



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 20-055

**Application of a STUDENT WITH A DISABILITY, by his parents, for review of a hearing officer relating to the provision of educational services by the Board of Education of the Hastings-on-Hudson Union Free School District**

### **Appearances:**

The Law Offices of Neal H. Rosenberg, attorneys for petitioners, by Lakshmi Singh Mergeche, Esq. of counsel

Keane & Beane, PC, attorneys for respondent, by Stephanie M. Roebuck, Esq., and Suzanne E. Volpe, Esq.

## **DECISION**

### **I. Introduction**

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioners (the parents) appeal from the decision of an impartial hearing officer (IHO), which denied their request to be reimbursed for their son's tuition costs at the Foreman School (Forman) for the 2018-19 and 2019-20 school years. 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**

At the age of four, the student was referred for special education services due to attention issues (Parent Ex. E. at p. 3; Dist. Ex. 7 at p. 1). The student received occupational therapy (OT) during preschool and continued to receive OT services, as well as consultant teacher and/or resource room services in elementary school (Parent Exs. B at p. 1; Dist. Ex. 7 at p. 1).<sup>1</sup> He has

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<sup>1</sup> The hearing record includes duplicative copies of the July 2018 private neuropsychological report, except that the evaluation report appears in the parent's exhibit as one of three enclosures to a letter from the parents to the district (compare Parent Ex. E at pp. 3-12, with Dist. Ex. 7 at pp. 1-10). For purposes of this decision, when referring to the July 2018 private neuropsychological report, the district exhibit shall be cited.

been found eligible to receive services as a student with an other health-impairment (see Dist. Ex. 2 at p. 1).<sup>2</sup>

The CSE convened on March 3, 2016 to develop an IEP for the student's 2016-17 school year (ninth grade) and recommended three 80-minute sessions of resource room in a small group (5:1) per six day cycle (Dist. Ex. 2 at pp. 1, 9). Further, the CSE recommended classroom accommodations (copy of class notes), testing accommodations (extended time, flexible setting, and use of word processor to record responses), and assistive technology (access to a word processor and speech-to-text software) (id. at pp. 9-11).<sup>3</sup> Further, the CSE developed five annual goals for the student in the area of study skills (id. at pp. 8-9).

Following the parents' request, the CSE reconvened on October 21, 2016 (Dist. Ex. 4 at p. 1). The student's mother indicated that she "requested the meeting because every year the student ha[d] a couple of classes where he consistently c[ould]n't figure out the system for handing in work on time" (id.). The CSE recommended "that the guidance department schedule a case conference with the student's teachers and discuss possible flexibility while the student works on this deficit" and added an accommodation to provide that the student's assignments be broken down into smaller parts with clear due dates (id. at pp. 1-2, 10). In addition to the resource room services previously recommended, the October 2016 CSE added three 80-minute sessions of integrated co-teaching services (ICT) for science per six day cycle since the student was "having difficulty" in science class (id. at p. 2; compare Dist. Ex. 3 at p. 9, with Dist. Ex. 4 at p. 9).

The CSE convened on May 22, 2017 to conduct the student's annual review and create an IEP for the 2017-18 school year (tenth grade) (Parent Ex. C at p. 1). The student's mother reported that, although the school year had "started rough," things had "turned around" and she and the student indicated that a change in the student's medication "[wa]s working" (id.). The CSE recommended three 80-minute sessions of resource room services in a small group (5:1) per six day cycle, as well as three 80-minute sessions of ICT services each in English-language arts (ELA) and social studies per six day cycle (id. at p. 9).<sup>4</sup> The CSE recommended classroom accommodations (copy of class notes, breakdown of longer assignments into smaller chunks, and provisions of cues to remain on task), testing accommodations, and assistive technology (access to word processor) (id. at pp. 9-11). The CSE developed eight annual goals in the areas of study skills, writing, mathematics, and career/vocational/transition (id. at pp. 8-9).

The student's final transcript for the 2016-17 school year demonstrated that he passed all of his classes with grades in the 80s and 90s (Dist. Ex. 14 at p. 3). Teacher reports from May 2017

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<sup>2</sup> The student's eligibility for special education programs and related services as a student with an other health-impairment is not in dispute (see 34 CFR 300.8[c][9]; 8 NYCRR 200.1[zz][10]).

<sup>3</sup> On June 3, 2016, the CSE amended the student's IEP by agreement without a meeting (Dist. Ex. 3 at p. 1). The same program and supports were recommended (compare Dist. Ex. 2 at pp. 9-11, with Dist. Ex. 3 at pp. 9-11).

<sup>4</sup> By letter dated July 25, 2017, the student's mother informed the district that the student would not attend the social studies class with ICT services as recommended on his IEP (Dist. Ex. 24 at pp. 4-7).

indicated that the student turned in most of his assignments, required frequent prompting, but had shown improvement over the course of the 2016-17 school year (Dist. Ex. 16 at pp. 1-3).

During the 2017-18 school year in the early months of 2018, the student's mother was in frequent contact with the district to inform staff at the high school that the student was undergoing a medication change, which was affecting his school work and social/emotional status (see Parent Ex. P at pp. 4-8; Dist. Ex. 24 at pp. 8-19).<sup>5</sup>

The CSE convened on April 16, 2018 to conduct the student's annual review and develop an IEP for the 2018-19 school year (11th grade) (see Dist. Ex. 1 at pp. 1-2).<sup>6</sup> According to the April 2018 CSE meeting minutes, the student's mother reported that the 2017-18 school year had "been an 'up and down' year academically, as well as a difficult year emotionally" (id. at p. 2). After the April 2018 CSE meeting, the student's mother informed the district on April 23, 2018 that the student was not interested in the counseling services that the CSE had recommended (see Dist. Ex. 24 at pp. 20-22).

On June 1, 2018, the parents executed an enrollment contract for the student's attendance at Forman as a "boarding student" for the 2018-19 school year (Parent Ex. M at pp. 1, 6).

The CSE reconvened on June 19, 2018 for a review concerning the student's program for the 2018-19 school year (Dist. Ex. 1 at p. 1). The student's mother reported that, since the annual review in April, the student had "struggled"; she expressed concerns regarding the student's social/emotional health and how that affected his schoolwork (id. at pp. 1-2). The CSE recommended a daily 80-minute session of resource room program services in a small group (5:1), as well as three 80-minute sessions of ICT services per six day cycle each in ELA and social studies (id. at pp. 9-10). Additionally, the CSE recommended that the student receive one 30-minute session of individual counseling services per six-day cycle (id. at p. 10). The CSE recommended classroom accommodations (copy of class notes, breakdown of longer assignments, cues for the student to remain on task, allowance for short breaks, preferential seating, refocusing and redirection, prompts to turn in homework, and provision of clear expectations), assistive technology services (access to word processor), and testing accommodations (extended time, flexible setting, and use of word processor to record responses) (id. at pp. 10-11). The CSE also created eight annual goals for the student in the areas of study skills, writing, mathematics, social/emotional/behavioral, and career/vocational/transition (id. at pp. 8-9). The student's mother did not agree with the recommendations (id. at p. 2).

The student's final transcript for the 2017-18 school year demonstrated that he again passed all of his classes with grades in the 80s and 90s (Dist. Ex. 9). Teacher reports from the final quarter of the 2017-18 school year indicated that the student's progress had slowed and that he was not

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<sup>5</sup> Communications between the parents and the district demonstrate that the issues with the student's medications continued at least through spring break of the 2017-18 school year (Dist. Ex. 24 at p. 19).

<sup>6</sup> The hearing record does not include an IEP generated as a result of the April 2018 CSE meeting; however, meeting minutes from the April 2018 CSE were recorded and appear within the meeting information summary in the June 2018 IEP (see Dist. Ex. 1 at p. 2).

always focused and motivated and needed help getting his work in on time, but that he would do well when he applied himself or was engaged (Dist. Ex. 12 at pp. 1-4).

In July 2018, the parents obtained an independent neuropsychological evaluation of the student (see Dist. Ex 7). The evaluating psychologist indicated that the student had "a long history of issues with fine motor skills, attention deficits, and learning issues requiring school support" (id. at p. 8). The psychologist reported that the student met the criteria for the following diagnoses: ADHD primarily inattentive type, disorder with written expression, specific reading disorder (reading speed), generalized anxiety disorder, and dysgraphia (id. at p. 9). Also, the psychologist indicated that the student was struggling in school and "feeling more frustrated" which caused "him to feel angry, withdraw a bit, and express some mood swings" (id. at p. 8). The psychologist recommended "a high school placement in a comprehensive educational setting that [wa]s small, highly structured, and specifically designed for students with academic challenges similar" to the student's (id. at p. 9). Specifically, the psychologist opined that the student required small classes that were structured and would provide for individualized instruction (id.).<sup>7</sup>

The parents withdrew the student from the public high school on August 17, 2018 (Dist. Ex. 23 at p. 2). The parents indicated that they did not agree with the recommendations of the CSE and decided to unilaterally place the student at Forman for the 2018-19 school year (id.).

On March 7, 2019, the parents executed an enrollment contract for the student's attendance at Forman as a "boarding student" for the 2019-20 school year (Parent Ex. N at pp. 1, 6).

In a letter dated March 25, 2019, the student's clinical psychologist indicated that the student's diagnosis had changed as he was now only diagnosed with ADHD and was "no longer taking medications for the[] previously medicated diagnoses" (Dist. Ex. 8 at p. 1).<sup>8</sup> The psychologist indicated that he believed the change in the student's "diagnostic picture" was due to the student's placement at Forman (id.). The psychologist opined that the student was benefitting from the program and recommended that the student continue at Forman "for the remainder of his high school career" (id. at pp. 1-2).

The CSE convened on March 28, 2019 to conduct the student's annual review and develop an IEP for the 2019-20 school year (12th grade) (see Parent Ex. D). The student's mother and staff from Forman participated by telephone (id. at p. 1). The CSE reviewed the July 2018 private neuropsychological evaluation, as well as letters from the student's psychiatrist and clinical psychologist, and considered input of staff from Forman (id. at pp. 1-3). The CSE recommended that the student attend his "[h]ome [p]ublic [s]chool [d]istrict" and receive a daily 80-minute

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<sup>7</sup> The hearing record also two includes letters addressed to the CSE, dated June 5, 2018, from the student's private psychiatrist and private clinical psychologist opining about the student's needs and the sort of learning environment from which he would receive benefit (see Parent Ex. E at p. 13). In the hearing record, the letters are included as enclosures to a letter from the parents to the district dated August 26, 2019, along with a copy of the June 2018 independent neuropsychological evaluation (see id. at pp. 1-15). While it appears that the district had a copy of the independent evaluation prior to this date (see Parent Ex. D at p. 3), it is less clear if the June 2018 letters were provided to the district prior to the parents' August 2019 letter.

<sup>8</sup> In a letter dated June 5, 2018, the psychologist had reported that the student met the criteria for diagnoses of ADHD predominantly inattentive type, generalized anxiety disorder, and mood disorder (Parent Ex. E at p. 14).

session of resource room services in a small group (5:1) with one 30-minute session of individual counseling services per six day cycle (id. at pp. 10, 14). The CSE recommended classroom accommodations (copy of class notes, assignments broken down, cues to remain on task, allowances for short breaks, preferential seating, refocusing and redirection, prompts to turn in homework, and provision of clear expectations), testing accommodations (extended time, flexible setting, use of work processor to record responses, use of a calculator, breaks, and multiple days for testing), and assistive technology (access to a work processor), and created 12 annual goals for the student in the areas of study skills, writing, mathematics, social/emotional/behavioral, and career/vocational/transition (id. at pp. 9-12). The student's mother disagreed with the recommendations, indicating that the student "was unable to be at [the district] [h]igh [s]chool without medication a[nd] the stimulant medication made him mentally ill" (id. at p. 2). The CSE indicated that they would look for an out-of-district placement for the student; however, the student's mother was not interested at that time (id.).

On April 3, 2019 the parents emailed the district and requested that the CSE send out applications for out-of-district placements for the student (Dist. Ex. 19). The student was accepted to a particular Board of Cooperative Educational Services (BOCES) therapeutic support program (Dist. Ex. 21 at p. 1).<sup>9</sup>

The CSE reconvened on July 16, 2019 (see Parent Ex. G). Staff from the BOCES program to which the student had been accepted participated and described the therapeutic support program (id. at pp. 1-2). The CSE meeting information summary indicates that the student's mother expressed that the BOCES program didn't "seem to be a fit" for the student (id.). The student's mother indicated that she was not interested in the BOCES program and, ultimately, the members of the CSE other than the student's mother agreed that a program at the district public high school could meet the student's needs (id. at p. 2). Therefore, the CSE made no changes to the program and placement recommended at the March 2019 CSE meeting (compare Parent Ex. G at pp. 9-14, with Parent Ex. D at pp. 9-14).

