (see Schaffer v. Weast, 546 U.S. 49, 53 [2005], citing Rowley, 458 U.S. at 205-06). However, as discussed above, the September 2015 CSE's ultimate recommendation for a 12:1 instructional support special class and one session of counseling per week was inadequate to address the student's needs.

C. Unilateral Placement

The district claims there is no evidence that Discovery met any of the student's special education needs or provided "interventions and supports" to address the student's executive functioning, organization, and attention needs. The district also argues that there is no evidence in the hearing record that the student received academic and social/emotional benefits from the

program at Discovery. Additionally, the district asserts that Discovery was "overly restrictive" for a student with average cognitive and academic skills and behavioral issues that were "not severe," and could be "managed within the general education high school environment."

A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak, 142 F.3d at 129). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (Carter, 510 U.S. at 13-14). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ. of the City Sch. Dist. of Yonkers, 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement'" (Gagliardo, 489 F.3d at 112, quoting Frank G. v. Bd. of Educ. of Hyde Park, 459 F.3d 356, 364 [2d Cir. 2006]; see Rowley, 458 U.S. at 207). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). When determining whether a unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether the placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see Gagliardo, 489 F.3d at 115; Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] ["evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]). A private placement is appropriate if it provides instruction specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; Educ. Law § 4401[1]; 34 CFR 300.39[a][1]; 8 NYCRR 200.1[ww]; Hardison v. Bd. of Educ. of the Oneonta City Sch. Dist., 773 F.3d 372, 386 [2d Cir. 2014]; C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 836 [2d Cir. 2014]; Gagliardo, 489 F.3d at 114-15; Frank G., 459 F.3d at 365).

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

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

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

1. Specially Designed Instruction

Contrary to the district's claim, review of the hearing record shows that Discovery addressed the student's identified special education needs. According to the principal, at the time of her testimony, there were 54 students generally between 13-18 years old attending the Discovery Academy school in two programs: Discovery Connections and Discovery Academy (Tr. pp. 645, 647). Discovery Academy issues high school diplomas and meets the "standards" for accreditation through a national accrediting board, such that credits received were "recognized," transferred "from state to state," and accepted by other schools (Tr. pp. 634, 638, 656). Discovery Academy also "works through" its state office of education regarding approved textbooks and curriculum (Tr. p. 641).

Discovery Academy staff review prior assessments, treatment plans with diagnoses, and recommendations, and talk to parents and a student's "prior treatment professionals" when making the initial determination whether the program is appropriate for a student or not (Tr. pp. 778, 782, 812-13).[24] Students at Discovery Academy take portions of the Stanford Achievement Test and assessments of math fluency, reading, and writing when they begin attending the school to inform teachers of strengths and weaknesses (Tr. pp. 654, 846-47). Following the assessment, staff interview students to determine where they remember "leaving off in school," look at transcripts, and set up individual academic plans for the students (Tr. pp. 641-43, 818, 847-48; see Dist. Ex. 20 at p. 2).[25]

Discovery Academy employs 14 teachers, certified in their content areas, who individualize programs for and work with incoming students to determine what is needed to complete high school credits (Tr. pp. 639-40, 644-45, 654, 845). Courses offered include English, history, math, and science, as well as electives such as study skills, financial literacy, coding, graphic arts, and physical education (Tr. pp. 643, 845). Discovery Academy breaks each subject into the number of "chapters" or lessons students are required to complete over the school year to achieve full credit for the course (Tr. pp. 671, 843-44; see Dist. Ex. 20 at p. 2). The school is "self-paced" in that students receive a study guide with each chapter and a rubric describing the assignment; when a chapter is completed, they take an exam to determine whether they move on to the next chapter (Tr. pp. 641-42, 843-44). Student grades are based on chapter completion, which includes reading essays and study guides, as well as their performance on testing associated with that lesson (Tr. pp. 654-55, 674-75, 872-74). Academic progress is tracked via a program that maintains the chapters completed and the students' grades by subject (Tr. pp. 850-51). Class sizes generally range from 8-10 students, who receive some in-class direct instruction from a

[24] The clinical director of Discovery Academy and Discovery Connections testified that Discovery's initial assessment does not result in a written report and accordingly, the hearing record does not include specific evidence that Discovery's initial assessment took place with this student; however, she also testified that Discovery "will vet every student to determine if it is an appropriate placement" (Tr. pp. 810-12).

