



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 19-097

**Application of a STUDENT WITH A DISABILITY, by her parent, for review of a determination of a hearing officer relating to the provision of educational services by the New York City Department of Education**

### **Appearances:**

Law Office of Erika L. Hartley, attorneys for petitioner, by Erika L. Hartley, Esq.

Howard Friedman, Special Assistant Corporation Counsel, attorneys for respondent, by Chrystal O'Connor, Esq.

## **DECISION**

### **I. Introduction**

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from the decision of an impartial hearing officer (IHO) which denied her request to be reimbursed for her daughter's tuition costs at the Lowell School (Lowell) for the 2018-19 school year. The appeal must be dismissed.

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

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

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

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

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

The student has received diagnoses of attention deficit hyperactivity disorder (ADHD)-inattentive type, generalized anxiety disorder, and social anxiety disorder (Parent Exs. J at p. 11; M). Due to residual signs of dyslexia, the student has also been considered for a diagnosis of specific learning disability with impairment in reading (id.). In addition, the student's slow progress in math has resulted in a diagnosis of specific learning disability with impairment in mathematics (Parent Ex. J at p. 11).

The student attended a district school for kindergarten during the 2009-10 school year and "struggled early on" (Parent Ex. J at p. 1). As a result, the student repeated kindergarten for the 2010-11 school year and was referred to the CSE where she was reportedly found eligible for special education services as a student with a speech or language impairment and received special

education teacher support services (SETSS) in school (*id.*). In addition, the student received related services of physical therapy (PT), occupational therapy (OT), and speech-language therapy (*id.*). However, the student continued to struggle, and by the end of the school year her scores on an academic achievement battery had declined (*id.* at pp. 1-2). As a result, a recommendation was made to change the student's placement, and for the 2011-12 school year (first grade) the student attended an integrated co-teaching class (ICT) with support services at a different district school (*id.* at p. 2).<sup>1</sup> A neuropsychological evaluation conducted during the 2011-12 school year indicated that the student's basic academic skills remained at the kindergarten level and there were parent and teacher concerns regarding the student's socialization and attending (*id.*). The student was diagnosed as having a specific learning disability in reading (dyslexia) (*id.* at p. 3). For the 2012-13 school year (second grade), a November 16, 2012 CSE changed the student's eligibility classification to learning disability (*id.* at p. 3). The November 2012 CSE also recommended that the student attend a 12:1+1 special class for math and English language arts (ELA) and receive related services of speech-language therapy, PT, and OT (*id.*). A neuropsychological evaluation conducted during the 2012-13 school year showed that the student continued to demonstrate academic difficulties but that there was "a higher level of concern about [the student's] adjustment, and this concern exceeded her learning concerns" (*id.* at p. 4). For the 2013-14 through 2016-17 school years (third, fourth, fifth and sixth grades), the student attended a nonpublic school (*id.* at p. 4). For the 2017-18 school year (seventh grade), the student was unilaterally placed in Lowell, a State-approved nonpublic school (Parent Ex. J at p. 5).<sup>2</sup>

In September 2017 the district requested consent to evaluate the student (Parent Ex. T at p. 1). Around this same time the parent sought and obtained a consultation with a pediatric neuropsychologist, who examined the student beginning on September 28, 2017 (Parent Ex. J at p. 1). On November 15, 2017 the neuropsychologist shared the results and recommendations of her evaluation with the parent (Parent Ex. J at p. 1).<sup>3</sup>

By email to the parent dated November 27, 2017, the district school psychologist requested a copy of the neuropsychological evaluation report from the parent so that the school psychologist could schedule a meeting as soon as possible (Parent Ex. N at p. 1).<sup>4</sup> She asked the parent to let her know if the report was unavailable so that she could schedule testing for the student (Parent Ex. N at p. 1). In a response dated November 30, 2017, the parent advised the school psychologist that she had received notice of a CSE meeting scheduled for December 6, 2017, and requested that

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<sup>1</sup>A school district may include integrated co-teaching services in its continuum of services. Integrated co-teaching services means the provision of specially designed instruction and academic instruction provided to a group of students with disabilities and nondisabled students (8 NYCRR 200.6 [g][1-3]).

<sup>2</sup> Lowell is a nonpublic school that has been approved by the Commissioner of Education as a school with which districts may contract for the instruction of students with disabilities (see 8 NYCRR 200.1 [d], 200.7).

<sup>3</sup> In the hearing transcript and IHO's exhibit list the pediatric neuropsychological consultation report is cataloged as a November 15, 2017 neuropsychological evaluation and therefore will be referred to as such throughout this decision (Tr. p. 34; IHO Decision at p. 15).

<sup>4</sup> The district school psychologist serviced as the district representative (CSE chairperson) at the June 8, 2018 CSE meeting (Tr. p. 126; Dist. Ex. 1 at p. 22).

it be rescheduled to early January 2018, as she did not yet have a copy of the neuropsychological evaluation report and felt it was important to share it with the CSE (Parent Ex. T at p. 2).

On December 4, 2017, the district school psychologist conducted a psychoeducational evaluation as part of the student's re-evaluation to determine the appropriateness of programs and services in meeting her needs (Parent Ex. K at p. 1). Overall, the results of standardized testing were similar to those reported in the November 2017 neuropsychological evaluation, with the exception of the student's performance in mathematics and on a pseudoword decoding subtest (compare Parent Ex. J at pp. 6-9 with Parent Ex. K at pp. 2-3).<sup>5, 6</sup>

By email dated December 5, 2017, the parent advised the district school psychologist that she did not have a copy of the recent neuropsychological evaluation but would send the report to the district as soon as she received it (Parent Ex. N at p. 2). However, she noted that the neuropsychologist believed the student required a small class in a full-time special education school for children with learning disabilities, like dyslexia (Parent Ex. N at p. 2).

On December 6, 2017, a CSE convened to develop an IEP for the student for the remainder of the 2017-18 school year (Dist. Ex. L at pp. 1, 13-14;18). The results of the district's December 2017 psychoeducational evaluation were reviewed by the CSE (compare Dist. Ex. L at pp. 1, 3 with Dist. Ex. K). The December 2017 CSE continued to find the student eligible for special education as a student with a learning disability and recommended ten-month 12:1+1 special classes for math and ELA for seven periods per week each, and 12:1+1 special classes for social studies and science for five periods per week each (id. at pp. 13-14, 18). The CSE also recommended related services of individual counseling one time per week for 30 minutes, OT, PT and speech-language therapy (id. at pp. 13-14).

On June 8, 2018, the CSE convened to develop the student's IEP for the 2018-19 school year (Dist. Ex. 1 at pp. 1, 19). Among other things, the June 8, 2018 CSE reviewed the results of the November 2017 neuropsychological evaluation (Dist. Exs. 1 at p. 1-2; 3 at p. 2). The June 2018 CSE continued to find the student eligible for special education as a student with a learning disability and recommended ten-month 12:1+1 special classes for math and ELA for seven periods per week each, and 12:1+1 special classes for social studies and science for five periods per week each (id. at p. 14).<sup>7</sup> The CSE also recommended related services of individual counseling one time per week for 30 minutes and group counseling (5:1) services one time per week for 30 minutes in

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<sup>5</sup> According to the testing completed by the district school psychologist, the student performed in the average range on measures of math calculation and math reasoning and problem solving, while the neuropsychologist reported that the student's skills in mathematics were below average and far below grade level (compare Parent Ex. J at p. 8 with Parent Ex. K at pp. 2-3).

<sup>6</sup> Consistent with the IHO's decision, the hearing record shows that the district school psychologist used the same testing measures for cognitive and academic testing as the neuropsychologist had two weeks earlier (compare Parent Ex. J at pp. 5-9 with Parent Ex. K at pp. 2-3). The IHO determined that results of the district's psychoeducational evaluation should be ignored due to the "practice effect" (see Tr. pp. 216-18; IHO Dec. at p. 11).

<sup>7</sup> The student's eligibility for special education programs and services as a student with a learning disability is not in dispute in this proceeding (see 34 CFR 300.8[c][7]; 8 NYCRR 200.1[zz][8]).

a separate location (id.). The CSE also recommended direct and group SETSS for math two times per week for a class period in the special education classroom along with related services of OT, PT and speech-language therapy (id. at pp. 14-15).