In a letter dated August 23, 2019, the parents notified the district that they disagreed with the CSE's recommendations and, therefore, intended to continue the student's enrollment at Forman for the 2019-20 school year and seek public funding of the costs of his tuition (Dist. Ex. 20 at pp. 1-2).<sup>10</sup> In particular, the parents emphasized the student's struggles during his enrollment at the district public high school in contrast to his success in the program at Forman (id. at p. 1). The parents also referred to the CSE's decision to explore out-of-district placements as a concession that the district "did not have a suitable program in [the] [d]istrict to meet [the student's] needs" (id. at pp. 1-2). With respect to the recommendations made at the July 2019 CSE, the parents specified that they had "substantial reservations" given the lack of sufficient "targeted

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<sup>9</sup> The evidence in the hearing record also indicates that the district sent an application to at least two other out-of-district programs (see Parent Ex. G at pp. 1-2; Dist. Exs. 20 at p. 2; 22).

<sup>10</sup> A second 10-day notice was sent on August 26, 2019 (Parent Ex. E at pp. 1-2). The second letter included the enclosures consisting of copies of the July 2018 independent neuropsychological evaluation and letters dated June 5, 2018 from the student's psychiatrist and clinical psychologist (id. at pp. 3-15),

executive functioning support, individualized instruction, a suitable peer grouping, and academic coursework appropriate for [the student's] cognitive ability and graduation needs" (id. at p. 2).

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

By due process complaint notice filed on September 25, 2019, the parents contended that the district denied the student a free appropriate public education (FAPE) for the 2018-19 and 2019-20 school years (Parent Ex A at pp. 1, 17-19). The parents requested tuition reimbursement at Forman for both school years (id. at p. 19).

Regarding 2018-19 school year, the parents argued that April and June 2018 CSE "recommendations were substantively and procedurally inappropriate, inadequate, and . . . not reasonably calculated to offer the Student an opportunity to make academic, social or emotional progress" (Parent Ex. A at pp. 5, 7). The parents asserted that the procedural inadequacies in the development of both the April and June 2018 IEPs impeded the student's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision-making process, and caused a deprivation of benefits (id. at pp. 5-7). The parents contended that the programs recommended by both CSEs "failed to adequately address the Student's academic, social and emotional needs" and failed to offer an appropriate peer group (id. at pp. 6-7). Further, the parents alleged that both the April and June 2018 CSEs created programs that were substantially similar to the 2017-18 school year, which was insufficient to address the student's deficits (id.). Additionally, the parents asserted that the CSEs failed to "accurately reflect the student Student's behaviors, academic abilities, and learning characteristics" in the present levels of performance and that the annual goals created by both CSEs were generic, vague, incomplete, and repetitive and "d[id] not respond to the Student's deficits" (id. at pp. 6-8). Regarding both the April and June 2018 CSEs, the parents argued that the CSEs failed to address the student's need for small instructional classes, individualized attention, specialized teaching strategies, and multisensory techniques (id. at pp. 6, 8). In addition, the parents contended that they provided the district with "treatment summaries" from the student's providers and a copy of the independent neuropsychological evaluation in August 2018 but that the CSE failed to reconvene to consider this information (id. at p. 13).

Turning to the 2019-20 school year, the parents asserted that both the March and the July 2019 IEPs were "substantively and procedurally inappropriate, inadequate and . . . not reasonably calculated to offer the Student an opportunity to make academic, social or emotional progress" (Parent Ex. A at pp. 13, 15). Additionally, the parents alleged that "the procedural inadequacies in the development of the Student's IEP[s] impeded the Student's right to a FAPE; significantly impeded the Parents' opportunity to participate in the decision-making process . . . and caused a deprivation of educational benefits" (id. at pp. 13-16). The parents argued that the March and July 2019 IEPs "fail[ed] to accurately reflect the results of the evaluations available" and, therefore, did not "adequately identif[y] the Student's needs" (id. at pp. 14, 16). The parents contended that the annual goals created were generic, did not respond to the student's deficits, and did not contain a baseline of measurement (id.). Further, the parents alleged that the IEPs failed to include "any plans for remediation of [the student's] deficits" (id.). The parents asserted that the program created

for the 2019-20 school year was less supportive than the 2017-18 program, which was not sufficient to address the student's deficits (id. at p. 16).<sup>11</sup>

The parents asserted that the out-of-district programs contacted by the district were inappropriate for the student (Parent Ex. A at pp. 14-15). The parents contended that despite their belief that the CSE recommended the BOCES program at the July 2019 CSE, the IEP indicated that the recommended placement was the district high school (id. at p. 15). As such, the parents argued that "the out-of-district placement search . . . [wa]s a disingenuous attempt for the District to attempt to maintain that the Student's placement at [the district] [h]igh [s]chool was appropriate while superficially exploring out of district placement" (id.). Further, the parents argued that the July 2019 IEP reflected an "inaccurate and self-serving depiction of the discussion" at the meeting as it did not accurately reflect the input of Forman and "exaggerate[d] the negatives" (id.). Also, specific to the July 2019 CSE, the parents contended that the recommendations failed to address the student's need for "small instructional classes throughout the school day, individualized attention, specialized teaching strategies, and multi-sensory techniques" (id. at p. 16).

As a remedy for the alleged violations and denial of a FAPE, the parents requested tuition reimbursement for the costs of the student's attendance at Forman for the 2018-19 and 2019-20 school years (Parent Ex. A at p. 19). The parents asserted that Forman was an appropriate unilateral placement for the student and that equitable considerations weighed in favor of the parents' request for reimbursement (id. at pp. 18-19). In addition, the parents alleged that their unilateral placement of the student at Forman "was appropriate in light of the Student[']s need for compensatory 'additional services' due to the systemic deprivation of instruction during the Student's enrollment in the District as well as a result of the deficiencies in their program recommendation for the 2018-2019 and 2019-2020 school years" (id. at p. 19).

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

The parties proceeded to an impartial hearing on November 8, 2019, which concluded on December 20, 2019, after three days of proceedings (see Tr. pp. 1-649). The IHO, in a decision dated February 11, 2020, found that the district offered the student a FAPE in the least restrictive environment (LRE) for both the 2018-19 and 2019-20 school years (IHO Decision at pp. 15-16, 19). In so finding, the IHO credited district witnesses and found that they were "consistent in explaining the intentions of the district in addressing [the student's] specific academic needs in each of the two years in contention" (id. at pp. 16-17).

The IHO held there was no "indication of procedural violations" and no "evidence of any violation of the parents' rights to participate in the decision making process" (IHO Decision at p. 13). Specifically, the IHO determined that there was "ample evidence that the District conducted comprehensive evaluations" and later noted that "no one dispute[d] the findings resulting from the many evaluations" of the student (id. at pp. 5, 11). The IHO further found that the IEPs created for both school years addressed "all of the needs indicated in" the July 2018 independent

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<sup>11</sup> Specific to the March 2019 CSE, the parents argued that the student's IEP was created without meaningful parental participation and that the program was predetermined (Parent Ex. A at p. 14).

neuropsychological evaluation (id. at p. 10).<sup>12</sup> The IHO noted that the IEPs addressed the student's needs related to improving organization, self-correction, and refocusing, and offered "small group classes, individualized attention, specialized teaching strategies and multisensory techniques" (id. at p. 17). As for the CSEs' recommendations for the student to attend the district high school, the IHO found that the district was "well prepared to address" the student's needs and that "[t]here [wa]s no reason to doubt" that the student would have demonstrated "an improved level of progress" had he attended the recommended placements (id. at pp. 5-6, 15).

Further, the IHO held that Forman was not an appropriate placement as the evidence was insufficient to establish that Forman offered "adequate accommodations" to address the student's needs and it was not the LRE for the student (IHO Decision at pp. 15-17). The IHO further determined that the evidence in the hearing record "d[id] not warrant placement of [the student] in a full time residential special education setting" such as Forman (id. at p. 16).

As for equitable considerations, the IHO noted that, for the 2018-19 school year, the parents paid a non-refundable deposit to Forman and then contacted the neuropsychologist to assess the student "to justify the placement at Forman" prior to the June 2018 CSE meeting (IHO Decision at p. 18). Regarding the 2019-20 school year, the IHO noted again that the parents paid a nonrefundable deposit to Forman "well in advance of the annual review meeting" and exhibited an attitude toward the out-of-district search, which "further demonstrate[d] that the Parents had no intention of returning [the student] to a program recommended by" the CSE (id.). Based on his findings, the IHO denied the parents' request for tuition reimbursement (id. at pp. 17-18).

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

The parents appeal, arguing that the IHO erred in finding that the district offered the student a FAPE for the 2017-18, 2018-19, and 2019-20 school years, that Forman was not an appropriate unilateral placement for the student, and that equitable considerations did not support an award of tuition reimbursement. First, the parents contend that the IHO improperly shifted the burden of proof regarding the district's offer of a FAPE from the district to the parents, pointing to the IHO's statement that the parents had not met their "burden of proving" that it would have been inappropriate for the student to remain in the district. Further, the parents assert that the IHO failed to adequately consider the evidence in the record as demonstrated by the "19-page decision [which] is devoid of any citations to the transcript."

Next, the parents argue that the IHO erred by finding that the district did not commit any procedural violations. Rather, the parents assert that the "combined procedural violations" for both school years "display[ed] a pattern of indifference to the procedural requirements of the IDEA."

Additionally, the parents contend that the IEPs created "for the 2017-2018, 2018-2019, and 2019-2020 school years are respectively substantively and procedurally inappropriate, inadequate and are not reasonably calculated to offer the Student an opportunity to make academic, social or emotional progress." The parents further argue that procedural inadequacies for all the school

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<sup>12</sup> The IHO also noted that the neuropsychological report was completed at the request of the parents, "who were attempting to justify their decision to place [the student] in a residential out of district setting" (IHO Decision at p. 10).

years significantly impeded their opportunity to participate in the decision-making progress and caused a deprivation of educational benefits.

The parents allege that the evidence in the hearing record demonstrates that the district failed to provide the student with an appropriate program during the 2016-17 and 2017-18 school years, which "resulted in erratic and inconsistent effort, and inconsistent progress." The parents allege that the present levels of performance in the June 2018 IEP fail to reflect the student's academic and behavioral needs and that the annual goals were "generic, vague, incomplete, and repetitive."

The parents allege that they provided the district with "treatment summaries" in August 2019 and that the district failed to reconvene the CSE to consider this information or the July 2018 independent neuropsychological evaluation obtained by the parents.

Specific to the 2019-20 school year, the parents contend that the "out-of-district placement search and then subsequent recommendation of a District program recommendation [wa]s a disingenuous attempt for the District to attempt to maintain that the Student's placement at [the district] [h]igh [s]chool was appropriate while superficially exploring out of district placement." Moreover, the parents allege that the July 2019 IEP contains "an inaccurate and self-serving depiction of the discussion" held at the CSE meeting as it does not accurately reflect the input of Forman staff and "exaggerates the negatives."

Based on these arguments, the parents contend that the district failed to offer the student a FAPE for the 2017-18, 2018-19, and 2019-20 school years as the district failed to "recommend a program reasonably calculated to enable the Student to receive educational benefits in the least restrictive environment."

As for the appropriateness of the unilateral placement, the parents assert that the IHO erred by finding that the evidence in the hearing record was insufficient as to the adequacy of accommodations offered at Forman and that the program at Forman offered was unduly restrictive. The parents contend that Forman was appropriate as the student received individualized instruction within a small class environment and that the student made academic and emotional progress during both school years.

Additionally, the parents assert that the IHO erred in finding that equitable considerations did not weigh in favor of an award of tuition reimbursement. The parents contend that they acted with good faith, did nothing to hinder the district, and participated in the out-of-district placement search.

Based on the foregoing, the parents request that the IHO's decision be annulled and that the district be required to fund the full tuition related to the student's attendance at Forman for the 2018-19 and 2019-20 school years.

In its answer, the district generally admits or denies the parents' allegations and asserts that the IHO's decision should be upheld in its entirety. Initially, the district asserts that the parents' request for review did not conform with the form requirements governing practice before the Office of State Review, as the paragraphs in the pleading were not numbered and that, as a result,

it was difficult for the district to respond to the parents' allegations. As a result, the district asserts that the request for review should be rejected in its entirety.

In specific response to the parents' allegations, the district asserts that the IHO did not shift the burden of proof to the parents and requests that the IHO's decision be read as a whole for meaning and context, rather than one sentence. Further, the district contends that the IEPs created for both school years were procedurally sufficient.<sup>13</sup>

## V. Applicable Standards

Two purposes of the IDEA (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 206-07 [1982]).

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

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<sup>13</sup> In a footnote in the answer, the district also asserted that the parents' allegations regarding procedural violations should be disregarded as they are "unduly vague" and do not meet the requirements of State regulation.