[25] The principal referred to the student's academic program as an "academic plan," a "schedule," and a "progress report" interchangeably (Tr. pp. 670-71; Dist. Ex. 20 at p. 2).

teacher "on a subject that is . . . related to everybody," although students in the class may all be working "in different places within the curriculum" of the subject (Tr. pp. 640-41, 861-62).

According to the principal, about one quarter of the students in the Discovery Connections program had IEPs and were usually eligible for special education as students with an emotional disturbance, although some were also eligible as students with other health-impairments or specific learning disabilities (Tr. pp. 687-88). As to the student in this matter, after reviewing the results of the private neuropsychological evaluation, the principal testified that, based on the student's reported scores on cognitive and achievement testing, the student "fit very well with the dynamics of our students" (Tr. pp. 651-53). During his time at Discovery, the student attended classes with 12 other students in the Discovery Connections program (Tr. pp. 647-50, 659, 665-66, 816). Although the student's classes were "mixed" with students in eighth through twelfth grade, as described above, his instruction was "curriculum specific" to his age (Tr. p. 650). During his time at Discovery, the student's courses included English 11, financial literacy, algebra 2, U.S. history, physics, physical education, "assisted studies," and "study skills" (Tr. p. 659; Dist. Ex. 20). The principal testified that the courses were selected specifically for the student, although his courses reflected "a pretty typical eleventh grade schedule" (Tr. p. 659).

Turning to the district's claim that there was no evidence in the hearing record that Discovery provided "interventions and supports" for the student's difficulties with executive functioning, organization, and attention, the special education coordinator testified that, since 2010, he had been responsible for looking at incoming students' IEPs and ensuring their accommodations were met (Tr. pp. 840-42, 912; see Dist. Ex. 5 at p. 9). He testified that the school used IEP annual goals as a guide to help determine what areas to focus on for a particular student (Tr. p. 841).[26] Additionally, one to one assistance from a certified special education teacher was available to assist struggling students (Tr. pp. 840-41). Students also received individual or group direct instruction from the teacher as needed (Tr. pp. 844, 861, 900). To assist students struggling with attention difficulties, the special education coordinator testified that he and the classroom teachers held discussions with students to address why they were not making progress; they would also chunk assignments into smaller amounts, review and answer questions about completed work, provide breaks, and set individual and class goals for work completion (Tr. pp. 868-70).

The special education coordinator also testified that the student did not require much assistance academically; while he completed his work slowly and was "easily distracted," he could read and understand the material provided to him (Tr. pp. 865, 939-40). In addition, the student's master treatment plan and therapist's progress report detailed both long and short term goals and objectives related to his ADHD diagnosis, including that the student would: delay instant gratification; identify problem-solving strategies, triggers that increase hyperactivity/impulsivity, and constructive ways to use energy; increase the frequency of completing school assignments and exhibiting socially appropriate behaviors; and comply with a system to reduce impulsive, disruptive, and negative attention-seeking behaviors (Tr. p. 801; Dist. Exs. 18 at p. 1; 19). Moreover, review of the student's weekly schedule shows that the student's program addressed his

[26] The principal testified that academic goals related to a student's need to stay on grade level, make up credits, and complete high school credits and that students did not generally have academic content area goals at Discovery unless they were "struggling" or had IEP goals for reading or math (Tr. pp. 683-85).

executive function skills at various points throughout the day in both individual and group activities (Parent Ex. 4).