In a prior written notice dated June 28, 2018, the district informed the parent of the CSE's recommendation for the student for the 2018-19 school year (Dist. Ex. 3). The prior written notice identified the assessments and materials used to determine the student's eligibility for special education services and to develop her IEP for the 2018-19 school year (id. at p. 2). These included an April 16, 2018 assistive technology evaluation, the December 2017 IEP and the November 2017 neuropsychological evaluation report (id.).<sup>8</sup> The prior written notice indicated that the parent reported during the CSE meeting that the student had learning and anxiety difficulties and that the student took time to process information (id.). The prior written notice also indicated that the parent verbalized that she did not know much about community schools and was open to looking at them (id.). Additionally, the prior written notice indicated that the parent had reported that student was learning to be comfortable at Lowell and that Lowell did not have students with behavioral problems (id.). The parent stated that she wanted a setting that was "helpful" to the student's learning and anxiety and that she wanted the student to continue attending Lowell, as she was making progress (id.).

In a letter dated August 17, 2018, the parent, through her attorney, provided 10-day notice to the district of her intent to unilaterally place the student at Lowell for the 2018-19 school year (Parent Ex. A pp. 1-2). The parent stated that the district failed to offer the student a free appropriate public education (FAPE) for the 2018-19 school year based on several procedural and substantive claims (id.). The parent also stated that Lowell was an appropriate unilateral placement for the student and that she would be seeking public funding for the student's placement for the 2018-19 school year (id. at p. 2).

On September 4, 2018, the parent executed an enrollment contract with Lowell for the student's attendance for the 2018-19 school year (Parent Ex. F).

In a school location letter dated September 9, 2018, the district identified the public-school site to which the district assigned the student to attend for the 2018-19 school year (Dist. Ex. 2 at p. 1).

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

By due process complaint notice dated September 10, 2018, the parent alleged that the district failed to offer the student a FAPE for the 2018-19 school year (Parent Ex. B at p. 1). Initially, the parent alleged that the June 8, 2018 CSE was improperly constituted because it included individuals who lacked direct knowledge of the student and "requisite credentials and expertise" to make an appropriate recommendation for the student (id. at pp. 1-2). More specifically, the parent argued that the CSE failed to take into consideration all of the student's current evaluative data, school reports, and recommendations when determining the student's program recommendation (id. at pp. 2-3). Next, the parent alleged that the CSE failed to consider the student's "emotional fragility," ADHD, OT and PT needs, language deficits, and processing

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<sup>8</sup> The April 2018 assistive technology evaluation was not entered into the hearing record as evidence.

issues (*id.* at p. 1). The parent further alleged that the CSE failed to consider the student's post-secondary and vocational needs (*id.*). In addition, the parent argued that the CSE failed to consider the student's need for a research-based reading program and a multi-sensory educational program in an appropriate ratio of staff to students (*id.*). The parent also alleged that the June 2018 CSE denied the parent the opportunity to participate in the development of the student's June 8, 2018 IEP (*id.* at p. 2).

With respect to the June 2018 IEP, the parent argued that the CSE failed to develop appropriate annual goals for the student (*id.*). The parent contended that the district failed to respond to the parent's August 19, 2018 10-day letter indicating her intent to unilaterally place the student at Lowell (*id.*). Next, the parent also argued that the CSE's recommendation of a 12:1+1 special class in a community school was not appropriate for the student and was not the student's least restrictive environment (LRE) (*id.* at p. 1). Next, the parent alleged that the CSE failed to consider a program similar to the program the student attended during the 2017-18 school year as well as the progress the student made in the program (*id.* at p. 2). The parent also argued that at the commencement of the 2018-19 school year, the district failed to provide the student with a school to attend, albeit in an inappropriate program (*id.*). With respect to the appropriateness of the student's unilateral placement, the parent alleged that Lowell was appropriate to meet the student's needs because it offered special education teachers and credentialed assistants who were specially trained to provide instructional, social and emotional modifications and supports for the student (Parent Ex. B at p. 3). The parent also argued that Lowell was appropriate because the student made progress (*id.*). Turning to equities, the parent asserts that she cooperated with the district, participated in the June 2018 CSE meeting and there is no evidence that would bar her requested relief (*id.*). As relief, the parent requested a determination that the student was denied a FAPE for the 2018-19 school year, Lowell is an appropriate unilateral placement for the student, and that equitable considerations favor the parent (*id.*). Lastly, the parent requested funding for the student's attendance at Lowell for the 2018-19 school year and attorney's fees (*id.* at pp. 3-4).

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

An impartial hearing convened on January 18, 2019 and concluded on July 2, 2019 after ten hearing dates (Tr. pp. 1-486). In a decision dated August 29, 2019, the IHO found that the district offered the student a FAPE for the 2018-19 school year (IHO Decision at p. 11). Initially, the IHO found that the June 2018 CSE's recommendation of a 12:1+1 class in a community school with related services was appropriate (*id.* at p. 10). More specifically, the IHO determined that with the level of support and management needs identified in the student's June 2018 IEP, the student was "likely to feel supported and her academics were likely to improve" (*id.*). The IHO further determined that the counseling sessions in the IEP were likely to assist the student with her anxiety as the student would be working on identifying feelings and appropriate coping strategies and self-advocacy (*id.*). The IHO also determined that the student's ADHD, learning needs and other impediments to learning would be addressed with information and directions broken down into smaller steps and chunks, prompts, visual and auditory cueing, redirection, multi-sensory reading instruction from a certified reading teacher, preferential seating, teacher assistance to remain and refocus on task, and other management strategies (*id.*). The IHO noted that although the district's witness did not provide a "cogent rationale" for the CSE's recommendation, she nevertheless found the recommendation of a 12:1+1 class in a community school with related services was appropriate (*id.* at p. 11). With respect to the composition of the proposed classroom, the IHO found there was no reason to assume that the students who attended the class would have

been problematic for the student as the student's anxiety appeared to be based upon her insecurity regarding her work; thus, there was no reason to believe that the student's social anxiety would have been "adversely affected" by the presence of a particular type of student (*id.* at pp. 10-11).

With respect to the appropriateness of the unilateral placement, the IHO found that the parent did not meet her burden of proof in establishing that Lowell was an appropriate unilateral placement for the student (IHO Decision at p. 11). The IHO noted that the student's anxiety at Lowell appeared to be extreme and that the student was markedly anxious during the 2017-18 school year (*id.*). The IHO also noted that neither the parent nor the school provided an explanation as to why the student's anxiety was higher than the previous nonpublic school the student attended (*id.*). The IHO further noted that there was no evidence that the student was able to focus sufficiently in school to benefit from her education at Lowell (*id.*). In addition, the IHO stated that the testimony from Lowell ignores or contradicts the fact that the student is struggling with reading. (*id.* at p. 12). The IHO also noted that the student continued to need intensive reading instruction and the student was only making slow progress in reading (*id.*). The IHO also noted that the student's struggles with expectations placed upon her at Lowell were a significant cause of the student's anxiety, especially in her core academic subjects (*id.* at p. 13). The IHO found that Lowell attributed too much of the student's difficulties due to anxiety and too little consideration on the student's academic deficits (*id.*).

With respect to the parent's contention that the district did not provide her with a school location letter, the IHO noted that the district's witness testified that the school location letter was sent out in June 2018, although it was dated September 9, 2018 due to a computer glitch (IHO Decision at p. 13). The IHO also noted that the parent failed to mention her non-receipt of the school location letter in her 10-day notice and that had the parent mentioned this in her letter, the district would have been able to cure the problem (*id.*). For the aforementioned reasons, the IHO denied the parent's request for relief for the 2018-19 school year (*id.*).

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

The parent appeals and asserts that the IHO erred in finding that the district offered the student a FAPE for the 2018-19 school year.<sup>9</sup> Initially, the parent argues that the district failed to

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<sup>9</sup> The parent's appeal pleading was denominated a "Petition" and the parent's submissions included additional procedural nonconformities. The regulations governing practice before the Office of State Review were amended well over two years ago (see N.Y. Reg., Sept. 28, 2016, at pp. 37-38; N.Y. Reg., June 29, 2016, at pp. 49-52; N.Y. Reg., Jan. 27, 2016, at pp. 24-26) to, among other things, align with federal terminology and change the name of the pleading to initiate a review from "petition" to "request for review" (8 NYCRR 279.4[a]; see 34 CFR 300.515[b]). In addition, the parent served a notice of intention to seek review upon the district; however, the notice of intention to seek review was not accompanied by the case information statement required by State regulation (8 NYCRR 279.2[e]). In addition, the notice of request for review accompanying the parent's pleading (denominated a "Notice of Petition") does not comply with 8 NYCRR 279.3, but instead contains the notice required under State regulation prior to January 1, 2017. Counsel for the parent has previously been alerted to these particular nonconformances in papers submitted on behalf of her clients (Application of a Student with a Disability, Appeal No. 18-131; Application of a Student with a Disability, Appeal No. 18-079). As counsel for the parent appears regularly in this forum, she should ensure that she reviews Part 279, as amended and effective January 1, 2017, and conforms her practice accordingly, as, while a singular failure to comply with practice requirements of Part 279 may not warrant an SRO exercising his or her discretion to reject a request for review (8 NYCRR 279.8[a]; see Application of a Student with a Disability, Appeal No. 16-040), an SRO may be more inclined to do so after repeated failures to comply with the practice requirements (see Application of a Student

take into consideration the student's deficits when making the student's program recommendation. The parent also asserts that the IHO improperly determined that the 12:1+1 special class in a community school was appropriate. Next, the parent asserts the IHO failed to consider the fact that the student was offered a seat to her assigned school for the 2018-19 school year after the school year began. The parent further asserts that the IHO erred in finding that Lowell was not an appropriate unilateral placement. In addition, the parent attaches three exhibits as additional evidence to her request for review.

