The University of the State of New York

The State Education Department
State Review Officer
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No. 20-118

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

Appearances:
Law Office of Noelle Boostani, attorneys for petitioner, by Noelle Boostani, Esq.

Howard Friedman, Special Assistant Corporation Counsel, attorneys for respondent, by Theresa Crotty, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from the decision of an impartial hearing officer (IHO) which denied her request to be reimbursed for her son's tuition costs at the Lang School (Lang) for the 2018-19 and 2019-20 school years. The appeal must be sustained.

II. Overview—Administrative Procedures

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

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

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

III. Facts and Procedural History

The parties' familiarity with the detailed facts and procedural history of this matter and the IHO's decision is presumed and will not be recited in detail here. Briefly, the CSE convened on January 9, 2018, to formulate the student's IEP for portions of the 2017-18 and 2018-19 school years (see generally Dist. Ex. 4). The parent disagreed with the recommendations contained in the January 2018 IEP and declined to consent to the provision of special education services pursuant to the January 2018 IEP during the school years in question. In September 2018, the parent obtained a private neuropsychological evaluation and thereafter requested a new initial evaluation of the student by letter dated October 26, 2018 (Parent Ex. F; Dist. Ex. 7). The CSE convened again on January 11, 2019, to formulate the student's IEP for portions of the 2018-19 and 2019-20 school years (see generally Parent Ex. B). Although the district commenced implementation of

the services set forth in the January 2019 IEP in the student's public school placement, the parent disagreed with the recommendations contained in the January 2019 IEP, and, as a result, notified the district of her intent to unilaterally place the student at Lang for the remainder of the 2018-19 school year as well as the 2019-20 school year (see Parent Exs. C-E). In a due process complaint notice, dated September 5, 2019, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2018-19 and 2019-20 school years (see Parent Ex. A).

An impartial hearing convened on December 18, 2019, and concluded on the same date after a single day of proceedings (Tr. pp. 1-192).[1] In a decision dated May 28, 2020, the IHO determined that the district offered the student a free appropriate public education (FAPE) for the 2018-19 and 2019-20 school years, and made no findings with respect to whether Lang was an appropriate unilateral placement, or whether equitable considerations weighed in favor of the parents' request for an award of tuition reimbursement (IHO Decision at pp. 21-26). The IHO denied the parent's requested relief (id. at p. 26).

IV. Appeal for State-Level Review

Although there are a number of conclusory or otherwise unsubstantiated or unexplained claims in the parent's request for review, the following issues presented on appeal must be resolved on appeal in order to render a decision in this case:

1. Whether the IHO erred in his conduct of the impartial hearing.

2. Whether the IHO erred in refusing to enter certain evidence into the hearing record.

3. Whether the IHO erred in determining that the January 2019 CSE meeting was conducted in a timely manner.

4. Whether the IHO erred in determining that the January 2019 CSE was properly composed.

5. Whether the IHO erred in determining that the January 2019 CSE was based upon adequate evaluative information.

6. Whether the IHO erred in determining that the educational placement on the continuum and related services listed in the January 2019 IEP were appropriate to address the student's needs.

7. Whether the IHO erred in determining that the January 2019 IEP addressed the student's behavior needs.

[1] The record on appeal contains some correspondence between the parties concerning the transcript of the impartial hearing. The parent contends, and the district does not disagree, that the transcript of the impartial hearing under review herein was missing part of a discussion between the attorney for the parent and the attorney for the district (Tr. p. 131). Given the lack of objection from the district, I will consider the transcript to include the additional colloquy as described by the parent's attorney (see July 5, 2020 Attorney Affirmation).

V. Applicable Standards

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

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

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). "The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created" (Endrew F., 137 S. Ct. at 1001). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations

omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Endrew F., 137 S. Ct. at 1001 [holding that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"]; Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132).

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

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E., 694 F.3d at 184-85; T.P., 554 F.3d at 252). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo, 489 F.3d at 111; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see R.E., 694 F.3d at 184-85).

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

VI. Discussion

A. Preliminary Matters

1. Conduct of Impartial hearing

The parent asserts that the conduct of the impartial hearing deprived her of her due process rights, specifically arguing, among other things, that the hearing date was out of compliance, that the district violated the five-day disclosure rule, that the district's counsel acted improperly, that the IHO's evidentiary rulings were improper, that the impartial hearing office lacked sufficient space to conduct the hearing, that the IHO interfered with the parent's cross examination of district witnesses, that the IHO failed to give the parent a full day to present her case, that the IHO did not consider all of the evidence, that the IHO decision was untimely, and that the hearing record, transcripts and certifications were handled improperly.