The special education coordinator further testified that teachers provided the student with redirection when he was distracted, and the coordinator worked with the student directly on "either a daily or a bi-daily basis," which entailed sitting with him and helping him with his work and administering chapter tests and reviewing the results with him (Tr. pp. 864-65, 915-16). Additionally, teachers rotated seating assignments, based in part on whether the student was distracted by certain features in the classroom or particular students and keeping the student away from those distractions (Tr. pp. 931-32).

Regarding the therapeutic nature of the program, the clinical director of Discovery Academy and Discovery Connections (clinical director) testified that seven therapists provide clinical services to students at the school (Tr. pp. 771-72, 775).[27, 28] Once a student was accepted to the school, they were assigned to a therapist who developed an individualized treatment plan based on the student's mental health diagnosis, prior treatment history, and "problem areas" that needed work (Tr. pp. 779-80; see Dist. Ex. 18). The treatment plan included a student's specific academic and therapy goals, including goals related to the expected behavior the student should exhibit in the classroom and at other functions (Tr. pp. 788, 813-14).[29] To track progress, the treatment team consisting of a student's clinical therapist, clinical director, teachers, and principal maintained a "constant level of collaboration," established benchmarks, and used a "level system" to measure student academic effort and progress, behavioral effort and progress, and clinical effort and progress (Tr. pp. 702-03, 782-83, 830, 870-71). At bimonthly treatment team meetings, staff documented and reviewed the progress a student had made (Tr. pp. 782, 807, 863-64). Teachers informed students' therapists about how a student performed in the classroom, and the treatment plan was updated to reflect how much work the student completed and the student's behavior during that time (Tr. pp. 655, 682, 702-03, 788-89; see Dist. Ex. 18).

Specific to the student's social/emotional and behavioral needs, when asked to review the recommendations from the May 2015 private neuropsychological evaluation report and the July 2015 psychiatric update, the clinical director testified that the Discovery Connections program was appropriate for the student and met his need for a specific type of residential educational setting where therapeutic support and mental health services were integrated into his day-to-day life, as well as continuation of family therapy (Tr. pp. 792-94, 800-01; see Tr. p. 652; Parent Ex. 4; Dist. Exs. 11 at pp. 7-8; 15 at p. 1). Review of the student's initial treatment plan and progress report

[27] Although the clinical director worked at Discovery while the student was in attendance, the clinical director was promoted to the role of clinical director after the student returned to the district high school (see Tr. pp. 774-75).

[28] According to the clinical director, all therapists had mental health licensing or were in the process of licensure (and receiving supervision) by the State, which allowed them to provide direct individual, group, and family therapy (Tr. p. 787). He further testified that the student's therapist was licensed as either a clinical mental health counselor, a clinical social worker, or a marriage and family therapist (Tr. pp. 787-88).

[29] To address problem areas, specific goals and objectives are developed using computer software and textbooks that provide "standard best practice goals" for specific diagnoses (Tr. pp. 682-83, 699-700, 780, 782, 804; see Dist. Ex. 18).

shows that the student's therapist developed long-term goals and short-term objectives for the student to address needs related to his depression including: acknowledging the depression verbally and resolving its causes; elevating mood and showing evidence of usual energy, activities, and socialization levels; reducing irritability and increasing normal social interactions with family and friends; and showing a renewed interest in academic achievement, social involvement, and eating patterns (Tr. p. 801; Dist. Exs. 18; 19 at p. 2). Goals to address the student's oppositional and defiant behaviors included: interacting with adults in a respectful manner; decreasing hostile and defensive behaviors to a socially acceptable level; decreasing the frequency of angry thoughts, feelings, and behaviors; learning and implementing stress management skills; learning assertiveness skills necessary to reduce angry feelings and solve problems; reducing intensity and frequency of hostile and defiant behaviors and replacing those behaviors with respect and cooperation; accepting responsibility for his own feelings, thoughts, and behaviors; and resolving the conflict that underlies his anger, hostility, and defiance (Dist. Exs. 18 at p. 2; 19 at p. 1).