In its answer, the district responds to the parent's allegations and argues in favor of the IHO's determinations that the district offered the student a FAPE for the 2018-19 school year and that the parent did not meet her burden in establishing that Lowell was an appropriate unilateral placement for the student. The district requests that the SRO uphold the IHO's decision in its entirety. Additionally, the district indicates that it does not object to two out of three exhibits as additional documentary evidence submitted by the parent.

## 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

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with a Disability, Appeal No. 16-060; see also Application of a Student with a Disability, Appeal No. 17-015; Application of a Student with a Disability, Appeal No. 16-040). For purposes of this decision, the parent's pleading will be referred to as a request for review.

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" (Andrew 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 Andrew 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]).<sup>10</sup>

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<sup>10</sup> The Supreme Court has stated that even if it is unreasonable to expect a student to attend a regular education setting and achieve on grade level, the educational program set forth in the student's IEP "must be appropriately ambitious in light of his [or her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives" (Andrew F., 137 S. Ct. at 1000).

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. Preliminary Matters**

#### **1. Scope of Review**

Prior to addressing the merits of the instant case, a determination must be made regarding what aspects of the IHO's decision are properly heard on appeal. Claims related to the 2018-19 school year, which the parent asserted in her due process complaint notice but which the IHO did not address, were not pursued on appeal, including claims pertaining to the composition of the CSE and "meaningful" parental participation (see Parent Ex. B at pp. 1-2).

The IDEA provides that "any party aggrieved by the findings and decision" of an IHO "may appeal such findings and decision to the State educational agency" (20 U.S.C. § 1415[g][1]; see 34 CFR 300.514[b][1]; 8 NYCRR 200.5[k]). State regulations governing practice before the Office of State Review are explicit and require that the parties set forth in their pleadings "a clear and concise statement of the issues presented for review and the grounds for reversal or modification to be advanced, with each issue numbered and set forth separately," and further specify that "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" (8 NYCRR 279.8[c][2], [4]; see also 8 NYCRR 279.4[a], [f]; see M.C. v. Mamaroneck Union Free Sch. Dist., 2018 WL 4997516, at \*23 [S.D.N.Y. Sept. 28, 2018] [upholding dismissal of allegations set forth in an appeal to an SRO for "failure to identify the precise rulings presented for review and [failure] to cite to the pertinent portions of the record on appeal, as required in order to raise an issue" for review on appeal]; J.S. v. New York City Dep't of Educ., 2017 WL 744590, at \*4 [S.D.N.Y. Feb. 24, 2017] [agreeing with an SRO that the parents' "failure to advance specific arguments in support of their conclusory challenge constituted waiver of those issues"]).

Here, as the parent neither alleges that the IHO erred with regard to the claims described above in the request for review nor does she argue that the IHO failed to address them. She does not pursue them and the claims are deemed abandoned and will not be further addressed (8 NYCRR 279.8[c][2], [4]).

Further, the parent's request for review does not comply with the form requirements of Part 279 of the practice regulations. "The request for review shall clearly specify the reasons for challenging the impartial hearing officer's decision, identify the findings, conclusions, and orders to which exceptions are taken, or the failure or refusal to make a finding, and shall indicate what relief should be granted by the State Review Officer to the petitioner (8 NYCRR 279.4[a] [emphasis added]). Additionally a request for review must provide a "clear and concise statement of the issues presented for review and the grounds for reversal or modification to be advanced, with each issue numbered and set forth separately, and identifying the precise rulings, failures to rule, or refusals to rule presented for review" 8 NYCRR 279.8[c][2]). The request for review fails to comply with these requirements, opting instead to accumulate a tangle of allegations about district wrongdoing together without describing how the IHO erred on specific issues. For example, with regard to the first point heading of the request for review, the parent's contention is that the IHO erred in the FAPE determinations at issue due to "improper factual findings" and "overlooking applicable federal and state regulations." These statements without more are unduly vague and overbroad. Moreover, it is not this SRO's role to research and construct the appealing parties' arguments or guess what they may have intended (see, e.g., Gross v. Town of Cicero, 619 F.3d 697, 704 [7th Cir. 2010] [appellate review does not include researching and constructing the parties' arguments]; Fera v. Baldwin Borough, 2009 WL 3634098, at \*3 [3rd Cir. Nov. 4, 2009] [a party on appeal should at least identify the factual issues in dispute]; Garrett v. Selby Connor Maddux & Janer, 425 F.3d 836, 841 [10th Cir. 2005] [generalized assertion of error on appeal is not sufficient]; see generally Taylor v. American Chemistry Council, 576 F.3d 16, 32 n.16 [1st Cir. 2009]; L.I. v. Hawaii, 2011 WL 6002623, at \*9 [D. Haw. Nov. 30, 2011]; Lance v. Adams, 2011 WL 1813061, at \*2 [E.D. Cal. May 6, 2011] [the tribunal need not guess at the parties' intended claims]; Bill Salter Advertising, Inc. v. City of Brewton, 2007 WL 2409819, at \*4 n.3 [S.D. Ala. Aug. 23, 2007]).

Part of the problem is that the parent is not fully engaging with specific determinations and factual findings made by the IHO, but attempting to repeat the same arguments already made to the IHO. The parent's request for review attempts to incorporate by reference into the pleading her closing brief as submitted to the IHO; however such incorporation by reference is also explicitly prohibited by the practice regulations (8 NYCRR 279.8[b]; see Req. for Rev. at p. 2, 7, 9).

Notwithstanding the forgoing, squarely appealed here is the parent's claim that the IHO erred in finding the 12:1+1 special class in a community school appropriate, which will be addressed separately herein. Out of an abundance of caution, the decision may also touch on other issues within that analysis. For example, while the parent discusses the inadequacy of the IEP goals, including a lack of speech, executive functioning, processing, and transition goals, the parent fails to challenge the IHO's failure or refusal to make a finding on her claim in the due process complaint notice that the student's goals were inappropriate in the IEP. However, goals are discussed in the decision to the extent they are relevant to the appropriateness of the 12:1+1 special class in a community school as further described below.

## **2. Additional Documentary Evidence**

As noted above, the parent attaches three exhibits to its request for review as additional evidence for consideration. The following documents include: (1) Parent Exhibit G; (2) Parent Exhibit L; and (3) Parent Exhibit U. Generally, documentary evidence not presented at an

impartial hearing is considered in an appeal from an IHO's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 08-030; see also 8 NYCRR 279.10[b]; L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 488-89 [S.D.N.Y. 2013] [holding that additional evidence is necessary only if, without such evidence, the SRO is unable to render a decision]). With respect to Parent Exhibits G and L, the IHO indicated in her decision that page "5" of Parent Exhibit G and page "15" of Parent Exhibit L were missing from the hearing record (IHO Decision at p. 15). With respect to the parent's resubmission of Parent Exhibits G and L, which now include page "5" of Parent Exhibit G and page "15" of Parent Exhibit L, I will accept these exhibits as additional evidence because I find it necessary to complete the hearing record and the district does not object to the additional evidence. With respect to Parent Exhibit U, which is a lesser redacted version of the exhibit originally entered into the hearing record by the parent, I agree with the district's contention that the document was available at the time of the impartial hearing and it is not necessary in order to render a decision; therefore, I decline to consider Exhibit U resubmitted by the parent.

## **B. June 2018 IEP**

### **1. Background Information—Student's Needs**

The evaluation of the student's needs is not a disputed issue in this appeal, however, a discussion thereof is relevant to whether a 12:1+1 special class in a community school was appropriate for the student.

The November 2017 neuropsychological evaluation included a review of the student's medical, early developmental, school, social, and family histories as well as the administration of standardized tests and behavior rating scales, and behavioral observations (Parent Ex. J at pp. 1-6). The resultant report indicated that the student's medical history was unremarkable and her general health was good (Parent Ex. J at p. 1). The neuropsychologist stated that "reported developmental milestones were on target" but noted that prior records indicated that the student received speech therapy and there were early social concerns (Parent Ex. J at p. 1).