§ 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>14</sup>

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-

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<sup>14</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).

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. Compliance with Practice Regulations and Scope of Review**

Turning first to the district's allegation that the parents failed to comply with the practice regulations, to the extent the district objects to the lack of numbered paragraphs in the parents' request for review, this is not violative of State regulation. Part 279 of the practice regulations was amended, effective January 1, 2017, and while the former regulations mandated that "pleadings shall set forth the allegations of the parties in numbered paragraphs" (8 NYCRR 279.8[a][former 3]), that requirement was explicitly repealed in the practice regulations as amended (see 8 NYCRR Part 279). The regulations as amended neither require nor preclude a party from using numbered paragraphs in their pleadings; however, parties are required to 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" (8 NYCRR 279.8[c][2][emphasis added]). Therefore, the lack of numbered paragraphs in the parents' request for review does not violate the practice requirements of Part 279 and is without merit (see 8 NYCRR 279.8).

However, the parents' request for review does not fully comply with the practice regulations as it does not provide a clear and concise statement of the issues presented for review and the grounds for reversal (see 8 NYCRR 279.8[c][2]). State regulation requires that a request for review "identify the findings, conclusions, and orders to which exceptions are taken, or the failure or refusal to make a finding" (8 NYCRR 279.4[a]). Further, section 279.8 of the State regulations requires that a request for review shall set forth:

- (1) the specific relief sought in the underlying action or proceeding;
- (2) 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; and
- (3) citations to the record on appeal, and identification of the relevant page number(s) in the hearing decision, hearing transcript,

exhibit number or letter and, if the exhibit consists of multiple pages,  
the exhibit page number

(8 NYCRR 279.8[c][1]-[3]). The regulation further states 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][4]).

Generally, the failure to comply with the practice requirements of Part 279 of the State regulations may result in the rejection of the submitted documents or the dismissal of a request for review by an SRO (8 NYCRR 279.8[a]; 279.13; 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]; T.W. v. Spencerport Cent. Sch. Dist., 891 F. Supp. 2d 438, 440-41 [W.D.N.Y. 2012] [upholding dismissal of a petition for review that was untimely and exceeded page limitations]). However, "judgments rendered solely on the basis of easily corrected procedural errors or 'mere technicalities,' are generally disfavored" (J.E. v. Chappaqua Cent. Sch. Dist., 2015 WL 4934535, at \*4-\*6 [S.D.N.Y. Aug. 17, 2015], quoting Foman v. Davis, 371 U.S. 178 [1962]).

In this case, the parents' request for review adequately identifies as a first issue for appeal their concern regarding the IHO's application of the statutory burden of proof (see Req. for Rev. at pp. 3-4). However, as their second issue raised on appeal, the parents assert generally that the district committed procedural violations that deprived the student of a FAPE, yet they do not indicate which procedural violations the district allegedly committed (see Req. for Rev. at p. 4). The use of broad and conclusory statements or allegations within a request for review does not act to revive any and all procedural violations the parents believe the IHO erroneously addressed or failed to address without the parents specifically identifying which procedural violations meet this criterion (M.C., 2018 WL 4997516, at \*23 [finding that "the phrase 'procedural inadequacies,' without more, simply does not meet the state's pleading requirement"]). For purposes of this decision, any matter that may be characterized as a procedural violation is discussed below only to the extent it relates to a substantive issue that was sufficiently raised in the request for review.<sup>15</sup>

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<sup>15</sup> The only procedural violation alleged with any specificity in the request for review—albeit, not in the section of the request for review that states that the IHO erred in finding no procedural violations—is the parents' allegation that the district failed to reconvene the CSE after the parents provided a copy of the July 2018 independent neuropsychological evaluation report, as well as the June 5, 2018 letter from the student's psychiatrist, and the June 5, 2018 letter from the student's clinical psychologist (see Req. for Rev. at p. 6). While the parents' due process complaint notice referenced a letter to the district dated August 17, 2018 that purportedly enclosed the independent evaluation and letters from the private providers (see Parent Ex. A at p. 11), the hearing record only includes a letter from the parents dated August 26, 2019 that includes the referenced enclosures (see Parent Ex. E). On appeal, the parents refer to the August 2019 letter as the one that should have triggered the district's obligation to reconvene (Req. for Rev. at p. 6). However, as of the date of the parents' August 2019 letter, the district had already received and reviewed the July 2018 independent neuropsychological evaluation report at the March 2019 CSE meeting (see Parent Ex. D at p. 3). Even if the CSE had not already reviewed the independent evaluation, the parents' provision of the evaluation and the letters from the private providers would not have triggered the district's obligation to reconvene the CSE. As a general matter, in addition to a district's obligation to review the IEP of a student with a disability periodically but at least annually, the IDEA and federal and State regulations also require a CSE, upon review, to revise a student's IEP as necessary to address: "[t]he

For the third numbered issue in the request for review, the parents allege that the IHO failed to adequately consider the evidence in reviewing the CSEs' recommendations for the 2018-19 and 2019-20 school years (Req. for Rev. at p. 4). The parents then quote passages from the IHO's decision that they allege were error but fail to identify what evidence the IHO erroneously relied upon or failed to rely upon or elaborate on why those portions of the IHO's decision should be reversed or modified (see *id.* at pp. 4-5). Moreover, although the parents then go on to identify some aspects of the CSEs' processes or recommendations they allege are inappropriate, they frame these allegations in terms of the district's or CSEs' errors, rather than as reasons that the IHO's decision was deficient, and they fail to separately identify these allegations as issues for review or cite the hearing record in support of their allegations in any meaningful way (see *id.* at pp. 5-6).<sup>16</sup> State level review of an IHO's determination is not simply the relitigation of all prior arguments conceivably leveled against a party during an impartial hearing; on the contrary, it is an appellate administrative process in which the allegations must be brought forth by the party and clearly aimed at the findings in the IHO's decision (see 8 NYCRR 279.4[a]; 279.8[c][2]; cf. *DiPilato v. 7-Eleven, Inc.*, 662 F. Supp. 2d 333, 340 [S.D.N.Y. 2009] [articulating a similar expectation for objections to a magistrate's report and recommendation]). The fourth and fifth numbered issues in the parents' request for review, pertaining to the appropriateness of Forman as a unilateral placement and equitable considerations, respectively, suffer from similar shortcomings of lack of any specificity to any particular evidence that the IHO overlooked (Req. for Rev. at pp. 8-9).

Notwithstanding the foregoing deficiencies, I will not impose a sanction of outright dismissal on the parents' request for review in this instance, given that the district was able to

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results of any reevaluation"; "[i]nformation about the child provided to, or by, the parents" during the course of a review of existing evaluation data; the student's anticipated needs; or other matters (20 U.S.C. 1414[d][4][A]; 34 CFR 300.324[b][1][ii][C]; 8 NYCRR 200.4[f][2][ii]). Further, an independent evaluation "[m]ust be considered by the school district, if it meets the school district's criteria, in any decision made with respect to the provision of a [FAPE] for the student" (8 NYCRR 200.5[g][1][vi][a]; see 34 CFR 300.502[c][1]). State regulations additionally provide that, if parents believe that their child's placement is no longer appropriate, they "may refer the student to the [CSE] for review" (8 NYCRR 200.4[e][4]). In a guidance letter, the United States Department of Education indicated that it is the district's responsibility to determine when it is necessary to conduct a CSE meeting but that parents may request a CSE meeting at any time and, if the district determines not to grant the request, it must provide the parents with written notice of its refusal, "including an explanation of why the [district] has determined that conducting the meeting is not necessary to ensure the provision of FAPE to the student" (*Letter to Anonymous*, 112 LRP 52263 [OSEP Mar. 7, 2012]; see 34 CFR 300.503; 8 NYCRR 200.5[a]). After a student has been evaluated and an IEP has been developed, none of the foregoing authority requires a district to reconvene a CSE within a specified period of time upon completion or receipt of an additional evaluation from a parent. Further, there is no evidence in the hearing record to indicate that the parents requested that the CSE reconvene to review the evaluation or letters. Accordingly, even if the parents sufficiently raised this procedural violation as an issue to be reviewed on appeal, the evidence shows that it was considered when the CSE convened to develop the following IEP, and any claim to the contrary would be without merit.

<sup>16</sup> Under the heading "Procedural History," the parents summarize allegations from an "amended due process complaint" notice and then state that "[t]he IHO's decision fails to directly address several of these concerns" (Req. for Rev. at p. 2); however, as the parents do not identify the particular issues that the IHO allegedly failed to address as specific issues for review on appeal—and, indeed, the parents only note that the IHO failed to address the "concerns" without stating that such failure was error or should warrant reversal or modification of the IHO's decision—this is insufficient on its own to revive all of the issues summarized in the procedural history as issues for review on appeal.

respond to the allegations raised in an answer and there is no indication that it suffered such undue prejudice to warrant that result. However, the parents' attorney is cautioned that, while a singular failure to comply with the practice requirements of Part 279 may not warrant an SRO exercising his or her discretion to dismiss a request for review or reject a memorandum of law (8 NYCRR 279.8[a]; 279.13; see Application of a Student with a Disability, Appeal No. 16-040), an SRO may be more inclined to do so after a party's or a particular attorney's repeated failure to comply with the practice requirements (Application of a Student with a Disability, Appeal No. 18-110; Application of a Student with a Disability, Appeal No. 17-079; Application of a Student with a Disability, Appeal No. 17-015; Application of a Student with a Disability, Appeal No. 16-040).<sup>17</sup> Consequently, the lack of compliance in the instant appeal will not result in a dismissal of the parent's appeal in its entirety but will circumscribe the issues to be addressed on the merits.<sup>18</sup>

In particular, as noted above, the parents quote passages of the IHO's decision that, for example, reflect the IHO's determinations that, despite the parents' opinion that the IEPs for the both school years offered an inappropriate amount of instruction or type of methodology, the IEPs were appropriate, and that the IEP developed for the student for the 2019-20 school year was appropriate and recommended resource room, counseling, and accommodations that addressed the student's attention and organization needs (see Req. for Rev. at p. 5, quoting IHO Decision at pp. 15, 17). While the parents allege such findings are erroneous, this is insufficient to preserve these issues for review on appeal given that the parents do not separately number the issues addressed in such passages as issues to be reviewed or provide any actual reasons why the IHO's determinations on these points should be reversed or modified other than mere disagreement with the result. The parties engaged in a three-day impartial hearing to develop the record on these issues and, while I review the evidence in the hearing record in its entirety, my role does not include making the parents' case for them based upon their overbroad, conclusory allegations.

The closest the parents come to stating reasons why the IHO's decision should be reversed on any point relating to the district's case that it offered the student a FAPE is by alleging that the IHO improperly shifted the burden of proof (see Req. for Rev. at pp. 3-4) and by referencing their view, relating to the 2018-19 school year, that the present levels of performance in the June 2018 IEP failed to reflect the student's needs, that the annual goals in the June 2018 IEP were "generic, vague, incomplete, and repetitive," and that the student made inconsistent progress during the 2016-17 and 2017-18 school years due to the district's failure to provide an appropriate program,<sup>19</sup>

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<sup>17</sup> An examination of decisions issued in previous State-level administrative appeals in which the parent's attorney appeared yields no serious admonitions with respect to the pleading requirements of Part 279.

<sup>18</sup> To the extent that the parents set forth allegations in their memorandum of law that are not contained in the request for review, it has long been held that a party is required to set forth the issues for review in their pleading and that a memorandum of law is not a substitute for a pleading (see 8 NYCRR 279.4, 279.6; see, e.g., Application of a Student with a Disability, Appeal No. 19-060). Thus, any issues included solely within the parents' memorandum of law have not been properly raised and will not be considered or addressed in this decision.

<sup>19</sup> The parents' argument about the lack of progress during the 2016-17 and 2017-18 school year is not even clearly plead in the request for review in that, although the parents allege the lack of progress, they fail to articulate their view that, as a result, the purportedly similar program recommended by the CSE for the 2018-19 school year was inappropriate (see Req. for Rev. at p. 5). However, given that this issue is essentially the crux of the parents' case as articulated in the due process complaint notice, post-hearing brief, and memorandum of law on appeal, it is

and relating to the 2019-20 school year that the district's out-of-district placement search leading up to the July 2019 CSE was disingenuous and the July 2019 IEP contained inaccurate depictions of the CSE meeting (see id. at pp. 5-6). Accordingly, my review is confined to these limited issues in which the parent has articulated something more than just bare allegations of general error.