To address these goals, the clinical director testified that students in the Discovery Connections program attended 60-minute group sessions in the morning before school and after school at the residence, Monday through Thursday, and also meet with therapists individually twice weekly (Tr. pp. 783-84, 817-18; see Parent Ex. 4). Group therapy sessions addressed social skills training, peer and family relationships, and relapse prevention planning, using "experiential activities" to help students process the clinical concepts and lessons being taught (Tr. p. 785). On Fridays and the weekend, students participated in psychosocial therapy group sessions related to recreation, leadership, and community service (Parent Ex. 4). Individual therapists met with students for one 30-minute session per week, and for one 60-minute family session per week to involve parents in the treatment process (Tr. pp. 786, 802). The clinical director testified that the approach for students exhibiting oppositional behavior "typically is very cognitive, behavioral" (Tr. p. 786). According to the principal, staff document student behaviors at the end of each shift (Tr. p. 707).

Given the above and contrary to the district's assertion, the hearing record supports the IHO's finding that Discovery addressed the student's "specific emotional and behavioral issues that interfered with his education and provided a sufficient academic component" (see IHO Decision at pp. 34-35).

2. Progress

To the extent that the district argues that the student did not receive any academic or social/emotional benefits from the Discovery program, a finding of progress is not required for a determination that a student's unilateral placement is adequate (Scarsdale Union Free Sch. Dist. v. R.C., 2013 WL 563377, at *9-*10 [S.D.N.Y. Feb. 4, 2013] [noting that evidence of academic progress is not dispositive in determining whether a unilateral placement is appropriate]; see M.B. v. Minisink Valley Cent. Sch. Dist., 523 Fed. App'x 76, 78 [2d Cir. Mar. 29, 2013]; D.D-S. v. Southhold Union Free Sch. Dist., 506 Fed. App'x 80, 82 [2d Cir. Dec. 26, 2012]; L.K. v Northeast Sch. Dist., 932 F. Supp. 2d 467,486-87 [S.D.N.Y. 2013]; C.L. v. Scarsdale Union Free Sch. Dist., 913 F. Supp. 2d 26, 34, 39 [S.D.N.Y. 2012]; see also Frank G., 459 F.3d at 364 [holding that although a student's "[g]rades, test scores, and regular advancement [at a unilateral placement] may constitute evidence that a child is receiving educational benefit, . . . courts assessing the propriety of a unilateral placement consider the totality of the circumstances in determining

whether that placement reasonably serves a child's individual needs"]). However, although not dispositive, a finding of progress is, nevertheless, a relevant factor to be considered (Gagliardo, 489 F.3d at 115, citing Berger, 348 F.3d at 522 and Rafferty, 315 F.3d at 26-27; Lexington County Sch. Dist. One v. Frazier, 2011 WL 4435690, at *11 [D.S.C. Sept. 22, 2011] [holding that "evidence of actual progress is also a relevant factor to a determination of whether a parental placement was reasonably calculated to confer some educational benefit"]).

The hearing record in this matter supports a finding that the student received academic benefit while attending Discovery. Review of the student's academic plan shows that from September 2015 to January 2016 the student completed a total of five chapters each in English 11 (A-), financial literacy (A-), U.S. history (B), and physics (B) (Dist. Ex. 20 at p. 2). He also completed 13 chapters of study skills (A-), and three chapters of algebra II (B+), for which he earned .50 and .25 credits, respectively (id.).[30, 31] The special education coordinator testified that, during the approximately 20 weeks the student attended the program, he met his weekly goal of maintaining attention to task during class lessons and assignments in order to complete them with 85 percent accuracy (Tr. pp. 912-15). According to the special education coordinator, the student's goal was to complete two chapters per week regardless of the subject, and although his progress was not as "fast" as staff would have liked, the student "was making progress" in some subject areas (Tr. pp. 867-68, 874-75, 879-80).[32] The special education coordinator also acknowledged that the student did not make sufficient progress in math, so they discussed and worked on sections of the material he found particularly difficult (Tr. pp. 875, 887, 903-04). Residential staff also reported to the principal that the student's oppositional behavior had impeded his academic progress, and the principal testified that the student earned less credits than students generally attain during a similar time-period (Tr. pp. 693-96). However, the principal indicated that students may need to focus more on their behavioral and emotional goals in order to prepare to address their academic goals, and students typically present with more behavioral and social issues than academic concerns when entering the program (Tr. pp. 696-98). Overall, while the student's academic progress may have been slower than initially predicted, the hearing record shows that the student did complete work and achieve high school credits during his time at Discovery.