According to the neuropsychologist, at the time of the evaluation, the student had just started attending the Lowell School (Parent Ex. J at p. 5). She explained that before finalizing her report, she sought feedback from the student's principal, counselor, teachers, and speech therapist at Lowell (Parent Ex. J at p. 5). The school officials rated the student as "performing far below grade level," "working much less," and getting along "much worse" compared to most students in the class (*id.*). According to the neuropsychologist, school staff described the student as a polite and compliant child who was sweet and good natured (*id.*). The student was considerate to peers and staff (*id.*). In addition, school staff noted that the student was a talented singer and dancer (*id.*). They also described the student as a creative writer, although she had not mastered the writing process (*id.*). The neuropsychologist reported that with regard to cognitive functioning, the student's expressive language, pragmatics, processing, recall, and executive functioning (organization, time management) were areas of weakness for her (*id.*). However, the biggest area of concern was the student's "severe anxiety, and great difficulty with social situations and crowds" (*id.*). The neuropsychologist noted that the student's anxiety was described as "crippling" (*id.*). Socialization with peers was an area of concern because the student had difficulty initiating friendships (*id.*). According to school staff, the student had poor coping skills, lacked confidence,

evidenced low self-esteem and learned helplessness, was easily frustrated, was unable to advocate for herself, and tended to shut down quickly (*id.*). The neuropsychologist indicated that according to school staff, the student required "a lot" of 1:1 prompting, attention and encouragement, and often needed counselor intervention to complete her schoolwork, participate in classroom activities and perform daily routines at school including walking to/from activities or classes (*id.*). However, school staff also noted that the student was making small but appreciable gains in her socialization and adjustment at Lowell (*id.*).

With respect to the student's social history, the neuropsychologist indicated that the student had made progress at her prior school but that "there [we]re still concerns " (Parent Ex. J at p. 5). Notably, the student was still afraid of what others thought and panicked in crowds (Parent Ex. J at p. 5). With respect to the student's reported family history, the neuropsychologist indicated that it was significant for dyslexia (Parent Ex. J at p. 5).

The neuropsychologist's behavioral observations of the student during the assessment included a statement that the student presented as less anxious and more confident than during previous evaluations (Parent Ex. J at p. 6). The neuropsychologist reported that the student's gross motor skills, although not formally assessed, were unremarkable for gait and balance problems (Dist. Ex. J at p. 6). She indicated that the student's constructional, fine motor, and graphomotor skills had improved but residual concerns remained (Parent Ex. J at p. 6). According to the neuropsychologist, the student tended to mumble and needed to be encouraged to speak loudly during the 1:1 testing situation (Parent Ex. J at p. 6). She judged the student's language comprehension and pragmatics to be intact for informal conversations (Parent Ex. J at p. 6). The neuropsychologist reported that the student often asked for directions/information to be repeated (Parent Ex. J at p. 6).

Administration of the Wechsler Abbreviated Scales of Intelligence (WASI-II) yielded a full scale IQ of 99, which according to the neuropsychologist meant that the student's "broad cognitive functioning [wa]s again in the average range "(Parent Ex. J at p. 6). The neuropsychologist reported that the student's summary scores had "improved across the board" which he characterized as "good news" (Parent Ex. J at p. 6). In several standardized assessments, the neuropsychologist noted that the student's performance on tasks measuring comprehension, expression, abstract reasoning and the capacity to learn verbal material were within the average range of functioning for the first time (Parent Ex. J at p. 6). The neuropsychologist further noted that the student's general fund of knowledge was in the "robust" average range whereas previously it was in the borderline range (Parent Ex. J at p. 6). The neuropsychologist attributed the improvement in the student's verbal skills and particularly her background knowledge to her enriched learning experiences and ability to access information from reading over the past two years (Parent Ex. J at pp. 6-7, 10). The neuropsychologist indicated that the student's performance on visual/nonverbal/fine motor tasks measuring visual perception, organization, reasoning and construction were overall in the average range of functioning (Parent Ex. J at p. 6). The student continued to show improvement in her scanning and speed but had difficulty if there were multiple demands for scanning, speed, and short-term memory (Parent Ex. J at p. 7). In addition, the student's fine motor speed and dexterity were still a little slow bilaterally, although she improved with practice (Parent Ex. J at p. 7).

The neuropsychologist reported that on tasks requiring brief attentional demands and/or immediate recall, the student's performances in were in the overall borderline range of functioning

and the student "continue[d] to struggle when she [wa]s required to multi-task and stay focused, work quickly and demonstrate response inhibition" (Parent Ex. J at p. 7). The neuropsychologist also reported that in the past the student's response style was slow and inaccurate but this time the student was attentive and worked with good speed but was more impulsive (Parent Ex. J at p. 7). In summary, the neuropsychologist indicated that the student continued to struggle on measures of cognitive processing including rote memory, short-term memory, working memory and sustained attention and vigilance (id.). There was a small but consistent pattern of favoring visual/nonverbal over auditory/oral modality and the student's auditory processing, which was in the mildly impaired range, was a consistent problem for her (id.).

In terms of the student's learning and memory, the neuropsychologist indicated that the student's performances were overall in the average range for immediate memory functioning and noted that the student made significant gains in immediate memory trials, especially on visual memory tasks (Parent Ex. J at p. 7). (Parent Ex. J at p. 7). After a delay, the student experienced some forgetting for oral/verbal information, a finding that was consistent with findings on cognitive processing measures (Parent Ex. J at p. 7). The neuropsychologist noted that the student performed well on a nonverbal task of concept formation, problem solving and the ability to benefit from feedback and experience (Parent Ex. J at pp. 7-8) He characterized the student's higher order executive functioning as "robust; "however, noted that the student's attention was a problem (id.).

Administration of the Wechsler Individual Achievement Test – Third Edition (WIAT-III) yielded scores in the average range for decoding, word recognition, and reading comprehension (Parent Ex. J at p. 8). The student's written spelling was below average and her reading fluency in the borderline range (Parent Ex. J at p. 8). According to the neuropsychologist, the student's performance on the WIAT-III demonstrated that she was a functional reader (Dist. Ex. J at pp. 8, 10). She noted that the student's skills had improved significantly in the last few years, which was a positive development and a testament to the intensive reading instruction at the student's prior school (id.). The neuropsychologist cautioned, however, that the student was still not " out of the woods," as some of her skills in language arts were not yet at grade level (id.).

In mathematics, the neuropsychologist reported that as measured by the WIAT-III, the student's skills were all below average and far below grade level (id.). The neuropsychologist reported that the student was slow to perform simple math operations, which was likely due to a combination of weakness in working memory and failure to make gains in elementary school when she was struggling with reading (Parent Ex. J at p. 8). According to the neuropsychologist, the student's math calculation skills had improved to the low average range and although the student was slow, she as able to add, subtract, and multiply; however, her skills had not progressed much beyond that (Parent Ex. J at p. 8). The student's math reasoning and problem-solving skills were in the borderline range; she was able to count, work with money, read an analog clock and read a graph and solve problems (Parent Ex. J at p. 8). The neuropsychologist estimated most of the student's math skills to be at the late elementary school level (Parent Ex. J at p. 8). The neuropsychologist stated that although the student made progress in mathematics "she failed to close the gap" (Parent Ex. J at p. 10). The neuropsychologist commented that it was possible that the efforts to improve the student's reading skills over the last two years had shortchanged the student with regard to the development of math skills, as early on, math skills were an asset for her (id. at pp. 10-11).

School staff from the student's prior nonpublic school and Lowell completed the teacher rating scales (adolescent) of the Behavior Assessment for Children – Third Edition (BASC-III) (Parent Ex. J at pp. 9, 11). (*id.* at p. 11). Staff responses from the student's prior nonpublic school yielded summary scores for clinical and adaptive profiles that were in the average range (Parent Ex. J at p. 9). The neuropsychologist reported that on the clinical profile the atypicality scale was markedly elevated and the anxiety and withdrawal subscales were moderately elevated (Parent Ex. J at p. 9). On the adaptive profile the study skills scale was mildly elevated and, on the content scales, the developmental social disorders scale was markedly elevated (Parent Ex. J at p. 9). The neuropsychologist concluded that there continued to be considerable concern about the student general adjustment (Parent Ex. J at p. 9). The student presented as nervous at school; she was polite and helpful to others but had difficulty functioning in group social situations (Parent Ex. J at p. 9). Based on the responses of the staff from the student's prior nonpublic school, the neuropsychologist reported that the student's clinical profile was consistent with generalized anxiety disorder and social anxiety disorder (Parent Ex. J at p. 9).