Also related to the scope of the issues properly before me on appeal, in their request for review, the parents claim that the student was denied a FAPE for the 2017-18 school year (Req. for Rev. at pp. 5, 9). However, the parent did not raise the issue of the district's provision of a FAPE to the student for the 2017-18 school year in the due process complaint notice, and, therefore, this issue is not properly raised for the first time on appeal (see Parent Ex. A at pp. 1, 19). The IDEA and its implementing regulations provide that a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its original due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.508[d][3][i], 300.511[d]; 8 NYCRR 200.5[i][7][i][a]; [j][1][ii]), or the original due process complaint is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.507[d][3][ii]; 8 NYCRR 200.5[i][7][b]). Reasonably read, the parents' due process complaint notice referenced deficiencies in the student's program that he received in the district high school during the 2016-17 and 2017-18 school years in support of an allegation that continuation of such a program during the 2018-19 and 2019-20 school years would no longer be appropriate (Parent Ex. A at pp. 3-4, 7, 16).<sup>20</sup> However, the parents due process complaint notice did not assert a claim that the district denied the student a FAPE for the 2017-18 school year (see generally id. at pp. 1-19). In contrast, the parents unambiguously alleged that "the District failed to provide the Student a FAPE for the 2018-2019 and 2019-2020 school years" (id. at p. 17). Therefore, the parents' allegations regarding a denial of a FAPE for the 2017-18 school year will not be further examined in this decision.

## 2. Burden of Proof

The parents assert that the IHO shifted the burden of proof to the parents in contravention of State law, which places the burden on the district to demonstrate it offered the student a FAPE. The parents point to the IHO's statement that the parents had not met their burden to demonstrate the recommendation for the student to attend the public school was not appropriate (see Req. for Rev. at p. 4; see also IHO Decision at p. 17).

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addressed below notwithstanding that it was poorly stated in the request for review (compare Req. for Rev. at p. 5, with Parent Ex. A at pp. 6-7, and Parent Post-Hr'g Brief at p. 17, and Parent Mem. of Law at p. 19).

<sup>20</sup> In addition, in their due process complaint notice, the parents do seem to reference the district's alleged failure to provide the student a FAPE during the school years that the student attended the district public school to justify their chosen unilateral placement for the 2018-19 and 2019-20 school years (see Parent Ex. A at p. 19 [alleging that their unilateral placement of the student at Forman "was appropriate in light of the Student[']s need for compensatory 'additional services' due to the systemic deprivation of instruction during the Student's enrollment in the District as well as a result of the deficiencies in their program recommendation for the 2018-2019 and 2019-2020 school years" (id. at p. 19)]. However, on appeal, the parents do not follow through on any specific argument that the IHO failed to rule on a request for compensatory education services or their allegation regarding a systemic deprivation of instruction to the student.

Under the IDEA, the burden of persuasion in an administrative hearing challenging an IEP is on the party seeking relief (see Schaffer v. Weast, 546 U.S. 49, 59-62 [2005] [finding it improper under the IDEA to assume that every IEP is invalid until the school district demonstrates that it is not]). However, under State law, the burden of proof has been placed 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 Hardison v. Bd. of Educ. of the Oneonta City Sch. Dist., 773 F.3d 372, 386 [2d Cir. 2014]; C.F. v. New York City Dep't of Educ., 746 F.3d 68, 76 [2d Cir. 2014]; R.E., 694 F.3d at 184-85;).

The parents are correct insofar as the IHO used a poor choice of words in stating that they had "not met their burden of proving" that the student remaining in the district was an inappropriate placement (IHO Decision at p. 17); however, elsewhere in the decision the IHO correctly stated that the burden of proof was on the district and cited the correct provision of State law (id. at pp. 2, 5, 15) and, further, the decision when read in its entirety reveals that the IHO made his decision based on an assessment of the relative strengths and weaknesses in evidence rather than by solely allocating the burden of persuasion to one party or the other (see generally IHO Decision). Thus, even assuming the IHO misallocated the burden of proof to the parent, the error would not require reversal in this case insofar as the hearing record does not support a finding that this was one of those "very few cases" in which the evidence was in equipoise (Schaffer, 546 U.S. at 58; M.H., 685 F.3d at 225 n.3). Furthermore, I have conducted an impartial and independent review of the entire hearing record and, as discussed below, I reach the same determination as the IHO with regard to the parents' FAPE challenges in the 2018-19 and 2019-20 school years (34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]).<sup>21</sup>

## **B. 2018-19 School Year**

### **1. Present Levels of Performance**

The parents allege generally that the June 19, 2018 present levels of performance failed to accurately reflect the student's behaviors, academic abilities, and learning characteristics.<sup>22</sup>

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<sup>21</sup> The IHO's decision is technically lacking in other respects; that is, while the IHO summarized the testimony at the impartial hearing in his decision in detail, he did not cite to the transcripts of the impartial hearing; further, the IHO did not attach an exhibit list to his decision (see generally IHO Decision). Both of these are requirements for an IHO decision under Part 200 of the State regulations, which states that "the decision shall reference the hearing record to support the findings of fact" and that the IHO "shall attach to the decision a list identifying each exhibit admitted into evidence" (8 NYCRR 200.5[j][5][v]). The IHO is reminded that he should comply with the regulations in drafting his decisions.

<sup>22</sup> The CSE convened for the student's annual review on April 16, 2018 (Tr. p. 86; Dist. Ex. 1 at p. 2). As previously noted, the IEP was not entered into the hearing record as documentary evidence. The meeting information summary found in the June 2018 IEP indicated that according to the parent, the student had an "up and down" year academically and a difficult year emotionally (Dist. Ex. 1 at p. 2). The meeting summary reflected information from the April 2018 teachers' reports, as well as a report by the student's special education teacher that the student was respectful and hardworking but needed reminders to complete work during his resource room periods (compare Dist. Ex. 1 at p. 2, with Dist. Ex. 13 at pp. 1-3). According to the meeting summary, the special education teacher viewed the student as smart and capable but indicated his work product was dependent on his

Among the elements of an IEP is a statement of a student's academic achievement and functional performance and how the student's disability affects his or her progress in relation to the general education curriculum (20 U.S.C. § 1414[d][1][A][i][I]; 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; see 8 NYCRR 200.1[ww][3][i]). In developing the recommendations for a student's IEP, the CSE must consider the results of the initial or most recent evaluation; the student's strengths; the concerns of the parents for enhancing the education of their child; the academic, developmental, and functional needs of the student, including, as appropriate, the student's performance on any general State or district-wide assessments as well as any special factors as set forth in federal and State regulations (34 CFR 300.324[a]; 8 NYCRR 200.4[d][2]).

In this case, the June 2018 IEP indicated that, in developing the student's IEP for the 2018-19 school year, the CSE considered April 12, 2018 and June 18, 2018 attendance reports, April 12, 2018 and June 18, 2018 report cards, April 12, 2018 and June 15, 2018 teacher reports, an April 12, 2018 student transcript, and the student's May 22, 2017 IEP (Dist. Ex. 1 at p. 3).<sup>23</sup> The descriptions of the student in the present levels of performance section of the June 2018 IEP were largely drawn from the aforementioned documents.

The April 2018 teachers' report indicated that, in English, the student loved to debate and discuss complex moral and philosophical issues and had become increasingly interested in how to use his writing as a way to express his perspective on the world (Dist. Ex. 13 at p. 1). The student's English teachers noted that the student struggled with focus in class and, at times, with reading comprehension (*id.*). The teachers reported the student often appeared fatigued, noted his tendency to retreat into the "world of his phone," and indicated that the student benefited from redirection "because once he gets his head in the game, he consistently impresses us and his classmates with his insight" (*id.*). With respect to writing, the English teachers noted the student was learning how to use the drafting process "to polish and organize rough but great first ideas," and indicated that they wanted to see the student establish the drafting process as a "normal" part of how he studied (*id.*). The teachers commented that the student was most comfortable one-on-one and remarked that the student's ability to ask compelling questions was "really special" (*id.*). At the time of the April 2018 teachers' report the student had an 86 average in English (*id.*). In the June 2018 teachers' report, the student's English teachers commented that the student had "a lot of potential" and was a natural at debate and philosophical conversations (Dist. Ex. 12 at p. 1). They noted that the student offered thoughtful insights, especially when discussing abstract concepts or current events (*id.*). However, the teachers reported that there was a disconnect with the student's behavior in class and, while always polite, the student had "retreated a bit" over the last two months (*id.*). The teachers explained that the student had taken to "furtively" checking his phone and taking more frequent breaks that, while never long, impacted his ability to stay connected to the class activity (*id.*). The teachers opined that, in turn, this caused the student's grade, which was a 76 at

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level of focus and emotional state (Dist. Ex. 1 at p. 2).

<sup>23</sup> The IHO found that the district conducted comprehensive evaluations (IHO Decision at p. 5). On appeal, the parents do not appeal the IHO's finding on this point or otherwise assert that the evaluative information used to develop the June 2018 IEP inaccurately described the student's learning characteristics or needs. Therefore, the IHO's determination regarding the sufficiency of the evaluative information before the CSEs is final and binding and will not be discussed (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at \*6-\*7, \*10 [S.D.N.Y. Mar. 21, 2013]).

the time the June report was written, to "slip" (id.). The English teachers noted that the student frequently did not follow directions despite indicating that he understood them when clarification was provided (id.). They explained that they were "particularly sensitive about due dates and extensions" and continued to break down larger assignments into more manageable pieces for the student (id.). However, despite the accommodations, the teachers noted that the student's then-current work was not reflective of the quality they were used to seeing (id.).

With respect to history, the April 2018 teacher report noted that the student possessed good foundational skills in world history and that he completed assignments by the scheduled due dates but the assignments did not always meet the prescribed criteria (Dist. Ex. 13 at p. 2). The student's history teacher noted that at times the student did not incorporate adequate supportive details or content-related vocabulary in written works but, when given an option and explicit directions, the student successfully revised the work (id.). The teacher reported that on occasion the student participated in class discussions and provided meaningful insight (id.). The teacher further reported the student completed study materials in preparation for assessments (id.). As in English, the student's history teacher noted the student often left the class for extended periods of time (id.). The June 2018 teacher report for history indicated that the student was capable when engaged in class activities and demonstrated the ability to add interesting insight during class discussions as well as to successfully complete assigned work (Dist. Ex. 12 at p. 4). The student's history teacher noted that on occasion the student submitted assignments past their due date, which negatively impacted his grade (id.). According to the history teacher, although the student made use of provided study materials, he did not consistently attend review sessions for assessments (id.). The student's history teacher reported that the student "often" left class and used his phone several times during an 80-minute period and when prompted to put the phone away he would say he was communicating with his mother (id.).<sup>24</sup>

The April 2018 teacher report for chemistry indicated the student had an inconsistent year and demonstrated initial difficulties with class material and the tempo of instruction (Dist. Ex. 13 at p. 3). However, the teacher noted that the student had since managed to adapt and seemed to be reasonably comfortable (id.). The chemistry teacher indicated that the student needed frequent reminders to refocus his attention but did so quite well (id.). The teacher reported the student had test results in the high 80s to low 90s, demonstrating a "solid" amount of work and had no fundamental difficulties in the class (id.). The teacher noted that occasionally the student's homework was missing but lab reports were submitted on time, although sometimes written in a cursory and superficial manner (id.). According to the chemistry teacher, the student did not exhibit behavior problems, collaborated well with peers during lab activities, and there were no observed antagonistic or otherwise troubling interactions (id.). The teacher commented that the student was more reserved than outgoing with his peers (id.). In terms of the June 2018 chemistry report, the teacher noted the student's progress had slowed in the fourth marking period with his grade dropping from 88 in the third quarter to 77 at the time the report was written (Dist. Ex. 12 at p. 2). The teacher indicated that, although the student was on track to finish the year successfully, his stamina, interest, and general participation had waned significantly (id. at p. 2). The chemistry

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<sup>24</sup> The June 2018 teacher report for history indicated the student regularly used the recommended testing accommodations of time and a half and flexible setting as well as a computer to record responses (Dist. Ex. 12 at p. 4).

teacher reported that, despite reminders and attempts at refocusing, the student seemed to "space out" and was inattentive, and took frequent bathroom breaks, sometimes more than once per period (id.). Lastly, the chemistry teacher reported that the student continued to hand in assignments on time and was generally conscientious and noted his interactions with the teacher and peers were "somewhat sparse" but unproblematic (id.).

The June 2018 teacher report for photography indicated the student was not always focused and motivated but he made sure his work was made up (Dist. Ex. 12 at p. 3). The teacher commented that the student needed to get his work in on time (id.). With respect to health, the June 2018 teacher report indicated that the student did a "great job" when he applied himself but his interest varied depending on the subject matter, as did the quality of the work he handed in (id. at p. 5). The health teacher noted the student's grade of 82 would have been higher if he demonstrated consistent effort and handed work in on time (id.).