Initially, while the parent, on appeal, contends that the impartial hearing and the IHO decision were not in compliance with applicable timelines, neither party offers any argument as to what the timelines were or how any failure to comply with them might have denied the parent's due process rights.

The IDEA, as well as State and federal regulations, provide that, within 15 days of the receipt of the due process complaint notice, the district shall convene a resolution meeting where the parents discuss their complaint and the school district has an opportunity to resolve that complaint with the parents and the relevant members of the CSE who have specific knowledge of the facts identified in the complaint, including a representative of the school district who has decision-making authority but not including an attorney of the school district unless the parents are accompanied by an attorney (20 U.S.C. § 1415[f][1][B][i]; 34 CFR 300.510[a]; 8 NYCRR 200.5[j][2][i]). The resolution period provision allots 30 days from the receipt of the due process complaint notice for the district to resolve the complaint to the parent's satisfaction or the parties may proceed to an impartial hearing (20 U.S.C. § 1415[f][1][B][ii]; 34 CFR 300.510[b][1]; 8 NYCRR 200.5[j][2][v]). If a party files an amended due process complaint, the timelines for the impartial hearing, including the timelines for the resolution process recommence (20 U.S.C. § 1415[c][2][E][ii]; 34 CFR 300.508[d][4]; 8 NYCRR 200.5[i][7][ii]).[3]

The parent's due process complaint notice is dated September 5, 2019 and was delivered to the district on the same day (Parent Ex. A at pp. 1, 11). Accordingly, absent any other information in the hearing record, the resolution period expired on October 5, 2019 (see 8 NYCRR 200.5[j][3][iii][b][1]-[4]).

[3] The Second Circuit has described the resolution period as the timeframe within which the district has to remedy any deficiencies in a challenged IEP without penalty (R.E. v. New York City Dep't of Educ., 694 F.3d 167, 187[2d Cir. 2012]). When, at the conclusion of the resolution period, parents "feel their concerns have not been adequately addressed . . . , they can continue with the due process proceeding and seek reimbursement. The adequacy of the IEP will then be judged by its content at the close of the resolution period" (id. at 188). The resolution period allows a "district that inadvertently or in good faith omits a required service from the IEP [to] cure that deficiency during the resolution period without penalty once it receives a due process complaint" (id.).

The impartial hearing or prehearing conference must commence within 14 days of the IHO receiving the parties' written waiver of the resolution meeting, or the parties' written notice that mediation or a resolution meeting failed to result in agreement, or the expiration of the 30-day resolution period, unless the parties agree in writing to continue mediation at the end of the resolution period (8 NYCRR 200.5[j][3][iii][b][1]-[4]). The IHO is required to render a decision not later than 45 days after the expiration of the resolution period (34 CFR 300.510[b], [c]; 300.515[a]; 8 NYCRR 200.5[j][5]), unless an extension has been granted at the request of either party (34 CFR 300.515[c]; 8 NYCRR 200.5[j][5][i]).

An IHO may grant extensions beyond these timeframes; however, such extensions may only be granted consistent with regulatory constraints and an IHO must ensure that the hearing record includes documentation setting forth the reason for each extension, and each extension "shall be for no more than 30 days" (8 NYCRR 200.5[j][5][i]). Absent a compelling reason or a specific showing of substantial hardship, "a request for an extension shall not be granted because of school vacations, a lack of availability resulting from the parties' and/or representatives' scheduling conflicts, avoidable witness scheduling conflicts or other similar reasons" (8 NYCRR 200.5[j][5][iii]). Moreover, an IHO "shall not rely on the agreement of the parties as a basis for granting an extension" (id.). If an IHO has granted an extension to the regulatory timelines, State regulation requires that the IHO must issue a decision within 14 days of the date the IHO closes the hearing record (8 NYCRR 200.5[j][5]).