According to the neuropsychologist, the responses provided by the staff at Lowell resulted in an "elevated F Index" due to the extreme level of concerns (Parent Ex. J at p. 9). Staff responses from Lowell yielded summary scores for clinical and adaptive profiles that were in the markedly elevated range (Parent Ex. J at p. 9). On the clinical profile the withdrawal, atypicality, depression, anxiety, learning problems, and attention problem scales were markedly elevated (Parent Ex. J at p. 9). On the adaptive profile the functional communication, study skills, adaptability, and leadership scales were markedly elevated and the social skills scale was moderately elevated (Parent Ex. J at p. 9). In addition, the content scales developmental social disorders, executive functioning and resiliency were markedly elevated and the emotional self-control scale was moderately elevated (Parent Ex. J at p. 9). The neuropsychologist reported that there was a very high level of concern regarding the student's adjustment to Lowell (Parent Ex. J at p. 9). When comparing school reports, the pattern was consistent, but the severity was much higher at Lowell (*id.*). The neuropsychologist noted that "clearly" the student had significant difficulty in her transition to the new school (*id.*). Based on the responses of the staff from Lowell, the student profile was consistent with generalized anxiety disorder, social anxiety disorder, learning disability, and ADHD – predominantly inattentive presentation (Parent Ex. J at p. 9).

Completion by the student's mother of the parent rating scale on the same behavior assessment tool revealed results consistent with prior findings (*id.*). The neuropsychologist indicated that by parent report, the student's summary score for the clinical profile was in the average range and summary score for the adaptive profile was in the mildly elevated range (Parent Ex. J at p. 10). On the clinical profile the withdrawal and attention problems scales were markedly elevated and in the adaptive profile the student's leadership, activities of daily living and functional communication scales were moderately elevated (Parent Ex. J at p. 10). On the content scales executive functioning and resiliency were mildly elevated (Parent Ex. J at p. 1). The neuropsychologist reported the student was emotionally comfortable at home so there were no significant concerns about anxiety, but there was significant concern about her socialization, as well as concerns about attention and adaptive skills (Parent Ex. J at p. 11). According to the neuropsychologist, the student's short attention span and tendency to be easily distracted had increased and were consistent with ADHD – predominantly inattentive presentation (Parent Ex. J at pp. 10). In addition, the neuropsychologist stated that concerns about the student's shyness and

difficulty making new friends were longstanding and consistent with a social anxiety disorder (Parent Ex. J at p. 1).

During the November 2017 neuropsychological evaluation, the student completed the self-report of personality for the BASC-III; this was the first time her reading level was high enough for her to complete a self-report (*id.*). According to the neuropsychologist, the student's summary scores were average for the clinical and adaptive profiles (Parent Ex. J at p. 1). However, the attention problem, social stress, and anxiety scales were moderately elevated, as was the interpersonal relations scale (Parent Ex. J at p. 10). In addition, the hyperactivity and self-reliance scales were mildly elevated (Parent Ex. J at p. 1). On the content scales mania was moderately elevated (Parent Ex. J at p. 10). The student reported significant concern about attentional control and mild concern about behavioral control, which the neuropsychologist noted was consistent with ADHD (*id.*). The student also had significant concerns about anxiety and social stress (*id.*). The student reported that she had a difficult time making friends and felt lonely and left out by others and she also had significant difficulty turning her mind off and slowing down because of a combination of ADHD and anxiety (Parent Ex. J at pp. 10, 11). On a positive note, the student reported feeling good about school and feeling supported by her teachers and parents (*id.*).

The neuropsychologist concluded that the student's "clinical picture was complex" (Parent Ex. J at p. 11). She noted that the student presented with residual signs of dyslexia and therefore a diagnosis of specific learning disability with impairment in reading was still a consideration at that time (*id.*). According to the neuropsychologist, the student's slow progress in math was consistent with a specific learning disability with impairment in mathematics, although her delays in math were likely due to executive weaknesses as well as gaps in learning because of the efforts to remediate her reading over the years (*id.*). In addition, the neuropsychologist indicated there had always been support for an ADHD-predominantly inattentive type diagnosis, but the student's self-reports suggested that ADHD-combined type was a consideration (*id.*). The student's history and reports of current adjustment also supported additional diagnoses of generalized anxiety disorder and social anxiety disorder (*id.*). The neuropsychologist cautioned that even with the student's improved attitude toward school and her improved reading/learning skills, she still presented as an anxious child who struggled in social situations in/out of the classroom (*id.*). She opined that the student appeared to be struggling considerably in her transition to a new school (*id.*).

The neuropsychologist offered numerous recommendations to address the student's needs identified by the evaluation (Parent Ex. J at pp. 11-13). First the neuropsychologist indicated that the student's "anxiety and socialization were of paramount concern" and recommended "individual work, group work, and child-focused parent consultation to address these concerns" (*id.* at p. 11). Next the neuropsychologist encouraged the parents to speak the student's pediatrician to determine if she would benefit from medical treatment for her symptoms of ADHD and anxiety (Parent Ex. J at p. 11). With respect to reading, the neuropsychologist recommended that the student continue to receive intensive reading instruction to improve reading fluency reading comprehension, and spelling and written expression (Parent Ex. J at p. 12). The neuropsychologist also recommended that the student receive intensive math instruction to improve her fluency and help her to build concepts/skills in a sequential linear way (Parent Ex. J at p. 12). The neuropsychologist indicated that when the student was comfortable, she could be a friendly and caring child who loved to laugh and tell stories; however, the picture of the student's adjustment outside of the home was very different and a big concern (*id.*). The neuropsychologist opined that the student's social discomfort

with children in group settings was clearly impeding her learning and overall adjustment to the extent that it was time to address her social discomfort much more aggressively (*id.*). The neuropsychologist noted that these concerns had been longstanding, [the student's adjustment had not improved sufficiently despite gains in learning and her adjustment had not improved sufficiently despite moving to a much smaller school with all the supports that she had at her previous private school setting (*id.*). The neuropsychologist specifically recommended that the student remain at a small school setting and the consideration of formal positive behavioral supports in all aspects of the student's day-to-day classroom and school routines; social goals in the student's IEP, and social goals in the student's related (*id.*).

The neuropsychologist detailed numerous teaching strategies and accommodations recommended to address the student's academic needs including 1:1 instruction and small group work; visual cues; multisensory instruction; pre-, re- and post- teaching to consolidate concepts; short focused work sessions and frequent break; limiting near point copying and providing class notes; and adult support in group situations (Parent Ex. J at p. 13). The neuropsychologist opined that the educational disability classification of learning disability was still appropriate for the student (Parent Ex. J at p. 11).

## **2. 12:1+1 Special Class Placement in a Community School**

Turning to the parties' dispute over the adequacy of the 12:1+1 special class program recommendation, for the reasons discussed below, I find no reason to disturb the IHO's determination that a 12:1+1 special class in a community school was an appropriate placement for the student.

The June 2018 IEP identifies the student's needs with considerable detail. The narrative summary from the November 2017 neuropsychological evaluation was included in the "evaluation results" section of the student's June 8, 2018 IEP (Dist. Ex. 1 at pp. 2, 19). It is also clear in the June 2018 IEP that the student's social/emotional needs, as described below, permeated all aspects of the student's educational performance. It appears that at least one of the reasons for the level of detail in the IEP is due to the fact that staff from Lowell prepared a draft of the IEP for the student. The CSE chairperson testified during the impartial hearing that prior to the CSE meeting Lowell provides the CSE with a draft IEP that "we review, and then if there are any changes that need to be required, we go ahead and do that then" (Tr. p. 162).

With regard to the student's social development, the June 2018 IEP described the student as anxious and as someone who had significant difficulty expressing and coping with her feelings (Dist. Ex. 1 at p. 5). The IEP indicated the student experienced feelings of anxiety, frustration, sadness and low self-esteem related to her academic and social difficulties (*id.*). She was easily overwhelmed by her feelings and had difficulty verbalizing why she was upset or asking for help during these times (*id.*). As a result, the student would often present as withdrawn and would avoid tasks/situations which were anxiety producing (*id.*). She benefited from teacher or counselor intervention in order to persevere with her work (*id.*). The IEP indicated that socially, the student had difficulty maintaining eye contact, avoided interactions with unfamiliar peers and adults, and struggled to participate in group activities due to her social anxiety (*id.*). She was fearful of large crowds and loud noises (*id.*). The student could become verbally unresponsive when interacting with unfamiliar adults or when she was overwhelmed by academic demands (*id.*). According to the IEP, the student exhibited "extreme anxiety" when faced with situations that involved other

classes such as, transitioning from class to class in the hallways, school assemblies, or being in a large group setting of more than 12 people (*id.*). At those times, the student needed to be removed from the situation until the crowds thinned in order for her to be able to function (*id.*). The IEP noted that the student left the classroom late for lunch every day so that she did not have to deal with crowds; however, she was making progress socializing with the other students in class and at lunch (*id.*). The IEP indicated that the student required a small, structured, supportive learning environment, along with counseling as a related service to address her social/emotional needs (Dist. Ex. 1 at p. 5). The IEP further indicated that the student benefitted from a school wide behavior management program, and counselor and teacher support when she was feeling anxious in order to persevere with her work and facilitate social interactions (Dist. Ex. 1 at p. 5).