The student's April 13, 2018 report card indicated that he consistently attended school but had a number of instances of unexcused tardiness (Dist. Ex. 11 at p. 1). The student's third quarter report card reflected a decrease in grades from the end of the second quarter; notably, his grade for English decreased from 93 to 83 and for geometry from 84 to 72 (id.). The student's grades remained constant in chemistry increasing from 87 to 88 and history, where he received an 84 for both the second and third marking periods (id. at p. 2). Teacher comments indicated that in geometry the student struggled more in the third quarter and needed to show his work on assignments and complete homework, and, in history, the teacher encouraged the student to use his phone less and remain in the classroom as much as possible (id.).

The June 2018 IEP also reflects input provided by the parent about the student's needs. On June 19, 2018 the CSE met to review the student's program, based on a request by the parent (Dist. Ex. 1 at p. 1). According to the meeting information summary, the student's mother advised the CSE that the student had struggled since the April 2018 annual review and opined that "it would not be in the student's best interest to do the same thing next year" as he was not feeling good about himself and "too much damage ha[d] been done to his self-esteem" (id.). The student's mother shared that the student felt that he was not able to learn the way the other students did and it made him feel "stupid" and then angry and withdrawn (id. at p. 2). According to the meeting information summary, the student's mother reported that the student could not tolerate the side effects of ADHD medication and was therefore no longer taking it (id.). The ensuing discussion by CSE members consisted of a review of the program and services recommended during the April 2018 meeting and a suggestion by the CSE chairperson that the student receive once daily resource room services and ICT services in social studies, in addition to the previously recommended services (id.). The student's mother shared that the student did not find resource room helpful, and she opined that it would not help the student with organization and timeliness of assignments (id.). Although the special education teacher described the role of the resource room teacher and how she assisted the student with the completing his assignments, the student's mother noted that the student still missed many assignments (id.). According to the meeting information summary, the student's mother reported that the student was in intensive therapy outside of school and she did not see how in-school counseling would address the student's executive functioning deficits (id.). The CSE chairperson recommended school counseling so that school-related incidents (and stressors) could be addressed in the moment, rather than waiting for outside therapy (id.). The student's mother reported that the student was withdrawing and suffering emotionally (id.). The CSE reviewed the

student's positive performance in chemistry but also discussed the concerns raised in the teachers' reports regarding the student's phone usage (id.). The CSE reviewed the program modifications and made additions; however, the student's mother was not in agreement with the recommended increase in services because she did not feel it addressed the student's needs (id.).

The present levels of performance in the June 2018 IEP described the student's educational performance with respect to mathematics, writing, reading, study skills, social development, and physical abilities (Dist. Ex. 1 at pp. 5-7). With respect to mathematics the June 2018 IEP indicated the student demonstrated calculation abilities in the average range, mathematic fluency in the low average range, and problem-solving skills in the very superior range (id. at p. 5). The IEP indicated that, although the student was able to solve algebraic and geometric problems easily, he often worked them out in his head or by using a calculator (id.). According to the IEP, the student had difficulty writing down the steps he took to solve a problem and when he looked back sometimes he could not recall how to solve it (id.). The IEP indicated that the student needed to show his step-by-step work to achieve full credit, especially on State assessments (id.). With regard to writing, the June 2018 IEP present levels of performance indicated the student's spelling and written expression fell in the average range with writing fluency falling in the low average range (id.). The IEP noted that the student used a word processor due to a graphomotor delay (id. at pp. 5, 7). The June 2018 IEP present levels of performance described the student's ability to create a five-paragraph complex claim essay showing both sides of an argument, supporting the argument with factual evidence and analysis, using sophisticated vocabulary, and demonstrating the use of interesting sentence structure (id. at p. 5). Although, the present levels of performance noted the student's ability to write interesting pieces and to edit his work with the use of an editor's checklist, they also noted that the student might leave out important ideas if he was not motivated by the topic (id.). Regarding reading, the June 2018 present levels of performance noted the student's ability to decode words and comprehend text was within the average range (id.). The present levels of performance also indicated that the student read and analyzed grade-level content material in all classes, was capable of reading to learn, and was able to draw conclusions, make connections, and understand inferences (id.).

In describing the student's study skills, the June 2018 IEP present levels of performance conveyed that the student was bright and a quick learner but experienced difficulty following step-by-step directions, procedures, and processes (Dist. Ex. 1 at p. 5). The IEP noted that the student's lack of focus prevented him from catching pertinent details of an assignment or activity (id.). Further, the IEP indicated that at times the student did not complete or thoroughly follow through with addressing assignment requirements, despite understanding the over-arching theme or concept, thereby leaving out details that would enhance his results on assignments (id.). The June 2018 IEP present levels of performance noted that, due to the aforementioned concerns, the student required directions reviewed for longer assignments, verbal reminders to hand work in on time, to check with teachers to gain clarification, and to exhibit extra effort to complete assignments (id. at pp. 5-6). The present levels of performance indicated that the student effectively used technology supports for organizational needs, demonstrated increased effort when working one-on-one, and was organized and able to find assignments when needed (id. at p. 6). Consistent with the April 2018 and June 2018 teachers' reports, the June 2018 IEP identified the student's need to improve thoroughness and completeness of his work (particularly on extensive writing assignments), maintain focus and attention during class instructions and activities, and seek support from content area teachers when needed (compare Dist. Ex. 12 at pp. 1-5, and Dist. Ex. 13

at pp. 1-3, with Dist. Ex. 1 at p. 6). The June 2018 IEP also noted the student's need to expand his writing by adding greater detail and to show step-by-step the process used when solving multi-step mathematical problems (Dist. Ex. 1 at p. 6).

In discussing the student's social/emotional development, the June 2018 IEP present levels of performance indicated that the student was respectful in his interactions with adults and sought out relationships with peers, but that he demonstrated a sensitive sense of self and had difficulty with mood management (Dist. Ex. 1 at p. 6). The present levels of performance identified the student's social/emotional needs as to develop and implement positive strategies to manage mood, and to learn and practice social skills that promote positive peer relationships (id. at pp. 6-7). The school psychologist testified that at the June 2018 CSE meeting the committee discussed the student's emotional well-being including parent concerns regarding the student's self-concept, feelings of being defeated, and anger and withdrawal (Tr. pp. 123-24). The present levels of performance did not specifically identify some of the concerns raised by the student's teachers in the April and June 2018 teachers' reports, such as the student's withdrawal during class, frequent breaks of extended time, use of his cell phone during class activities, and reduced stamina, interest, and general participation (compare Dist. Ex. 12 at pp. 1-5, and Dist. Ex. 13 at pp. 1-3, with Dist. Ex. 1 at pp. 5-7).

With the exception of graphomotor delays, the student's physical development was described as being within normal limits and the IEP noted strengths in the student's keyboarding skills and his ability to apply them to educational tasks (Dist. Ex. 1 at p. 7).

With respect to the parents claim that the June 19, 2018 present levels of performance failed to accurately reflect the student's behaviors, academic abilities, and learning characteristics, the evidence in the hearing record supports a finding that the June 2018 IEP sufficiently reflected the student's needs. As detailed above, the IEP described the student's academic performance and identified the areas in which the student had difficulty. The meeting information summary showed that the committee reviewed the April and June 2018 teachers' reports and discussed the student's social/emotional status at the time of the meeting, his struggles with the effects of ADHD medications, his need for a "more restrictive environment" to address his needs, and parental concerns regarding how to best meet the student's executive functioning needs (Dist. Ex. 1 at pp. 1-2).<sup>25</sup> The present levels of performance reflected the student's abilities in content-area classes and as well as his executive functioning needs. While the present levels of performance did not specifically describe the change in the student's demeanor in the fourth quarter of the school year or reference the student's tendency to use his phone during class or take long breaks, they did indicate that the student had difficulty with mood management and that he needed to develop and implement positive strategies to manage his mood (Dist. Exs. 1 at pp. 6-7; 12). In addition, the present levels of performance noted the student's difficulty with maintaining focus and attention (Dist. Ex. 1 at pp. 5-6). There is no evidence that the present levels of performance contained incorrect information about the student. Although the present levels of performance in the June 2018 IEP could have provided a greater level of detail and specificity, they were not so infirm that they failed to provide a sufficient foundation upon which to develop the student's program (see

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<sup>25</sup> According to the meeting information summary, the CSE chairperson recommended a "more restrictive environment," which appeared to consist of an increase in resource room services and the addition of ICT services in social studies (Dist. Ex. 1 at p. 2).

G.B. v New York City Dep't of Educ., 145 F. Supp. 3d 230, 250 [S.D.N.Y. 2015] [noting that "[e]very aspect of a student's specific educational issues does not need to be detailed in the IEP, as long as the IEP [is] designed to specifically address those issues").

In view of the foregoing evidence, the June 2018 IEP adequately reflected the student's strengths and deficits and provided sufficient information upon which to develop the remainder of the student's IEP. Therefore, the parent's contention that the June 2018 present levels of performance failed to provide an adequate description of the student to the extent that the student was denied a FAPE is without merit.

## **2. Annual Goals**

The parents contend that the annual goals in the June 2018 IEP were generic, vague, incomplete, and repetitive. In their memorandum of law, the parents elaborate on this issue and argue that the goals lacked "specific levels, which are necessary for measuring progress" and further allege that the goals did not address all the student's deficits (Parent Mem. of Law at p. 20). In particular, the parents assert that the IEP did not include goals to address the student's needs in the areas of ELA and writing, that the study skills goals did not address the student's "need to improve organization, self-correct or refocus," and that the social/emotional/behavioral goals failed to address the student's "anxiety, depression, or frustration and there are not specific counseling goals listed" (id.).

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

As described above, the student demonstrated needs related to focusing and attending, following directions, handing in assignments in a timely manner, improving thoroughness and completeness of work, and showing the step-by-step process with regard to mathematical problems (Dist. Ex. 1 at pp. 5-6). The student also demonstrated needs related to developing and implementing positive strategies to manage mood concerns, and learning and practicing social skills that promote positive peer relationships (id. at pp. 6-7).

A review of the June 2018 IEP shows that the CSE recommended eight annual goals to address the student's needs relative to study skills, writing, mathematics, social/emotional/behavioral development, and career/vocational/transition needs (Dist. Ex. 1 at pp. 8-9). With respect to study skills the June 2018 IEP included three goals: first, that the student will check his work to insure he has completed the assignments thoroughly while meeting the stated requirements; second, the student will seek out his curriculum or special education teachers for assistance in clarification of material or assignments; and third, the student will maintain his attention on tasks during class lessons and assignments in order to complete assignments on time

on a daily basis across all academic settings (*id.* at pp. 8-9). The student's resource room teacher testified that the first goal was important because sometimes the student would not complete an assignment, he might skip answers or give a cursory answer (Tr. p. 57). She reported that the student needed go back and check to make sure he had done all he could so he could get a better grade (*id.*). The resource room teacher testified that progress would be monitored by reviewing the student's homework assignments for completeness and monitoring the student's grades on those assignments (*id.*; *see* Dist. Ex. 1 at p. 8). With regard to the second goal, the resource room teacher explained that it was important because the student needed encouragement to go see his teachers for clarification (Tr. pp. 57-58). She noted that sometimes the student would say he was not clear on an assignment and the only way to get clarity was to go to the curriculum or ICT teacher and get more information about it (Tr. p. 58). According to the resource room teacher, the third study skills goal was important because the staff was concerned about the student's attention in class and how it was impacting his ability complete class work (Tr. p. 58; Dist. Ex. 1 at p. 9). The June 2018 IEP identified that criterion levels (such as eight out of ten trials over ten weeks, four out of five trials over ten weeks) for each goal and indicated that the student's progress would be measured through homework assignments or observation checklists (Dist. Ex. 1 at pp. 8-9). The IEP also identified the schedule of when progress would be monitored (every two weeks, weekly etc.) (*id.*).

With respect to writing, the June 2018 IEP included a goal that targeted the student's need to check his written work to make sure it had met the requirements of the assignment and contained the supporting details and evidence to support his position (Dist. Ex. 1 at p. 9). The IEP identified the criteria for achieving the goal (four out of five trials over ten weeks), the method of assessment (portfolio materials), and when progress would be measured (every two weeks) (*id.*). The resource room teacher testified that the goal was important because sometimes the student would think that he put everything in a written assignment that he needed to and might not realize that more information was needed (Tr. p. 59). Regarding mathematics, the June 2018 IEP goal required the student to show his work when answering mathematical problems and included criteria for achieving the goal (eight out of ten trials over ten weeks), a method for measuring progress (portfolio materials), and when progress would be measured (every two weeks) (Dist. Ex. 1 at p. 9). The resource room teacher indicated the student was "very capable mathematically" and could do things quickly in his head but had difficulty writing down some of the steps he used or showing his work (Tr. pp. 49, 59). The resource room teacher indicated that the student's failure to show his work limited the credit he received because without the accompanying work the student did not demonstrate his understanding of how he arrived at his answers (Tr. pp. 45-47, 49).