In this matter, the hearing was conducted on December 18, 2019 (Tr. pp. 1-192). During the hearing, the parties asked for an extension of the timelines to submit closing briefs to the IHO, which the IHO granted and allows the parties two weeks after receipt of the transcripts to file closing briefs (Tr. pp. 189-90). The IHO also advised the parties that he would issue a decision within 30 days from receipt of the closing briefs (Tr. p. 190). The parent and district both filed closing briefs dated March 20, 2020 (Parent Ex. R; Dist. Ex. 27). The IHO issued his decision on May 28, 2020, in which he identified the record close date as May 18, 2020 (see IHO Decision). While this set of circumstances does not appear to be in compliance with the applicable timelines, a delayed decision in this instance would not warrant overturning the IHO's findings. Courts have found that as long as the student's substantive right to a FAPE is not compromised because of the late decision, an untimely administrative decision, by itself, does not deny the student a FAPE (Jusino, 2016 WL 9649880, at *6 citing J.D. v. Pawlet Sch. Dist., 224 F.3d 60, 69 [2d Cir. 2000] ["Case law's emphasis on substantial vindication of substantive rights and ensuring a fair opportunity to participate is equally present in resolving disputes arising out of the decision deadline date. With respect to the 45–day deadline, "relief is warranted only if... [a] forty-five-day rule violation affected [the student's] right to a free appropriate public education"]; see A.M. ex rel. J.M. v. N.Y.C. Dep't of Educ., 840 F. Supp. 2d 660, 689 n.15 [E.D.N.Y. 2012] aff'd, 513 F. App'x 95 [2d Cir. 2013] [same]. According to the courts, the substance of an administrative decision is not flawed just because it is issued late (J.C. v. New York City Dep't of Educ., 2015 WL 1499389, at *14 [S.D.N.Y. Mar. 31, 2015], aff'd 643 F. App'x 31 [2d Cir. 2016] [noting that "(t)he untimeliness of the SRO's decision does not suggest a flaw in its logic and reasoning, however. Moreover, Plaintiffs have cited no authority supporting their assertion that an SRO decision is entitled to no deference when issued outside the '30–day statutory timeline.'"] citing M.L., 2014 WL 1301957, at *13 ["Although the Court agrees with Plaintiffs that the State Review Office's routine delays in issuing decisions is problematic, it has found no authority in IDEA cases

that allows it to declare the SRO's decision a nullity"]). The parent does not allege any basis for relief for this purported violation because she does not indicate how, if at all, the delayed start of the hearing or the claimed issuance of the decision past the deadline affected the student's right to a FAPE.

I next turn to the parent's assertions regarding the IHO's conduct in accepting or denying the admission of evidence into the hearing record.

State regulations set forth the procedures for conducting an impartial hearing and address, in part, minimal process requirements that shall be afforded to both parties (8 NYCRR 200.5[j]). Among other process rights, each party shall have an opportunity to present evidence, compel the attendance of witnesses, and to confront and question all witnesses (8 NYCRR 200.5[j][3][xii]). However, federal and State regulations provide that a party has the right to prohibit the introduction of evidence that has not been disclosed to that party at least five business days in advance of the impartial hearing (34 CFR 300.512[a][3]; 8 NYCRR 200.5[j][3][xii]). Further, State regulation provides that the IHO "shall exclude any evidence that he or she determines to be irrelevant, immaterial, unreliable, or unduly repetitious" or issue a subpoena if necessary (8 NYCRR 200.5[j][3][xii][c]; see 8 NYCRR 200.5[j][3][iv]).

However, courts have not enforced absolute adherence to the five-day rule for disclosure but have upheld the discretion of administrative hearing officers who consider factors such as the conditions resulting in the untimely disclosure, the need for a minimally adequate record upon which to base a decision, the effect upon the parties' respective right to due process, and the effect upon the timely, efficient, and fair conduct of the proceeding (see New Milford Bd. of Educ. v. C.R., 431 Fed. App'x 157, 161 [3d Cir. June 14, 2011]; L.J. v. Audubon Bd. of Educ., 2008 WL 4276908, at *4-*5 [D.N.J. Sept. 10, 2008], aff'd, 373 Fed. App'x 294 [3d Cir. 2010]; Pachl v. Sch. Bd. of Indep. Sch. Dist. No. 11, 2005 WL 428587, at *18 [D. Minn. Feb. 23, 2005]; Letter to Steinke, 18 IDELR 739 [OSEP 1992]; see also Dell v. Bd. of Educ., 32 F.3d 1053, 1061 [7th Cir. 1994] [noting the objective of prompt resolution of disputes]).