Throughout the June 8, 2018 IEP, the present levels of performance detailed the student's anxiety, poor executive functioning, difficulty attending, need for teacher prompting and assistance, need to have material broken down and to be guided step-by-step through school work, difficulty transitioning from task to task and physically throughout the school building, tendency to speak in an inaudible voice when called on, and tendency to "shut down" when overwhelmed (Dist. Ex. 1 at pp. 2-5). The IEP indicated that the student worked "fairly well" in small groups but had difficulty in large groups (*id.*).

With respect to academics, the June 2018 IEP indicated that the student received specialized, systematic, multisensory reading instruction from a certified reading teacher twice per week and that she was making slow but steady progress (Dist. Ex. 1 at p. 3). The student required teacher assistance to determine the author's point of view in informational texts, to formulate significant claims, and to find supportive evidence (Dist. Ex. 1 at p. 3). According to the IEP, the student had not mastered the conventions of Standard English and had difficulty with sentence structure, capitalization, verb tense, spelling and punctuation (Dist. Ex. 1 at p. 3). The student had not yet mastered the use of graphic organizers and when asked to write had trouble transferring her ideas to paper (Dist. Ex. 1 at p. 3). The IEP indicated that the student frequently struggled with multiple meaning words and phrases (Dist. Ex. 1 at p. 3). According to the IEP, even with "diversified and scaffold[ed]" homework, the student's completion and submission of quality homework was inconsistent (Dist. Ex. 1 at p. 3).

In terms of math, the IEP indicated that the student tested at a fourth-grade level (Dist. Ex. 1 at p. 6). The student had basic recall of multiplication tables but required significant wait time to process and recall answers (Dist. Ex. 1 at p. 6). For division, the required processing and wait time was extended (Dist. Ex. 1 at p. 6). According to the IEP, when notetaking, the student required teacher support "on how to start writing formulas and mathematical vocabulary" (Dist. Ex. 1 at p. 6). The student also became hyper-focused on formation and alignment of numbers which delayed her ability to stay on pace with the class (Dist. Ex. 1 at p. 6). The IEP stated that while working independently the student easily became anxious about how to approach an equation, even after it was previously modeled (Dist. Ex. 1 at p. 3). The student's homework was differentiated to focus on the review of basic foundations and 2-3 equations associated with the daily lesson (Dist. Ex. 1 at p. 3).

The IEP indicated that the student was cooperative and compliant during structured speech-language therapy sessions (Dist. Ex. 1 at p. 3). However, the student had difficulty retaining and recalling verbally presented material, defining and explaining target vocabulary, and engaging in group discussions at an appropriate volume (Dist. Ex. 1 at p. 4). According to the parent, the

student often complained about physical pain due to her anxiety (Dist. Ex. 1 at p. 4). The student did not see a therapist in the community or take medication for anxiety (Dist. Ex. 1 at p. 4).

The June 2018 IEP indicated that the student had engaged in a trial period of the use of assistive technology to complete reading and writing assignments (Dist. Ex. 1 at p. 4). Observation and teacher feedback suggested that the student could benefit from a portable touchscreen tablet with external keyboard, headphones with word Prediction, and auditory feedback and E-text reader applications (Dist. Ex. 1 at p. 4).

With respect to physical development, the IEP stated that the student's therapy sessions included exercises/activities related to improvement of balance and coordination, gross motor function, and postural control/awareness (Dist. Ex. 1 at p. 6). The IEP described the student's gross and fine motor skills as functional, yet below age level (Dist. Ex. 1 at p. 5). According to the IEP, the student demonstrated below age level static and dynamic standing balance (Dist. Ex. 1 at p. 6). The student also demonstrated limited/reduced physical endurance (Dist. Ex. 1 at p. 6). The IEP noted that the student needed reduce pencil pressure during writing and to improve graphomotor skills and writing mechanics (Dist. Ex. 1 at p. 6). The IEP indicated that the student needed to improve her executive functioning skills, specifically transitioning/shifting focus between classrooms and activities; working memory to retain information; ability to manipulate/complete tasks, ability to perform multistep activities such as mental arithmetic; planning-prioritizing-organizing; and self-monitoring for performance on tasks (Dist. Ex. 1 at p. 5). The IEP further indicated that the student needed to improve her visual perceptual skills including visual tracking, visual discrimination, figure ground, and short-term visual memory (Dist. Ex. 1 at p. 5). The IEP indicated that the student would benefit from increased self-control skills to reduce impulses and to reduce responses to external auditory/visual stimuli during task assignments (Dist. Ex. 1 at p. 5).

As noted above, the June 2018 CSE recommended the student attend 12:1+1 special classes for math and ELA for seven periods per week each, and 12:1+1 special classes for social studies and science for five periods per week each (Dist. Ex. 1 at p. 14). The CSE also recommended that the student received group SETSS for two periods per week (*id.*). In addition, the CSE recommended that the student receive related services of individual counseling one time per week for 30 minutes, group counseling one time per week for 30 minutes, individual occupational therapy (OT) one time per week for 30 minutes, small group (2:1) OT one time per week for 30 minutes, individual physical therapy (PT) one time per week for 30 minutes, and speech-language therapy in a group (3:1) two times per week for 30 minutes (*id.* at pp. 14-15). The IEP also included a recommendation for specific assistive technology equipment and applications and testing accommodations of revised test directions, breaks and on-task focusing prompts (Dist. Ex. 1 at pp. 15, 17). While the June 2018 IEP contained numerous environmental modifications and human/material resources for addressing the student's academic management needs, the management needs section of the IEP failed to detail the modifications and resources needed to address the student's social/emotional management needs, specifically her anxiety.

The management needs identified in the June 2018 IEP indicated that the student required teacher cues for upcoming transitions; directions repeated and broken down into smaller steps, with models/examples; teacher prompting and visual/auditory cueing; re-direction, individual/specialized, systematic, multi-sensory reading instruction from the certified reading teacher; preferential seating; teacher assistance to remain/refocus on task; hands-on, multi-sensory

instruction with manipulatives; curriculum materials adapted/modified in presentation and pacing; explicit instruction in skills/strategies; pre-teaching of concepts/skills and frequent review/repetition [over learning]; graphic organizers and visual prompts; teacher clarification an assistance to decode words, understand vocabulary, and comprehend passages; highlighting important textual information; text broken down into smaller chunks; verbal prompts, like chaining; assistance with writing; the use of reinforcement, and modeling; sensory breaks, extended time to complete exams; and school-wide behavior modification system (Dist. Ex. 1 at p. 6). With regard to the individual and group counseling, the June 2018 IEP included two annual goals (Dist. Ex. 1 at pp. 10, 14). The first annual goal targeted the student's ability to accurately identify feelings and coping strategies and the second addressed the student's need to develop self-advocacy skills for enhanced school performance (Dist. Ex. 1 at p. 10).

During the impartial hearing, the CSE chairperson testified that the use of reinforcement and modeling was listed as a management need to assist the student with her anxiety and social/emotional needs (Tr. p. 171). Among the parental concerns listed on the June 2018 IEP was that the student "benefits from a school wide behavior management program used by all staff throughout the day" and a school wide behavior modification system was identified on the IEP (Dist. Ex. at pp. 5, 6). The CSE chairperson further indicated that the purpose of the school-wide behavior management system on the student's IEP was to promote positive social/emotional behavior (Tr. p. 172). The district did not provide additional details with respect to the a "school-wide behavior intervention program" although this likely due to the fact that Lowell staff were the initial drafters of the student's IEP (see Dist. Ex. 1 at p. 6).<sup>11</sup> When asked whether the district's program had offered a schoolwide behavior modification support for the student, the CSE chairperson responded, "if it's on the IEP, it should be," indicating a lack of specific recollection (Tr. pp. 237-38).

The CSE chairperson also testified that the neuropsychological evaluation indicated that the student had made progress with respect to her anxiety (Tr. pp. 198-99). The CSE chairperson indicated that her personal knowledge of the student was based on the psychoeducational evaluation she conducted in December 2017, that lasted for approximately two hours (Tr. pp. 198, 205-07; see Parent Ex. K).<sup>12</sup> She noted that the student did not demonstrate significant anxiety and explained that the student was anxious at the beginning of testing but calmed down and was comfortable as the testing ended (Tr. pp. 198-99). The CSE chairperson indicated that the evaluation process provided a snapshot of the student but agreed that an important piece of the snapshot would be knowing how the student functioned emotionally in the school setting (Tr. p. 207). In terms of how the student's emotional fragility manifested itself in the school setting, the CSE chairperson indicated that the student was withdrawn, did not ask for help, appeared sad, and

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<sup>11</sup> The student's special education teacher at Lowell testified that the school had a "school-wide BIP" in which every student had a point sheet that they carried with them from class to class (Tr. pp. 310-11). Each week the school had different goals that the student needed to reach as part of the BIP (Tr. p. 311). The teacher indicated that "everybody was basically on the same behavior intervention plan" (Tr. p. 311).