Turning to the student's social/emotional and behavioral progress, reports the principal received from a residential staff member who worked closely with the student indicated that he exhibited behavioral progress during his time at Discovery (Tr. pp. 703-04, 706-07). In a report the district received in January 2016, the therapist indicated that the student got along with his peers, was not involved in "any serious incidents," was "very compliant" with staff and followed their directives, showed more "consistency" over the past few months and leadership with his

[30] The student also received .50 credits for physical education and a course entitled "[a]ssisted [s]tudies" for a total of 1.75 credits earned during his attendance at Discovery (Dist. Ex. 20 at p. 2).

[31] Study skills is a course for students to learn how to organize time, review alphabetical and numeric order, take true-false and multiple-choice tests, read charts and maps, use online materials, and increase study skills (Tr. pp. 904, 906-07; Dist. Ex. 20 at p. 2).

[32] According to the special education coordinator, although easily distracted and reportedly not motivated to complete school work, the student showed progress in his courses until November 2016, when he became "really sick" and only completed two chapters for the month (Tr. pp. 868, 874).

peers, and felt better about himself (Dist. Ex. 19 at p. 2).[33] The therapist further reported that the student was "more stable" than when he began attending the program and had completed a number of community service hours, and opined that the student attending his home high school would not be an "issue" (id.).

Accordingly, the hearing record supports a finding that Discovery was an appropriate placement for the student for a portion of the 2015-16 school year as there is sufficient evidence that instruction was specially designed to meet his unique needs and the hearing record supports a finding that the student received academic and social and emotional benefits from the program.

3. Least Restrictive Environment

Lastly, regarding the district's claim that Discovery was "overly restrictive," the district points out a legitimate concern, in that residential placements are considered more restrictive than day programs because the "norm in American public education is for children to be educated in day programs while they reside at home and receive the support of their families" (Walczak, 142 F.3d at 132, citing Carlisle Area Sch. v. Scott P., 62 F.3d 520, 534 [3d Cir. 1995]);. Nevertheless, under the circumstances of the present case, the district's LRE argument lacks merit.

Initially, although the restrictiveness of a parental placement may be considered as a factor in determining whether the parents are entitled to an award of tuition reimbursement (M.S., 231 F.3d at 105; Walczak, 142 F.3d at 122), parents are not as strictly held to the standard of placement in the LRE as are school districts (C.L., 744 F.3d at 830, 836-37; see Carter, 510 U.S. at 14-15; M.S., 231 F.3d at 105 [stating that parents "may not be subject to the same mainstreaming requirements as a school board"]) and "the totality of the circumstances" must be considered in determining the appropriateness of the unilateral placement (Frank G., 459 F.3d at 364). Additionally, while some Circuit Courts of Appeal have adopted separate tests to determine whether a unilateral residential placement is reimbursable under the IDEA, in determining the appropriateness of any unilateral placement, including a residential one, the Second Circuit has employed the analysis considering the "totality of the circumstances," with LRE being one factor (see D.D-S., 506 Fed. App'x at 82 [holding tuition reimbursement was not warranted for a residential placement because the parent did not present evidence that the placement was appropriate to address the student's educational needs]; Mrs. B., 103 F.3d at 1120-22; see also Jefferson County Sch. Dist. R-1 v. Elizabeth E., 702 F.3d 1227, 1238-39 [10th Cir. 2012], cert. denied 133 S. Ct. 2857 [2013] [holding that the essential question is whether the residential