To the extent the parent claims that the district violated the five-day disclosure rule, I note that the parent was aware of this asserted violation of the disclosure rule and initially declined to stipulate to the admission of the district's proffered evidence at the impartial hearing (Tr. pp. 20-29). However, there were extensive discussions regarding the admission of documentary evidence during the impartial hearing and, as a result, the parent's counsel stipulated to the admission of the district's proposed exhibits numbered 1 through 5, 7 through 19, and 23 through 25, which were admitted into evidence (Tr. pp. 41-42). Under these circumstances, given that her counsel stipulated to the admission of the district's documentary evidence and successfully objected to some exhibits on other grounds, the parent's assertion of a violation of the five-day disclosure rule on appeal borders on being frivolous. With respect to the parent's claim that the IHO's evidentiary rulings were improper, in that he refused to accept some of the parent's offered exhibits, I have addressed the parent's additional evidence submissions below. Additionally, to the extent that the parent contends that the IHO did not consider all of the evidence or gave too much or too little weight to any particular piece of evidence, I have conducted an impartial and independent review of the entire hearing record (34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]).

Turning to the parent's claims regarding the IHO's conduct during the hearing regarding the questioning of witnesses, State regulation provides that each party "shall have up to one day to present its case" and that the IHO has the authority to ask questions of counsel or witnesses for the purposes of clarification or completeness of the hearing record (NYCRR 200.5[j][3][vii], [xiii]). With respect to the parent's claim that the IHO interfered with the parent's cross examination of a district witness, I have reviewed the impartial hearing record and transcript, and although the IHO took an active role in questioning witnesses, I do not find that he inappropriately cut off any questioning of a district witness, but rather was informing parent's counsel that her line of questioning may not lead to relevant evidence (see Tr. pp. 67-68).

With respect to the parent's claim that the impartial hearing office lacked sufficient space to conduct the hearing and that the IHO failed to give the parent a full day of hearing, I note that the parties succeeded in streamlining the hearing by submitting a significant amount of testimonial evidence via affidavit, and I also note that the parent rested her case without a request for additional time to make her case (Tr. p. 189; Parent Exs. N; Q ; Dist. Ex. 26).

With respect to the parent's claim that the district's counsel acted "improperly," this argument is supported by nothing more that citations to transcript pages. Review of the cited pages reveals ordinary interactions between litigators in contested matters, certainly nothing that would cause a reviewer to be concerned that a parties' due process rights were infringed, and in nearly all instances the impartial hearing officer was mediating the interactions between counsel for the district and the parent in an appropriate manner (see Tr. pp. 21, 68, 96, 106, 110, 116, 127, 128-31).

In light of the above, my review of the hearing record demonstrates that the parent had the opportunity to present a case at the impartial hearing and that the impartial hearing was conducted in a manner consistent with the requirements of due process by the IHO (see Educ. Law § 4404[2]; 34 CFR 300.514[b][2][i], [ii]; 8 NYCRR 200.5[j]).[4]

2. Impartial Hearing Record and Additional Evidence

In addition to the request for review and memorandum of law, the parent submitted 31 documents as proposed additional evidence. Collectively, the parent has identified the submitted additional evidence and labeled it as SRO Exhibits C-Gg.

Generally, documentary evidence not presented at an impartial hearing is considered in an appeal from an IHO's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 08-030; Application of a Student with a Disability, Appeal No. 08-003; see also 8 NYCRR 279.10[b]; L.K. v. Ne. Sch. Dist., 932 F. Supp.

[4] To the extent that the parent asserts that the IHO failed to identify and apply the proper legal standards and failed to accurately identify certain facts from the hearing record, I will conduct a review of the entire hearing record and, in conducting my review, I will apply the facts of this matter to the applicable standards as set forth in this decision.

2d 467, 488-89 [S.D.N.Y. 2013] [holding that additional evidence is necessary only if, without such evidence, the SRO is unable to render a decision]).

The offered exhibits SRO Exhibits E-J and L are accepted as additional evidence because they were submitted to the IHO during the impartial hearing and they provide background information with respect to the student's behavioral needs prior to the January 2019 CSE meeting. The offered exhibits SRO Exhibits K and M-X are admitted as additional evidence because although they could have been submitted to the impartial hearing officer during the impartial hearing, they contain relevant information with respect to the student's behavioral needs prior to the January 2019 CSE meeting as well as such needs shortly after the January 2019 IEP was implemented. All other submitted additional evidence is not accepted as it is unnecessary to render a decision herein.