<sup>12</sup> The CSE chairperson, who was testifying by telephone while on family leave from her duties, suggested a greater level of personal familiarity with the student than the evidence in record bears out, as she did not personally conduct a classroom observation of the student; however, it appears that when evaluating the student, she was capable of developing a rapport with the student and decreasing her anxiety during the testing (see Tr. pp 44, 122, 198-99).

would frustrate easily (Tr. p. 204).

The CSE chairperson testified that she was aware at the time of the June 2018 CSE meeting that the student became anxious when she was asked to answer a question in class or had to transition in the hallways from class to class; she could not recall if she was aware of the student becoming anxious in crowded situations (Tr. pp. 238-39). The CSE chairperson testified that in addition the counseling goals contained in the June 2018 IEP there was a goal that addressed the student's ability to transition between classrooms as part of the daily routine with minimal reminders and a goal that targeted the student's ability to refocus when distracted (Tr. p. 239; Dist. Ex. 1 at p. 9).

The issue of the student's anxiety featured prominently in the testimony during the impartial hearing as well as in the IHO's decision. In addition to the information contained in the evaluative information and June 2018 IEP regarding the student's anxiety, testimony by the director of admissions at Lowell also indicated that the student exhibited "crippling" anxiety which did not allow her to fully participate in the school environment without "abundant" support (Tr. pp. 371, 384). She noted that every person from Lowell that attended the June 2018 CSE meeting, including the parent, attempted to relay sentiments of the student's anxiety to the CSE with examples (*id.* at page 371-72). Additional testimony by the school psychologist from Lowell who was the student's counselor since seventh grade, described the student as "emotionally fragile" (Tr. pp. 252, 254). She indicated the student's generalized anxiety disorder and social anxiety affected the student socially and academically, interfering with her ability to fully function in the classroom; she became overwhelmed by anxiety and "shut down" (Tr. pp. 254-55). According to the Lowell psychologist, when the student shut down, she became completely nonverbal, would not communicate why she was upset or what happened, would not ask for help, and appeared "mostly blank" in her affect for up to 30 minutes (Tr. pp. 260-62). Testimony by one of her teachers at Lowell indicated that "all of [the student's] academics [we]re driven by the social-emotional aspect here in class" (Tr. pp. 291, 300-01). The parent testified that the district school psychologist did not take the student's severe anxiety, difficulty focusing, and difficulty processing into account (Tr. pp. 395-96).

The assistant principal of the community school to which the student had been assigned by the district was called as a witness during the impartial hearing. The evidence is clear that the assistant principal did not participate in the CSE or the development of the student's June 2018 IEP (Dist. Ex. 1 at p. 22). The assistant principal's direct examination by the district's attorney covered predictable topics such as the community school's capacity to implement the services listed in the June 2018 IEP and whether a seat was available for the student (Tr pp. 49-54). She also testified that she had only seen the student's June 2018 IEP and she had never met the student or seen the student's evaluations (Tr. pp. 49, 65, 81).

In an unusual line of attack upon the direct testimony, the cross-examination of the assistant principal then went into the degree and manner in which the district could address the student's needs, based upon the IEP itself. The parent argues on appeal that evidence not "within the four corners of the IEP" is improper to consider and that the IHO committed "egregious error" when he "failed to address the retrospective evidence relied upon" (Req. for Rev. at pp. 5-6). However, the parent's argument fails to appreciate that the Second Circuit rejected a rigid "four-corners rule" that would prevent consideration of evidence—including testimony that explains the written terms of the IEP (R.E., 694 F.3d at 186-87; P.C. v. Rye City Sch. Dist., 232 F. Supp. 3d 394, 411

(S.D.N.Y. 2017). While the parent now tries to stifle the evidence, much of the assistant's principal's cross-examination testimony that was elicited by the parent is permissible, non-retrospective testimony that explains the terms of the IEP in a convincing manner.<sup>13</sup> Despite acknowledging that she did not know the student she testified that district would use varying techniques to work specifically on reading comprehension, and noted that if she needed assistance with phonetic support there was also Wilson-trained staff available (Tr. pp. 88).<sup>14</sup> When explaining the functioning of a 12:1+1 special class, the assistant principal testified that she was aware from the IEP of the extreme difficulty in negotiating large settings, and that students with those needs are permitted passes to leave and that the classroom paraprofessional would assist with that (or have the assistance of another student depending on the level of need) (Tr. pp. 87-88, 93-94).<sup>15</sup> According to school protocol, all students line up in their class before they are released (Tr. p. 89). She indicated while her classmates were lining up, the student would be released (Tr. p. 89). She noted that classes were stopped five minutes early so that students could complete their last minute "exit slip," an assessment that they did on the way out (Tr. p. 89). The assistant principal explained that the student could complete her exit slip and be escorted across the hall while the other students were being lined up in the classroom (Tr. p. 89). The assistant principal was also able to discern from the IEP that large settings such as lunch, physical education class, and hallways, would be instances to be particularly attentive to with regard to the student's anxiety (Tr. pp. 88, 92). The assistant principal testified that she would need to know the student to know precisely how long it would take her to transition (Tr. pp. 90-92). The assistant principal pointed out how the IEP addressed the student's fine and gross motor skills, visual tracking and scanning, sensitivity to auditory stimuli (95-100).<sup>16</sup> The assistant principal also candidly acknowledged that the IEP did not make the student's receptive language skills explicitly clear, but that they should have been stated in the IEP; however the need was addressed in the IEP goals (Tr. pp 103, 111-13).

Although the June 2018 IEP acknowledged that the parent wanted the student to continue at Lowell (Dist. Ex. 1, at pp 20),<sup>17</sup> the CSE chairperson also addressed the obligation of the CSE

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<sup>13</sup> In one instance, the assistant principal explained that the distance between the student's classrooms would have been approximately 10 feet (Tr. pp. 89); however, I have not considered that evidence as permissible for purposes of evaluating adequacy of the IEP as there is nothing in the IEP regarding the maximum distance between the student classes, or for that matter, the distance between her classes at Lowell.

<sup>14</sup> In questioning, the assistant principal acknowledged that Wilson would address phonemic awareness skills, but she did not indicate that the student's reading instruction would be limited only to Wilson (Tr. pp. 107).

<sup>15</sup> The assistant principal described the classroom paraprofessional's past experience, including instances of working one on one with students (Tr. pp. 93-94 ["she is trained on how to read the IEPs, and implement the services placed on them, as far as what is recommended -- not necessarily the placement, but for what the students need is"]), but she did not testify that the student would be provided a 1:1 paraprofessional beyond the terms of the IEP and the IHO did not find that the student would be offered a 1:1 paraprofessional. The parent's argument that the testimony shows otherwise is a mischaracterization of the evidence (Req. for Rev. at p. 5).

<sup>16</sup> The use of a scribe became a topic during the impartial hearing, but it was not a disputed issue (Tr. pp. 97, 108-109; 114).

<sup>17</sup> Although the parent made numerous claims that the CSE did not consider the evaluation of the student, her emotional fragility, multisensory reading instruction, and placement in a nonpublic school such as Lowell, the

to attempt to place the student in a less restrictive appropriate setting within the district prior to recommending placement in a nonpublic school (154, 156, 186-88; 197-98; 225, 227, 231-34).<sup>18</sup> The psychologist from Lowell also testified about how she believed the student would react to a community school setting, indicating that "it's my opinion that she will not be able to function in the larger environment, or without the supports that we provide [and] the larger school environment will be overwhelming for her and the transitions will be overwhelming for her" (Tr. pp. 271-73). However, the Lowell psychologist also admitted that she had never visited a community school (Tr. p. 273) and I do not give her opinion particularly heavy weight in this regard, as it appears that the student requires considerable time to adjust to any new setting, including Lowell (274, 375-76). The evidence above does not convince me that because the student has difficulty with transitions, that a public school setting, with appropriate supports, must essentially be ruled out due to the student's anxiety, especially when the parent argues in this case that she was able to make progress after she adjusted to Lowell.