The June 2018 IEP included two goals that addressed the student's social/emotional needs including the need to identify, practice, and implement five positive strategies to manage his mood and to identify, practice, and implement five strategies that promote positive interactions with others (Dist. Ex. 1 at p. 9). Both goals included achievement criteria of 80% success with moderate assistance over six weeks and indicated that the student's progress would be monitored through recorded observations on a weekly basis (*id.*). The school psychologist testified that she recommended the social/emotional goals based on the student's mother's report and her (the psychologist's) resulting concern regarding the things the parents shared about the student's mood and self-esteem (Tr. p. 125). The psychologist noted that she was concerned following the incident that took place earlier in the year and wanted to offer the student additional help even though he was in outpatient therapy and "being managed" by a physician (Tr. p. 125). The psychologist testified that she would have worked with the student on the social/emotional goals through the

use of cognitive behavioral strategies, identifying the student's most negative mood, distinguishing between helpful and hurtful way of coping, and identifying triggers and strategies (Tr. pp. 125-26). Additionally the psychologist indicated that she would help the student identify strategies he could implement, discuss the consequence of each strategy, practice strategies, engage in role modeling, and get feedback to help the student see the benefit of the strategies and use them more consistently (id.).

The final goal in the student's June 2018 IEP was a career/vocational/transition goal that called for the student to identify and research vocational preferences, interests, and aptitudes by using vocational assessments, informal interviews, computer software and/or reference materials (Dist. Ex. 1 at p. 9). The IEP indicated that the goal would be monitored through observational checklists every five weeks and the criteria for achievement would be two out of three trials over ten months (id.).

While the June 2018 CSE followed the procedure for developing annual goals that included evaluative criteria, procedures to evaluate the goals, and schedules to be used to measure progress, there is some support to the parents' allegation regarding measurability to the extent that many of the annual goals themselves provided little guidance with regard to the manner in which the student's progress was to be measured (see Dist. Ex. 1 at pp. 8-9). For example, the study skill goal required the student to seek out his teachers for assistance, and although the IEP contained the criteria and methods of measurement, the goal was worded in such a way that it left it to the student's discretion to determine when he needed such assistance, making it unclear what the evaluative criteria referenced (see id. at p. 8). In any event, even though some of the goals were lacking in this regard, courts generally have been reluctant to find a denial of a FAPE on the basis of an IEP failing to sufficiently specify how a student's progress toward his or her annual goals will be measured when the goals address the student's areas of need (D.A.B. v. New York City Dep't of Educ., 973 F. Supp. 2d 344, 359-61 [S.D.N.Y. 2013]; A.D. v. New York City Dep't of Educ., 2013 WL 1155570, at \*10-\*11 [S.D.N.Y. Mar. 19, 2013]; J.L. v. City Sch. Dist. of New York, 2013 WL 625064, at \*13 [S.D.N.Y. Feb. 20, 2013]; P.K. v. New York City Dep't of Educ. (Region 4), 819 F. Supp. 2d 90, 109 [S.D.N.Y. 2011], aff'd, 526 Fed. App'x 135 [2d Cir. May 21, 2013]), and I similarly find that this procedural violation did not arise to a denial of a FAPE

Next, contrary to the parents' allegations, the IEP included goals in all of the areas cited by the parents (i.e., to address writing, organization, attention, and the social/emotional needs related to his moods) (Dist. Ex. 1 at pp. 8-9; see Parent Mem. of Law at p. 20).<sup>26</sup> Moreover, courts have held that an IEP need not identify annual goals as the vehicle for addressing each and every need in order to conclude that the IEP offered the student a FAPE (see J.B. v. New York City Dep't of Educ., 242 F. Supp. 3d 186, 199 [E.D.N.Y. 2017]).

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<sup>26</sup> To the extent that parents object to the lack of goals specific to counseling (see Parent Mem. of Law at p. 20), State guidance with respect to IEP development notes that "[g]oals are developed for the student, not the service provider" but that a district may "group annual goals by the need area" ("Questions and Answers on Individualized Education Program (IEP) Development, The State's Model IEP Form and Related Requirements," at pp. 22-23, Office of Special Educ. Mem. [Apr. 2011], available at <http://www.p12.nysed.gov/specialed/formsnotices/IEP/training/QA-411.pdf>). As summarized above, the IEP included social/emotional/behavioral goals, among others, that the student could work on during counseling sessions (see Dist. Ex. 1 at pp.8-9).

To the extent the parents contend, without elaboration, that the goals are "repetitive," the carryover of annual goals from a student's IEP in the prior school year to the next school year's IEP has been found to be appropriate "[w]here a student's needs and objectives remain substantially the same; '[i]t is especially sensible that [an IEP] would reflect continuity with [a student's] needs and objectives as of [previous years,]'" (P.C. v. Rye City Sch. Dist., 232 F. Supp. 3d 394, 413-15 [S.D.N.Y. 2017], quoting L.B. v. New York City Dep't of Educ., 2016 WL 5404654, at \*11 [S.D.N.Y. Sept. 27, 2016]; see M.B. v. City Sch. Dist. of New Rochelle, 2018 WL 1609266, at \*15 [S.D.N.Y. Mar. 29, 2018] [finding that, despite "some carry-over" between goals for the years at issue, "each of the disputed IEPs contained a number of new goals and objectives that appropriately reflected [the student's] progress and updated evaluative information"])). Here, the teacher who was the student's resource room teacher at the time of the impartial hearing testified that "very often" if a student needed to continue working on a particular goal it may be carried over from year to year (Tr. p. 87).<sup>27</sup> The goals on the June 2018 IEP are similar in nature to the goals included in the May 2017 IEP but are responsive to the student's continuing needs as described in the present levels of performance on the June 2018 IEP (compare Dist. Ex. 1 at pp. 8-9, with Parent Ex. C at pp. 8-9).<sup>28</sup> The May 2017 IEP included goals related to the student's ability to seek teacher assistance when needed, attend during class, hand in assignments in a timely manner, and write out step by step processes when solving multi-step math problems (Parent Ex. C at pp. 8-9). As summarized above, the June 2018 IEP included similar goals but added goals in the area of social/emotional/behavioral needs (see Dist. Ex 1 at pp. 8-9). While it appears that there was some carryover with the goals, given the continuity in the student's areas of need, this alone does not support a finding that the IEP was inappropriate.

Based on the foregoing, the evidence in the hearing record supports a finding that the goals in the June 2018 IEP addressed the student's academic, functional, and social/emotional needs with sufficient specificity and without undo repetition to enable the student to be involved in and make progress in the general education curriculum while meeting the needs that resulted from his disability.

### **3. Placement / Progress During the 2017-18 School Year**

The parents challenged the 2018-19 programming in their request for review and in their memorandum of law, the parents further specify that the June 2018 CSE recommended a program and placement for the 2018-19 school year that "placed the Student in a substantially similar

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<sup>27</sup> In her testimony at the impartial hearing, the student's resource room teacher compared the goals in the student's June 2018 IEP with the goals in the student's March 2016 IEP (Tr. p. 87). Two of the eight goals on the student's June 2018 IEP are similar to two of the five goals from the student's March 2016 IEP (compare Dist. Ex. 2 at p. 9, with Dist. Ex. 1 at pp. 8-9). The goals for the student's 2016-17 school year as set forth in the May 2016 IEP were maintained in the June and then October 2016 IEPs (compare Dist. Ex. 2 at p. 9, with Dist. Ex. 3 at p. 9, and Dist. Ex. 4 at p. 9).

<sup>28</sup> Emails between the parents and school staff indicate that from January 2018 through April 2018 the student continued to demonstrate difficulty with handing in assignments and was struggling with executive functioning skills, which supported the continuation of the study skills goals and made the repetition of similar goals appropriate to address the student's needs (Dist. Ex. 24 at pp. 9, 11, 12). The student's third quarter report card also made reference to the student's increased struggling, failure to complete assignments, and his need to decrease phone use and increase time spent in the classroom (Dist. Ex. 11 at p. 2).

program as his program for the 2017-2018 school year, which proved to be insufficient to address his deficits" (Parent Mem. of Law at p. 20).

A student's progress under a prior IEP is to varying degrees a relevant area of inquiry for purposes of determining whether a subsequent IEP is appropriate, particularly if the parents express concern with respect to the student's rate of progress under the prior IEP (see H.C. v. Katonah-Lewisboro Union Free Sch. Dist., 528 Fed. App'x 64, 66 [2d Cir. Jun. 24, 2013]; Adrienne D. v. Lakeland Cent. Sch. Dist., 686 F. Supp. 2d 361, 368 [S.D.N.Y. 2010]; M.C. v. Rye Neck Union Free Sch. Dist., 2008 WL 4449338, at \*14-\*16 [S.D.N.Y. Sept. 29, 2008]; see also "Guide to Quality Individualized Education Program (IEP) Development and Implementation," Office of Special Educ., at p. 18 [Dec. 2010]). Furthermore, "if a student had failed to make any progress under an IEP in one year," at least one court has been "hard pressed" to understand how a subsequent IEP could be appropriate if it was simply a copy of the IEP which failed to produce any gains in a prior year (Carlisle Area Sch. v. Scott P., 62 F.3d 520, 534 [3d Cir. 1995] [noting, however, that the two IEPs at issue in the case were not identical as the parents contended]).

First, a comparison of the May 2017 and the June 2018 IEPs reveals they do not set forth identical programs, making a review of the student's progress during the 2017-18 school year a less reliable indicator as to how the student might fare under the June 2018 IEP when viewed at the time it was written (see Carlisle Area Sch., 62 F.3d at 534). Specifically, during the 2017-18 school year, the student received resource room services (5:1) three times during a six-day cycle for a period of one hour and 20 minutes (Parent Ex. C at p. 9). Additionally, the CSE recommended that the student receive ICT services for ELA and social studies to support the his writing needs, although the parents opted for the student to attend a general education class for social studies, without the ICT services (Tr. pp. 313-14; Parent Ex. C at p. 9-10; Dist. Ex. 24 at p. 7). By way of comparison, the June 2018 IEP modified the IEP by increasing the recommendation for resource room services, providing for a daily session of one hour and 20 minutes (compare Dist. Ex. 1 at p. 9, with Parent Ex. C at p. 9). The June 2018 IEP continued the recommendation for ICT services in ELA and social studies but added one 30-minute session of counseling services in a six-day cycle (compare Dist. Ex. 1 at pp. 9-10, with Parent Ex. C at p. 9).<sup>29</sup> In addition to carrying over the classroom recommendations set forth in the May 2017 IEP (copy of class notes, breakdown of longer assignments into smaller chunks, and provisions of cues to remain on task), the June 2018 IEP also provided that the student would have access to short breaks, preferential seating, refocusing and redirection, prompts to turn in homework, and provision of clear expectations (compare Dist. Ex. 1 at p. 10, with Parent Ex. C at p. 9). Keeping this in mind, I turn to the evidence of the student's progress in the district program during the 2017-18 school year.

In addition to reports of the student's progress summarized above in the discussion of the present levels of performance in the June 2018 IEP, a July 18, 2018 IEP progress report indicated that, with respect to study skills, the student generally was progressing gradually or satisfactorily during the first three quarters of the school year but demonstrated a deterioration of performance

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<sup>29</sup> According to the school psychologist, at the time of May 2017 CSE meeting the district offered school-based counseling to help the student with problem-solving or to further assess the student for more significant concerns; however, after speaking with the student, the student's mother indicated he was not interested in the services (Tr. pp. 111-112; Dist. Ex. 24 at pp. 21-22).

in the final quarter (Dist. Ex. 5 at pp. 2-3).<sup>30</sup> Specifically, the student was progressing gradually regarding the thoroughness and completeness of work, but during the fourth quarter his performance was inconsistent and he was in jeopardy of not achieving the goal (*id.* at p. 2). The progress report indicated that the student had to be reminded to provide more detail in his writing and had turned in assignments that were incomplete (*id.*). According to the student's resource room teacher the first three quarters of the 2017-18 school year went "fairly well" for the student and he was making progress but the last quarter "just seemed more difficult" and the student did not meet the specifications of his writing assignments (Tr. p. 36). While the student was initially progressing satisfactorily in seeking teacher assistance, by the final quarter he was often reluctant to do so and needed "strong encouragement" (Dist. Ex. 5 at p. 2). The student's ability to maintain attention for 20 minutes regressed from a satisfactory performance and an expectation that the student would meet the goal to the student not achieving the goal in the final quarter (Dist. Ex. 5 at p. 2). The student's resource room teacher testified that the student's attention was variable depending on his interest level, and during the fourth quarter there were more comments from his teachers that the student was more distracted and leaving the classroom and using his phone, as opposed to trying to stay focused (Tr. p. 39; Dist. Ex. 5 at p. 2). The July 2018 progress report noted that the student required strong encouragement to seek out appropriate support from content area teachers during after-school tutorial, whereas in the previous two quarters the student was progressing satisfactorily toward this goal (Dist. Ex. 5 at p. 2). Regarding handing in assignments in a timely fashion, the student improved from progressing inconsistently and gradually to turning in the vast majority of the homework on time with reminders (Tr. p. 43; Dist. Ex. 5 at pp. 2-3).