[33] The therapist indicated the student would benefit from continued individual and family counseling to address continued needs related to honesty, sense of self, and improving relationships with his parents (Dist. Ex. 19 at p. 2).

placement provides specially designed instruction and related services to meet the student's unique needs]).[34, 35]

As discussed above in more detail, the hearing record shows that the student exhibited escalating in-school behavioral incidents beginning in November 2014 through January 2015 for which he received detention and two five day out-of-school suspensions (Tr. pp. 66-69, 124). In February and April 2015 the student was disciplined for cutting class and arriving to class 25 minutes late (Dist. Ex. 3 at p. 3). In late April 2015, the student received detention for forging a teacher's name on a pass (Tr. p. 137). Within a day or two of that incident, the student stole a cell phone from a locker and "smashed it," and also had "vaporizing paraphernalia" in his backpack resulting in another five-day out-of-school suspension and a superintendent's hearing (Tr. pp. 93, 137, 139; Dist. Ex. 3 at p. 3). Although some district witnesses testified that the parents "agreed" that, after the cell phone incident the student would not return to school and instead would receive home instruction, the parent testified she was unaware of the superintendent's hearing and only received a letter from the district informing her the student was prohibited from returning to school property for the remainder of the 2014-15 school year (compare Tr. pp. 93, 136-38, 229-30, with Tr. pp. 518-19, 576-77; see Dist. Ex. 16 at p. 3).[36] After the April 29, 2015 incident, the student did not return to school and, according to the parent, received "very little" of his home instruction and was not allowed to complete his final exams (Tr. pp. 233-34, 529). Therefore, the hearing record does not support the district's assertion that the student's in-school behaviors could be appropriately managed in a general education setting with supports.

Once the student was removed from school and the district failed to offer the student a FAPE, although it may have been more in keeping with the principles underlying LRE considerations for the parents to have explored options other than an out-of-State residential therapeutic placement, their choice of Discovery was not so restrictive that it was inappropriate (see, e.g., C.B. v. Special Sch. Dist. No. 1, 636 F.3d 981, 990-91 [8th Cir. 2011]). It is also noteworthy that the parents followed the recommendations of both private and independent evaluators who recommended that the student be placed in a residential therapeutic school (see Dist. Exs. 15 at p. 2; 16 at p. 10; 17 at p. 2). Accordingly, in light of the student's social/emotional

[34] The Circuit Courts for the Third, Fifth, and Seventh circuits have adopted various tests for determining the appropriate of a residential unilateral placement (Richardson Indep. Sch. Dist. v. Michael Z., 580 F.3d 286, 297-300, 298 n.8 [5th Cir. 2009] [holding that a residential placement must be essential for the student to receive meaningful educational benefits and primarily oriented toward enabling the student to receive an education]; Mary T. v. Sch. Dist., 575 F.3d 235, 242-44 [3d Cir. 2009] [holding that a residential placement must be necessary for educational purposes as opposed to being a response to medical or social/emotional problems segregable from the learning process]; Dale M. v. Bd. of Educ., 237 F.3d 813, 817 [7th Cir. 2001] [holding that the services provided by the residential placement must be primarily oriented toward enabling the student to obtain an education, rather than noneducational activities]).

[35] Although regulations only provide that a residential placement must be at no cost to the parent when it is necessary to provide special education and related services to a student with a disability, those regulations apply to the district's obligation to provide a FAPE rather than to a parent's unilateral placement (34 CFR 300.104; see Educ. Law §4402 [2.b][2]).

[36] The district school psychologist who provided testimony about the superintendent's hearing did not attend it (Tr. p. 138).

needs and the level of support required by the student, LRE considerations do not preclude a finding that the parents' unilateral placement was appropriate (see Mrs. B., 103 F.3d at 1120-22).