As the assistant principal essentially acknowledged during her cross examination, the IEP is not at all perfect. Some of the items addressed in the present levels of performance would have been better stated in the management needs section, and although not stated as a specific claim in this case, I would have much preferred to see the indication of a "certified reading instructor" noted in section listing the special education and related services to be provided to the student rather than in the management needs section. Additionally, as the assistant principal acknowledged, it would have been better to explicitly list the student's receptive language skills in the present levels of performance rather than rely on the goals to communicate the student's needs. However, these deficiencies do not rise to the level of a denial of a FAPE to the student. The IDEA explicitly states that it is unnecessary "to include information under [one] component of a child's IEP that is already contained under another component of such IEP" (20 U.S.C. § 1414[d][1][A][ii][II]; 34 CFR 300.320[d][2]; see Klein Indep. Sch. Dist. v. Hovem, 745 F. Supp. 2d 700, 727-28 [S.D. Tex. 2010] rev'd on other grounds, 690 F.3d 390 [5th Cir. 2012]; see also D.S. v. Parsippany Troy Hills Bd. of Educ., 2018 WL 6617959, at \*16 [D.N.J. Dec. 18, 2018]). The evidence above provides insufficient basis to overturn the IHO's determination that the June 2018 IEP calling for a 12:1+1 setting in a community school was an appropriate setting for the student or that the district denied the student a FAPE.

### **C. Receipt of School Location Letter**

Turning to the parent's contention that the parent contends that the IHO failed to consider the timeliness of a seat being offered to the student after the school year began, the IHO clearly did not overlook the issue, instead allowing, over the objection of the parent, rebuttal testimony from a witness called by the district that the school location letter was sent earlier than September 9, 2018, but that a computer glitch caused the letter to be misdated (IHO Decision at p. 13). The decision to allow a rebuttal witness was within the sound discretion of the IHO. The IHO also

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evidence does not bear out those claims.

<sup>18</sup> Counsel for the parent also mischaracterized the witness's testimony regarding restrictiveness by asking "what was so intensive at the program at Lowell that you felt was too restrictive" when she should know it is not the intensity of the special education support that governs the LRE standard, but the student's access to non-disabled peers, which the witness indicated should be "as much as possible" (225, 232-33).

noted that the parent's 10-day notice of unilateral placement omitted the allegedly missing school location letter (id.).

Initially, with respect to the school location letter, in general, the IDEA and State regulations require that a district must have an IEP in effect at the beginning of each school year for each child in its jurisdiction with a disability (34 CFR 300.323[a]; 8 NYCRR 200.4[e][1][ii]; Cerra, 427 F.3d at 194; K.L. v. New York City Dep't of Educ., 2012 WL 4017822, at \*13 [S.D.N.Y. Aug. 23, 2012], aff'd, 530 Fed. App'x 81, 2013 WL 3814669 [2d Cir. July 24, 2013]; B.P. v. New York City Dep't of Educ., 841 F. Supp. 2d 605, 614 [E.D.N.Y. 2012]; Tarlowe, 2008 WL 2736027, at \*6 [stating that "[a]n education department's delay does not violate the IDEA so long as the department 'still ha[s] time to find an appropriate placement . . . for the beginning of the school year in September'"], quoting Bettinger v. New York City Bd. of Educ., 2007 WL 4208560, at \*8 n.26 [S.D.N.Y. Nov. 20, 2007]). Once a CSE formulates an IEP, a school district is required to provide the special education services in conformity with the student's written IEP (20 U.S.C. § 1401[9][D]). In this case, in light of the immense in size of the district in this case, it is reasonable to hold that order to implement the student's June 2018 IEP, the district was required to notify the parent where the IEP services would be implemented before the IEP went into effect as part of its obligations to implement the student's services.

As to the parent's claims with respect to her alleged nonreceipt of the school location letter,

New York law provides a presumption of mailing and receipt if there is proof of a standard office practice or procedure designed to ensure that properly addressed mail is sent. Nassau Ins. Co. v. Murray, 46 N.Y.2d 828, 829 (1978). "As long as there is adequate testimony by one with personal knowledge of the regular course of business, it is not necessary to solicit testimony from the actual employee in charge of the mailing." Matter of Lumbermens Mut. Cas. Co. (Collins), 521 N.Y.S.2d 432, 434 (1st Dep't 1987) (citing Bossuk v. Steinberg, 58 N.Y.2d 916, 919 (1983)). To rebut the presumption, the intended recipient cannot just deny receipt but must demonstrate that the sender's "routine office practice was not followed or was so careless that it would be unreasonable to assume that the notice was mailed." Nassau, 386 46 N.Y.2d at 829.

T.C. v. New York City Dep't of Educ., 2016 WL 1261137, at \*9 [S.D.N.Y. Mar. 30, 2016]).

In this case, the parent testified that she never received the school location letter (Tr. p. 400) and, initially, the parent's argument seemed an attractive one as the school location letter in the hearing record was dated September 9, 2019, which was after the June 2018 IEP was scheduled to go into effect (Dist. Ex. 2). However, the district's rebuttal witness testified that she personally mailed the school location letter to the parent when the school site was secured on July 12, 2018 (Tr. pp. 449-453; see Dist. Ex. 6 at p. 2). The district witness explained that "as I stated earlier, the way that the SESIS has functioned that school year was the day that I finalize it, it would automatically generate with the September start date, because the school location letter is corresponding to the start date for that school year" (Tr. pp 449, 458-59, 468, 472). She indicated that issue with the incorrect date on the letters was a "SEGIS programming issue" during the summer of 2018, but that she no longer noticed the problem occurring at the time she testified in summer 2019 (Tr. pp. 475-76, 479-81). The district witness further testified regarding her routine

office practice with respect to the mailing of the school location letter by explaining that when she finalized the "prior written notice package" for the parent, this included the school location letter which she physically mailed to the parent on July 12, 2018 (Tr. pp. 463-64, 469-70, 472-74).<sup>19</sup> In her decision, the IHO also relied on documentary evidence and appeared to draw an inference weighing against the parent's version of events. While the omission of the school location letter from the 10-day notice of unilateral placement would not preclude the parent from raising that point as a topic for the hearing in her subsequent due process complaint notice, it was also not unreasonable for the IHO to question the parent's failure to mention the lack of a school location issue in her detailed three-page August 2018 10-day notice of unilateral placement when weighing and resolving issues of disputed fact, such as whether the district sent the school location letter to the parent (IHO Decision at p. 13).<sup>20</sup> Thus, in accordance with the foregoing, I find that this evidence was sufficient to give rise to the presumption of mailing and receipt of the school location letter by the parent, and the IHO was free to accept the witness's testimony when weighting evidence relevant to the issue. There is no basis to overturn the IHO's determination. Accordingly, the parent's allegation of error on the part of the IHO in this instance is without merit.

As a final note, I am sympathetic to the fact that the student appears to experience significant anxiety, often regardless of the particular environment she is in. During the course of my responsibilities of conducting an independent review of the entire hearing record, there is one observation that may be of use to the parties in their considerations of programming for the student going forward. It was not identified as an issue in this proceeding and, as such, is not a basis for any of my determinations in this decision. However, I note that the student's IEP indicated that, with regard to special factors, that the student did not require "positive behavioral interventions, supports and other strategies to address behaviors that impede the student's learning or that of others" (Dist. Ex. 1 at p. 7). However, as described above, much of this case was focused on the student's behaviors that interfere with her schooling, and the IEP was replete with information on that topic. Thus, if they have not done so already, the parties may consider having a comprehensive functional behavioral assessment of the student conducted at some point in the near future, as it may yield useful information that neither party has considered with respect to addressing the symptoms related to the student's anxiety disorders and ADHD. As of the 2018-19 school year, it appears, at least from what is in the hearing record, that neither the district or Lowell personnel considered this possibility, however as the IHO astutely observed during the impartial hearing, a student's interfering behavior can manifest not only as "difficult behaviors" such as acting out in class, but also as more silent behavior of the "self-defeating" variety.

## **VII. Conclusion**

Having determined that the parent's challenges to the IHO's determination that the district offered the student a FAPE are without merit, the necessary inquiry is at an end and it is not necessary to address the appropriateness of the parent's placement of the student at Lowell or

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<sup>19</sup> The witness testified that, for the most part, the school location letter was the only kind of letter she sent, except that occasionally she would help send a notice of an IEP meeting to parents if needed (Tr. pp. 473).

<sup>20</sup> The absence of the school location letter in the parent's 10-day notice of unilateral placement shows, alternatively, that the issue did not factor heavily in the parent's decision to unilaterally place the student at Lowell.

whether equitable considerations preclude relief (see M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 66 [2d Cir. 2000]).

I have reviewed the parties' remaining contentions and find them to be without merit.

**THE APPEAL IS DISMISSED.**

**Dated:**           **Albany, New York**  
                  **November 18, 2019**

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