The July 2018 IEP progress report indicated that the student's expository writing performance progressed throughout the academic year (Dist. Ex. 5 at p. 3). Fourth quarter comments indicated that the student was capable of excellent written work but noted that the student needed reminders to include all relevant supporting details and that the use of outlines and preplanning helped improve the final product (*id.*). The student's resource room teacher testified that she had to provide the student with encouragement regarding his writing and that during the fourth quarter the student's work "fell off" (Tr. p. 44). She indicated that through the third quarter the student's writing was "absolutely beautiful" and the student was receiving "really strong grade[s]" but that the last quarter was harder for him (Tr. pp. 44-45). The July 2018 IEP progress report showed that, with respect to the student's mathematics goal, the student was progressing satisfactorily during the first two quarters, inconsistently in the third quarter, and did not achieve the goal by the final quarter (Dist. Ex. 5 at p. 3). The resource room teacher stated that student had not done well with the goal (Tr. p. 46). She noted that the student had "excellent math ability" and could do a lot of things in his head and therefore did not necessarily feel that he needed to show how he got the answer (Tr. p. 46). Finally, according to the July 2018 IEP progress report, the student was progressing satisfactorily and expected to achieve his goal to research and analyze the requirements of occupations of interest (Dist. Ex. 5 at p. 3).

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<sup>30</sup> The fourth quarter IEP progress report for the 2017-18 school year is dated July 18, 2018 which postdates the June 2018 CSE meeting (compare Dist. Ex. 1 at p. 1, with Dist. Ex. 5 at p. 1). However; the hearing record shows that the student's resource room teacher who completed the July 2018 progress report participated in the both the April 2018 and June 2018 CSE meetings as the special education teacher (Tr. pp. 48-49, 86; Dist. Ex. 1 at pp. 1-2).

As the parents allude to, it appears that the decline in the students' progress towards the end of the 2017-18 school year may have been related to a change in his medications and, overall, that the student struggled with the competing difficulties of an increased need related to executive functioning and attention versus an increased need related to his social/emotional functioning and mood depending on the medications the student was or was not taking at the time (see Tr. pp. 117, 124; Dist. Exs. 1 at p. 2; 24 at pp. 8-9, 19). However, there is no evidence in the hearing record to support the parents' statement that the district overly emphasized medication management as a predicate for the student's availability for learning as the parents argue (see Parent Mem. of Law at p. 18).<sup>31</sup> On the contrary, the June 2018 CSE was aware that the student was struggling, learned that he was no longer taking medications, and adjusted its recommendations accordingly, offering the increased resource room and accommodations, as well as counseling (Tr. pp. 60-63, 319-21; Dist. Ex. 1 at pp. 1-2, 5-7, 9-10).

While it is understandable that the parents preferred Forman to an in-district placement, a district is not required to maximize a student's educational opportunity (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Based on the foregoing, the evidence in the hearing record supports the IHO's conclusion that the program and services recommended by the June 2018 CSE were appropriate and offered the student a FAPE in the LRE for the 2018-19 school year.

## **C. 2019-20 School Year**

### **1. Predetermination**

With respect to the 2019-20 school year, the parents argue that district's search for an out-of-district placement was "disingenuous" and "superficial[]" (Req. for Rev. at p. 6).

The basis of the parents' complaint about the out-of-district search for a placement is unclear, but it most closely resembles a claim that the educational placement for the 2019-20 school year was predetermined. The consideration of possible recommendations for a student prior to a CSE meeting is not prohibited as long as the CSE understands that changes may occur at the CSE meeting (T.P., 554 F.3d at 253; A.P. v. New York City Dep't of Educ., 2015 WL 4597545, at \*8-\*9 [S.D.N.Y. July 30, 2015]; see 34 CFR 300.501[b][1], [3]; 8 NYCRR 200.5[d][1], [2]). The key factor with regard to predetermination is whether the district has "an open mind as to the content of [the student's] IEP" (T.P., 554 F.3d at 253; see D.D-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at \*10-\*11 [E.D.N.Y. Sept. 2, 2011], aff'd 506 Fed. App'x 80 [2d Cir. Dec. 26, 2012]; R.R. v. Scarsdale Union Free Sch. Dist., 615 F. Supp. 2d 283, 294 [E.D.N.Y. 2009], aff'd, 366 Fed. App'x 239 [2d Cir. Feb. 18, 2010]). Districts may "prepare reports and come with pre[-]formed opinions regarding the best course of action for the child as long as they are willing to listen to the parents and parents have the opportunity to make objections and suggestions" (DiRocco v. Bd. of Educ. of Beacon City Sch. Dist., 2013 WL 25959, at \*18

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<sup>31</sup> The IDEA and federal and State regulations specifically prohibit conditioning receipt of special education services on a student obtaining a prescription for a controlled substance (20 U.S.C. § 1412[a][25][A]; 34 CFR 300.174; 8 NYCRR 200.4[e][9]).

[S.D.N.Y. Jan. 2, 2013] [alternation in the original], quoting M.M. v. New York City Dept. of Educ. Region 9 (Dist. 2), 583 F. Supp. 2d 498, 506; [S.D.N.Y. 2008]; see B.K. v. New York City Dept. Of Educ., 12 F. Supp. 3d 343, 358-59 [E.D.N.Y. 2014] [holding that "active and meaningful" parent participation undermines a claim of predetermination]).

Contrary to the parents' characterizations of the district's search for an out-of-district placement for the student, the district's efforts demonstrate that it approached development of the student's educational program with the requisite "open mind" (T.P., 554 F.3d at 253).

In this case, notwithstanding that the March 2019 CSE determined an appropriate placement for the student, the district gave fair consideration to an out-of-district placement option, taking into account the parents' concerns.<sup>32</sup> Specifically, the evidence in the hearing record demonstrates that for the 2019-20 school year the March 2019 CSE recommended that the student attend a program and placement in a district public school consisting of daily 5:1 resource room services, individual counseling one time per six-day cycle, supplemental aids and services, testing accommodations, and assistive technology (Parent Ex. D at pp. 10-12). At the meeting, the district offered to seek an out-of-district placement due to the parents' concerns that the student would require a therapeutic environment if he returned to the district (Tr. p. 331; Parent Ex. D at p. 2). At the meeting the student's mother declined the district's offer; however, she later changed her mind and requested the district conduct the search (Tr. pp. 331-32, 606; Parent Ex. D at p. 2; Dist. Ex. 19).

The district then conducted an out-of-district search for a placement for the student (see Tr. pp. 332-33; Dist. Exs. 21; 22). The student was accepted to a particular BOCES therapeutic support program (Dist. Ex. 21 at p. 1). After that, the CSE reconvened in July 2019 to consider the results of the search for an out-of-district placement (see Parent Ex. G at p. 1).<sup>33</sup> In attendance at the July 2019 CSE meeting were representatives from the BOCES program to which the student had been accepted (id.). During the July 2019 CSE meeting, the student's mother again expressed her view that the student would need therapeutic support if he returned to the district because he would have to "go back on medication" but emphasized that he did not need such support at Forman (id.). Representatives from BOCES discussed the therapeutic supports that would be available to the student if he attended the program (id.). However, the student's mother expressed that the BOCES program was not a good fit for the student and described the supports the student received at Forman to address his executive functioning and attention-related needs (id. at p. 2).

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<sup>32</sup> Once the CSE determined an appropriate class placement for the student, the district was not obligated to consider a more restrictive placement—such as an out-of-district placement (see B.K., 12 F.Supp.3d at 359 [indicating that "once the CSE determined that a 6:1:1 placement was appropriate for [the student], it was under no obligation to consider more restrictive programs"]; E.F. v. New York City Dep't of Educ., 2013 WL 4495676, at \*15 [E.D.N.Y. Aug. 19, 2013] [explaining that "under the law, once [the district] determined . . . the least restrictive environment in which [the student] could be educated, it was not obligated to consider a more restrictive environment"]; A.D., 2013 WL 1155570, at \*8 [finding that "[o]nce the CSE determined that [the public school setting] would be appropriate for the [s]tudent, it had identified the least restrictive environment that could meet the [s]tudent's needs and did not need to inquire into more restrictive options"]).

<sup>33</sup> The July 2019 CSE does not appear to have considered any additional evaluative information but rather received information regarding two BOCES programs with an ensuing discussion regarding the student's needs and potential placements that could meet the student's needs (Tr. pp. 177-178, 334-337; Parent Ex. G at pp. 1-3).

The CSE continued the discussion of the different placement options, including weighing each program's relative strengths in terms of mainstreaming options, availability of elective courses, and the ability to differentiate instruction to meet the student's needs (*id.*). Ultimately, the student's mother expressed "that she was not interested in pursuing a placement" with the BOCES program (*id.*). Based on the discussion, the committee members other than the student's mother agreed that the recommendations made at the March 2019 CSE meeting for the student to attend a placement in the district public school could meet the student's needs and that he did not need an out-of-district placement (*see id.*; *compare* Parent Ex. G at pp. 11-13, *with* Parent Ex. D at pp. 10-12).

The foregoing demonstrates that the CSE genuinely weighed out-of-district placement options as part of its consideration of possible placements for the student but permissibly concluded that an in-district placement was the appropriate setting. Accordingly, the hearing record does not support the parents' allegation to the contrary.

## **2. CSE Discussion at the July 2019 Meeting**

The parents assert that the IEP included "an inaccurate and self-serving depiction of the discussion at the July 2019 CSE meeting" (Req. for Rev. at p. 6). By way of examples, the parents indicate that the July 2019 IEP does not accurately reflect the input of staff from Forman and "exaggerates the negatives." Overall, the substance of the parents' concern is difficult to discern. For example, it is unclear based on the parents' pleading whether they challenge the statement of the student's needs in the IEP present levels of performance or just the comments regarding the content of the CSE meeting set forth in the meeting information summary.<sup>34</sup> Further, in neither the request for review nor the memorandum of law, do the parents point to any example of a statement in the IEP that they believe is inaccurate. However, notwithstanding that the parents' claim is insufficiently stated, out of an abundance of caution and despite the fact that there is no bright line standard by which to evaluate such vague allegations, I will examine the July 2019 IEP to evaluate the degree to which information provided by Forman—both during the CSE meetings

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<sup>34</sup> The former would tend to fall under the umbrella of a present levels of performance claim, whereas the latter would be more akin to parental participation. With regard to the former, the regulatory language governing the contents of the present levels of performance is set forth above. As for parental participation, federal and State regulations require that school districts take steps to ensure that parents are present at their child's IEP meetings or are afforded the opportunity to participate (34 CFR 300.322; 8 NYCRR 200.5[d]). Although school districts must provide an opportunity for parents to participate in the development of their child's IEP, mere parental disagreement with a school district's proposed IEP and placement recommendation does not amount to a denial of meaningful participation (*see T.F. v. New York City Dep't of Educ.*, 2015 WL 5610769, at \*5 [S.D.N.Y. Sept. 23, 2015]; *A.P.*, 2015 WL 4597545 at \*8, \*10; *E.F.*, 2013 WL 4495676 at \*17 [stating that "as long as the parents are listened to," the right to participate in the development of the IEP is not impeded, "even if the [district] ultimately decides not to follow the parents' suggestions"]; *P.K. v. Bedford Cent. Sch. Dist.*, 569 F. Supp. 2d 371, 383 [S.D.N.Y. 2008] [noting that "[a] professional disagreement is not an IDEA violation"]; *Sch. for Language & Comm'n Dev. v. New York State Dep't of Educ.*, 2006 WL 2792754, at \*7 [E.D.N.Y. Sept. 26, 2006] [finding that "[m]eaningful participation does not require deferral to parent choice"]). When determining whether a district complied with the IDEA's procedural requirements, the inquiry focuses on whether the parents "had an adequate opportunity to participate in the development" of their child's IEP (*Cerra*, 427 F.3d at 192). As demonstrated above with respect to the discussion of the out-of-district placement option and as discussed herein, the evidence in the hearing record demonstrates that the March and July 2019 CSEs considered the parents' input and attempted to address their concerns.

and in written reports—is accurately reflected in the IEP, as well the degree to which any statements in the CSE meeting summary appear inaccurate or exaggerated based on the evidence in the hearing record.