D. Equitable Consideration

The district claims that the IHO erred in finding that equitable considerations favored the parents, as the district contends the parents were not open to considering any other program aside from a residential placement. Further, the district argues that the parents did not agree to the district's program because they were required to place the student in a residential facility.

The final criterion for a reimbursement award is that the parents' claim must be supported by equitable considerations. Equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; R.E., 694 F.3d at 185, 194; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 68 [2d Cir. 2000]; see Carter, 510 U.S. at 16 ["Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable"]; L.K. v. New York City Dep't of Educ., 674 Fed. App'x 100, 101 [2d Cir. Jan. 19, 2017]). With respect to equitable considerations, the IDEA also provides that reimbursement may be reduced or denied when parents fail to raise the appropriateness of an IEP in a timely manner, fail to make their child available for evaluation by the district, or upon a finding of unreasonableness with respect to the actions taken by the parents (20 U.S.C. § 1412[a][10][C][iii]; 34 CFR 300.148[d]; E.M. v. New York City Dep't of Educ., 758 F.3d 442, 461 [2d Cir. 2014] [identifying factors relevant to equitable considerations, including whether the withdrawal of the student from public school was justified, whether the parent provided adequate notice, whether the amount of the private school tuition was reasonable, possible scholarships or other financial aid from the private school, and any fraud or collusion on the part of the parent or private school]; C.L., 744 F.3d at 840 [noting that "[i]mportant to the equitable consideration is whether the parents obstructed or were uncooperative in the school district's efforts to meet its obligations under the IDEA"]).

Reimbursement may be reduced or denied if parents do not provide notice of the unilateral placement either at the most recent CSE meeting prior to their removal of the student from public school, or by written notice ten business days before such removal, "that they were rejecting the placement proposed by the public agency to provide a [FAPE] to their child, including stating their concerns and their intent to enroll their child in a private school at public expense" (20 U.S.C. § 1412[a][10][C][iii][I]; see 34 CFR 300.148[d][1]). This statutory provision "serves the important purpose of giving the school system an opportunity, before the child is removed, to assemble a team, evaluate the child, devise an appropriate plan, and determine whether a [FAPE] can be provided in the public schools" (Greenland Sch. Dist. v. Amy N., 358 F.3d 150, 160 [1st Cir. 2004]). Although a reduction in reimbursement is discretionary, courts have upheld the denial of reimbursement in cases where it was shown that parents failed to comply with this statutory provision (Greenland, 358 F.3d at 160; Ms. M. v. Portland Sch. Comm., 360 F.3d 267 [1st Cir. 2004]; Berger v. Medina City Sch. Dist., 348 F.3d 513, 523-24 [6th Cir. 2003]; Rafferty v. Cranston Public Sch. Comm., 315 F.3d 21, 27 [1st Cir. 2002]); see Frank G., 459 F.3d at 376; Voluntown, 226 F.3d at 68).

The hearing record reflects that the parents cooperated with the CSE, did not impede or otherwise obstruct the CSE's ability to develop an appropriate special education program for the student, made the student available for evaluations, and did not act unreasonably. The parents notified the district in writing that they were unilaterally enrolling the student at a therapeutic residential school on August 24, 2015 and intended to seek reimbursement of the cost of the student's tuition from the district (Parent Ex. 10). Although the notice was sent approximately two days prior to the student's enrollment at Discovery on August 26, 2015 (Parent Exs 5; 6; 7; Dist. Ex. 19 at p. 1), as discussed above, due to the finding that the June 2015 IEP is barred by the statute of limitations, the parents' claims addressed in this decision relate to the period after September 10, 2015. Accordingly, even though the parents did not provide 10-day written notice, the district had the opportunity at the September 2015 CSE meeting to devise an appropriate plan and cure the defects alleged by the parents. Accordingly, any failure in the notice does not warrant a reduction in an award of tuition reimbursement.

Additionally, even where a parent has no intention of placing a student at the district's recommended program, it is not a basis to deny a request for tuition reimbursement (E.M., 758 F.3d at 461; C.L., 744 F.3d at 840 [holding that the parents' "pursuit of a private placement was not a basis for denying their [request for] tuition reimbursement, even assuming . . . that the parents never intended to keep [the student] in public school"]). In this instance, the district contends that the parents did not agree with the district's program because they were "mandated to place [the student] in a residential facility" (Req. for Rev. ¶ 45). The district clarifies its argument in its memorandum of law and asserts that the parents rejected the district placement because a an out-of-State court required the student be placed in a residential facility as a condition of his release from the juvenile justice system (Mem. of Law at pp. 29-30). In support of this conclusion, the district cites to a single page of the transcript, in which the IHO asked the student's mother whether his release from juvenile detention was "conditioned upon [the student's] placement in . . . a residential educational program or would another kind of educational program have met the conditions for his release," and the student's mother responded "[r]esidential" (Tr. p. 631). Moreover, prior to that question, the parents' attorney inquired whether it was "a condition that [the student] go to a residential program in [that particular state] . . . as a condition of his release," to which the student's mother responded "yes" (Tr. p. 628). In attempting to clarify, the IHO asked the student's mother whether the student's release was "specifically condition upon placement at a residential program," at which point the she cut the IHO off and replied "no," the IHO then finished the question by adding "in [that particular state]" and directed the student's mother to let the IHO finish the question, and the student's mother again responded "no" (Tr. p. 629). Moreover, when the student's mother was first asked by the district's attorney whether the student was released "because the judge concurred with your plan of placing him in a residential facility," the parent responded, "[n]o. I think he would have been released regardless, but I don't quite remember" (Tr. pp. 592-93). Taken as a whole, it is not altogether clear from the testimony of the student's mother whether the student's release from juvenile detention was predicated on the student's placement in a residential facility.[37] Aside from the parent's testimony, there is little else in the hearing record showing that the student's release to a residential facility was a requirement for his release from the juvenile justice system. And, to the contrary, the September 2015 IEP specifically identifies

[37] Furthermore, the parent's testimony was at times unclear, contradictory, and occasionally unresponsive (Tr. pp. 562-63, 569-70, 572-74, 578-79, 581, 622-23, 628-29).

that the student's placement at Discovery was "not a court placement for the student" (Dist. Ex. 5 at p. 1). The clinical director at Discovery also testified that, based on the documents available to him, he did not believe that the student was referred to Discovery by the Court system (Tr. pp. 825-26).

As a result of the foregoing, there are no equitable factors that weigh against awarding tuition reimbursement. However, to the extent that the parents are entitled to reimbursement of the student's tuition for the 2015-16 school year at Discovery, since the parents' claims related to the June 2015 IEP are barred by the statute of limitations, the parents are only awarded reimbursement for the cost of tuition from the September 2015 CSE meeting, September 10, 2015, rather than the beginning of the school year.

VII. Conclusion

Based on the foregoing, the evidence in the hearing record shows that the district failed to offer the student a FAPE for the 2015-16 school year, that placement of the student at Discovery was reasonably calculated to meet his educational needs, and that equitable considerations warrant reimbursement for the costs of the student's tuition at Discovery for the 2015-16 school year, from September 10, 2015 through January 16, 2016. I have considered the parties' remaining contentions and find them to be without merit.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision, dated April 28, 2017, is reversed to the extent that it found that claims related to the June 2015 IEP were not barred by the statute of limitations and awarded reimbursement of the cost of the student's tuition at Discovery from August 26, 2015 through January 16, 2016; and

IT IS FURTHER ORDERED that, upon proof of payment, the district shall reimburse the parents for the cost of the student's tuition at Discovery Connections from September 10, 2015 through January 16, 2016.

Dated: **Albany, New York**
August 27, 2018

SARAH L. HARRINGTON
STATE REVIEW OFFICER