In developing the student's IEP for the 2019-20 school year, the March 2019 CSE considered the results of the parents' privately obtained July 2018 neuropsychological evaluation, a June 5, 2018 letter from the student's psychiatrist, a March 25, 2019 letter from the student's clinical psychologist, and information provided by the academic reading teacher from Forman (Forman representative) (see Tr. pp. 435-37; Parent Ex. D at pp. 1-3).<sup>35, 36</sup>

The July 2019 IEP reflects the CSEs' heavy reliance on the information provided by the 2018-19 Forman first semester progress report (compare Parent Ex. G at pp. 6-8, with Parent Ex. I at pp. 1-4).<sup>37</sup> For example, with respect to mathematics, the July 2019 present levels of performance indicated that as of April 2019 the student had a B in Algebra II and rating of 4 out of 5 for effort (compare Parent Ex. G at p. 6, with Parent Ex. I at p. 3). The IEP further indicated that the student was off to a very good start in Algebra II, and he was always on time and prepared for class (compare Parent Ex. G at p. 6, with Parent Ex. I at p. 3). According to the IEP, the student had missed more than one homework assignment but had made most of them up and turned them in later (compare Parent Ex. G at p. 6, with Parent Ex. I at p. 3). The IEP noted that the student had done well on most of his quizzes and his chapter test, and he had proven that he was a capable, determined student (compare Parent Ex. G at p. 6, with Parent Ex. I at p. 3).

Similarly, with respect to the student's writing ability, the July 2019 IEP referenced information gleaned from the Forman progress report (compare Parent Ex. G at p. 6, with Parent Ex. I at p. 2). The IEP indicated that the student had received a B- in research writing and a three out of five for effort (Parent Ex. G at p. 6).<sup>38</sup> The IEP described the student as capable of

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<sup>35</sup> In addressing the parent's allegation regarding the July 2019 IEP, a review of the March 2019 CSE is relevant since it was the annual review for the student for the 2019-20 school year, subsequent to which the July 2019 CSE reconvened (see Parent Exs. D at p. 1; G at p. 1). The parent's claim only makes reference to the July 2019 IEP; however, the present levels of performance remained constant through both March and July 2019 IEPs, and therefore consideration of both meetings informs review of the contents of the July 2019 IEP (compare Parent Ex. D at pp. 5-7, with Parent Ex. G at pp. 6-8).

<sup>36</sup> Although the parents have asserted in their request for review their claim that the district failed to reconvene to consider the independent evaluation and letters from the private providers at the time the parent provided the documents to the district (addressed above), they have not alleged that the CSE failed to sufficiently consider the the independent evaluation or any other document once it did convene.

<sup>37</sup> The Forman representative testified that she read the reports from the Forman teachers and gave summaries of the student's progress in each class, highlighted the student's areas of weakness and strengths, and reported what his teachers did to support the student (Tr. p. 435). Further, the Forman representative stated she described the school day and how the student was performing within the structure of the Forman program (id.). While not stated explicitly in the hearing record, the teacher reports referred to by the Forman representative are presumed to be parent exhibit I given that some of the information included the reports is reflected verbatim in the present levels of performance of the July 2019 IEP (compare Parent Ex. I, with Parent Ex. G at pp. 6-8).

<sup>38</sup> The Forman progress report indicated that the student received a grade of B+ in academic writing and a three out of five for effort (Parent Ex. I at p. 2).

developing and organizing main ideas with a high level of independence, especially when a topic resonated with him (compare Parent Ex. G at p. 6, with Parent Ex. I at p. 2). The IEP noted that, although the student's productivity in class fluctuated at times, he was receptive to feedback and incorporated comments in his revisions (compare Parent Ex. G at p. 6, with Parent Ex. I at p. 2). According to the IEP, throughout the semester, the student continued to strengthen his language skills by practicing essential grammar skills in standardized testing format, combining sentences to create more complex structure, as well as applying decoding and multi-sensory strategies to study a specific academic vocabulary list (compare Parent Ex. G at p. 6, with Parent Ex. I at p. 2). The IEP stated that the student had made steady progress in the areas of essay structure, varied word choice, and most significantly academic tone, but cautioned that more deliberate attention to detail and connotation would be necessary for the student to bridge the discrepancy between the quality of his writing and his proficiency in grammar and vocabulary (240 words) testing (compare Parent Ex. G at pp. 6-7, with Parent Ex. I at p. 2). Lastly, the IEP indicated that moving forward, to the student needed to focus on maintaining an academic writer's voice, following through with the standard writing process, and employing within-sentence punctuation so as to refine the overall quality of his writing (compare Parent Ex. G at pp. 6-7, with Parent Ex. I at p. 2).

With respect to reading, the July 2019 IEP borrowed directly from the 2018-19 Forman progress report when describing the student's academic performance. The IEP indicated that the student had a B in "Literature and Film" and his effort was rated a three out of five (compare Parent Ex. G at p. 7, with Parent Ex. I at p. 3). The July 2019 IEP characterized the student as a "discussion force" in the class during the first two marking periods but indicated that he "went silent" during the third marking period when he did not like the material being covered (compare Parent Ex. G at p. 7, with Parent Ex. I at p. 3). Both the Forman progress report and the student's July 2019 IEP reflected that the student "finished the course strongly" but noted that it was a result of the teacher's intervention rather than the student's self-advocacy, and indicated the student's need to incorporate supporting detail into his writing (compare Parent Ex. G at p. 7, with Parent Ex. I at p. 3). The July 2019 IEP, consistent with the Forman 2018-19 progress report, noted the student's insightfulness about human behavior when discussing the characters in literature pieces used during the course curriculum (compare Parent Ex. G at p. 7, with Parent Ex. I at p. 3).

The July 2019 IEP also included a description of the student's study skills in the present levels of performance that was taken directly from the executive function coaching portion of the 2018-19 Forman progress report (compare Parent Ex. G at p. 7, with Parent Ex. I at p. 4). Both exhibits described the student as enjoying the collaborative partnership of executive function coaching, noting that the student was "willing to participate in reflecting on his progress and building new habits" (compare Parent Ex. G at p. 7, with Parent Ex. I at p. 4). Further, in keeping with the 2018-19 Forman progress report, the July 2019 present levels of performance conveyed the student's openness regarding suggestions and his willingness to try new approaches to build new habits around his morning routine, managing emotions, and seeking extra help from teachers (compare Parent Ex. G at p. 7, with Parent Ex. I at p. 4).

With respect to social development, the July 2019 IEP indicated that "[a]s per Forman and the parent" the student did not have needs in the area of social development but noted that the student's mother stated the student would need therapeutic support if he was to return to the district (Parent Ex. G at p. 7). As contained in the 2018-19 Forman progress report, the July 2019 IEP identified the student's social emotional strengths as possessing a "heart of gold and loyalty like

no other," noting the student had been "willing to see himself as a leader and take on additional roles" (compare Parent Ex. G at p. 7, with Parent Ex. I at p. 1).

Turning to the other information from Forman represented in the IEP, the student's mother testified that when she received a copy of the July 2019 IEP she found several discrepancies between the Forman representative's input at the March 2019 CSE meeting and the notes in the IEP (Tr. p. 616).

According to the meeting information summary, the Forman representative informed the CSE that the student had difficulty with executive functioning and that he struggled to get to meals on time (especially breakfast); needed reminders to get to places on time; and missed his first period class on many occasions, continued to get up late, and needed a person to get him out of bed (Parent Ex. G at p. 3). As reflected in the meeting summary, the Forman representative further advised the CSE that the student needed digital reminders and constant feedback and lacked motivation and arrived at class sometimes tired and physically fatigued (id.). The summary noted that Forman had assigned an adult to support the student (id.). The meeting information summary also showed that the Forman representative indicated that the student needed help with nightly study time but was taking the initiative to complete his homework and was "putting effort to check-in" (id.). The summary also indicated that Forman's executive functioning coach was helpful to the student and that he was learning good habits and bought into the program (id.). As memorialized in the meeting information summary, the Forman representative shared that the student had developed a passion for photography that allowed him to develop his own voice and medium, which helped to booster the student's self-esteem (id.). The Forman representative noted that the student was doing research on and tracking criteria for colleges (id.).

The student's mother contends that, contrary to meeting information summary, the Forman representative never said that the school had assigned an adult to support the student, nor had she stated that the student needed support with nightly study time (Tr. p. 617). Rather, the student's mother contends that the Forman representative stated, "that sometimes, kids need a lot of support with that" and that the student's dorm parents reported, "he does that very well with one reminder" (id.). The student's mother testified that the indication in the March 2019 meeting information summary that the student lacked motivation and arrived to class sometimes tired and physically fatigued was from "one teacher reporting it in a morning class" (id.). The student's mother stated that the student was generally describe as engaged and motivated and opined that the meeting information summary "ma[d]e it sound global" (id.).

The Forman representative, who testified at the impartial hearing (see Tr. pp. 260, 462), reported that during the 2018-19 year the student struggled to get up and out of the dorm on time to make it to breakfast on a consistent basis (Tr. pp. 426-27). She noted that, in turn, the student was late to his health center commitment and perhaps late to his first period courses (Tr. p. 427). The Forman representative indicated that there were "a couple of times when [the student] slept in and the dean of students had to wake him up and get him to class" (id.). She testified that the statement in the meeting information summary that "Forman ha[d] assigned an adult to support the student" was not accurate and that the school did not assign adults to any students (Tr. pp. 435-36). According to the Forman representative, she reported that the student was "getting late to class, and one of the teachers commented that when he c[a]me[] into class that he [wa]s physically fatigued" and seemed very tired (Tr. p. 436). The Forman representative indicated that the teacher

said she made a note to the dorm parents "to make sure that [the student] [wa]s going to bed on time, and not staying up on his devices[,] in order to improve his awareness in class (id.).

Although the student's mother was unhappy with the statements attributed to the Forman representative in the March 2019 CSE meeting information summary, information contained in the Forman progress report suggests that most of what was written in the summary was accurate. For example, dorm notes indicated that the student "had made progress in room cleanliness and focusing on studies during evening study hall," which suggests that at some point the student had difficulty with the nightly study hall (Parent Ex. I at p. 2). In addition, the student's teacher for "Executive Function Coaching" indicated that her coaching with the student focused on "motivation and finding reasons for putting effort into school" as well as "how to monitor the passage of time, prioritizing tasks, and being accountable to the plan he created" (id. at p. 4). The student's health teacher reported that during independent work sessions the student "required explicit guidelines, additional prompts, and direct monitoring to stay on task with momentum" (id.). The health teacher further noted that at times the student fell behind on assignments and struggled to catch up (id.).

With respect to the July 2019 CSE meeting information summary, the student's mother testified that there were additional discrepancies between what the summary stated and what transpired at the CSE meeting (Tr. pp. 617-18). She stated that she did not indicate, as the summary reflected, that the BOCES program was only for students with mental health issues, as she knew that was not true (id.; see Parent Ex. G at p. 2). The student's mother further testified that, although the meeting information summary indicated that BOCES would put executive functioning supports in place if a student needed them, "[t]hat was never described to [her]" (Tr. p. 618; see Parent Ex. G at p. 2). Lastly, the student's mother indicated that the description of the role of the executive functioning coach in the meeting information summary was not accurate (Tr. p. 618). While the summary stated that "the student's mother reported that [the student] ha[d] a specific class and teacher that coordinate to help organize the student and keep him on task" the student's mother testified that that was not the role of the executive functioning coach (Tr. pp. 618-19; see Parent Ex. G at p. 2). She explained that the executive function coach performed "a much deeper dive into the sources of problems with motivation and difficulty" (Tr. pp. 618-19; see Parent Ex. I at p. 4). The Forman progress report described the executive function coaching provided by the school as a "playground" where a student met individually with their coach to co-create executive functioning approaches that the student chose to use (Parent Ex. I at p. 4). According to the description, the coach provided a supportive non-judgmental partnership in which the student was encouraged to set reasonable and attainable goals and, with the coach, create an action plan to support the changes and accountability the student wanted to make (id.).

Even assuming for the sake of argument that July 2019 CSE meeting information summary contained some discrepancies compared to the statements of the Forman representative or the student's mother at the CSE meeting, the IEP as a whole accurately reflects the student's strengths and needs as presented in the Forman progress report, among other sources. At most, any minor discrepancy in the meeting information summary would amount to a procedural violation and, based on the evidence in the hearing record would not amount to a denial of a FAPE.

## **VII. Conclusion**

Having determined that the evidence in the hearing record supports the IHO's determination that the district offered the student a FAPE for the 2018-19 and 2019-20 school years, the necessary inquiry is at an end and there is no need to reach the issue of whether Forman was an appropriate unilateral placement for the student or whether equitable considerations support the parent's request for relief (Burlington, 471 U.S. at 370).

**THE APPEAL IS DISMISSED.**

**Dated: Albany, New York  
May 21, 2020**

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**JUSTYN P. BATES  
STATE REVIEW OFFICER**