3. Scope of Review

As a final preliminary matter, the parent asserted during the impartial hearing that the district failed to offer the student a FAPE during all of the 2018-19 and 2019-20 school years, and further argued that both the January 2018 and January 2019 IEPs failed to offer the student a FAPE. However, because the January 2019 IEP was the one in place at the time the parent unilaterally placed the student at Lang in April 2019, and that IEP remained in place when the parent unilaterally placed the student at Lang for the 2019-20 school year, only the January 2019 IEP is at issue, and the parent's requested relief of tuition reimbursement at Lang for the 2018-19 and 2019-20 school years is tied to the appropriateness of that IEP. Therefore, the issues presented in this matter all pertain to the educational placement and services set forth in the January 2019 IEP.

B. January 2019 IEP

1. Timeliness of the CSE

The parent asserts, without any additional specificity, that the district failed to show that its "IEP meetings were timely."

Once a referral is received by the CSE chairperson, the chairperson must immediately provide the parents with prior written notice, including a description of the proposed evaluation or reevaluation and the uses to be made of the information (8 NYCRR 200.4[a][6]; 200.5[a][5]). After parental consent has been obtained by a district, the "initial evaluation shall be completed within 60 days of receipt of consent" (8 NYCRR 200.4[b]; see also 8 NYCRR 200.4[b][7]). "Within 60 school days of the receipt of consent to evaluate for a student not previously identified as having a disability . . . the board of education shall arrange for appropriate special programs and services" (8 NYCRR 200.4[e][1]).

After withholding consent for the provision of special education by the district during the 2017-18 school year under the January 2018 IEP, the district "closed" the student's case and the student remained in public school without special education services (Tr. pp. 53-54, 132; Dist. Ex. 6). In an October 26, 2018 email to the district, the parent requested that the student's "case" be opened (Dist. Ex. 7). The district provided the parent with a prior written notice and a request for consent to evaluate the student in writing dated October 30, 2018 (Dist. Ex. 8). The parent signed

consent for the student's evaluation on November 16, 2018 (Dist. Ex. 9). Thereafter, the district conducted evaluations, which are discussed further below, and a CSE meeting was held on January 11, 2019, during which an IEP was developed for the student with an implementation date of January 28, 2019 (Parent Ex. B at pp. 1, 8, 13). In light of the above, there is no basis to find that the district did not arrange for appropriate special programs and services within 60 school days of receiving consent from the parent to evaluate the student.

2. CSE Composition

The parent contends that the IHO erred in finding that the January 2019 CSE was properly composed because a district witness at the impartial hearing stated that nobody present at the student's CSE meeting had a background in servicing students with autism (Tr. p. 99; see IHO Decision at p. 24).

State regulation requires, in pertinent part, that a CSE must be composed of the following persons: the parents or persons in parental relationship to the student; not less than one regular education teacher of the student whenever the student is or may be participating in the regular education environment; not less than one special education teacher of the student, or, if appropriate, not less than one special education provider of the student; a school psychologist; a district representative who shall serve as the CSE chairperson; an individual who can interpret the instructional implications of evaluation results; a school physician if requested in writing 72 hours prior to the meeting; an additional parent member if requested in writing 72 hours prior to the meeting; other persons having knowledge or special expertise regarding the student, and if appropriate, the student (8 NYCRR 200.3[a][1]).

Here, the January 2019 CSE was composed of the following members: A related service provider/special education teacher, a general education teacher, the parent, a school psychologist (who also participated as the district representative), a school social worker, the student's private therapist who participated by telephone, the student's guidance counselor, and a district assistant principal (Dist. Ex. 14). I note that the school psychologist and special education teacher would qualify as individuals who can interpret the instructional implications of evaluation results, and a functional behavioral assessment (FBA) had been conducted and a behavioral intervention plan (BIP) developed prior to the January 2019 CSE meeting (Dist. Exs. 20-22).

In addition, prior to the meeting, the parent was provided a notice indicating who would be participating in the CSE meeting (Dist. Ex. 3 at p. 1). To the extent that the parent believed that there should have been a CSE member more familiar with providing services to students with autism, the parent was notified of her right to invite "other individuals who you determine to have knowledge or special expertise about your child " (id.; see 34 CFR 300.321[a][6]; 8 NYCRR 200.3[a][1][ix]).

Accordingly, I concur with the IHO that the January 2019 CSE was appropriately composed and contained all the required members.

3. Evaluative Information

The parent asserts that the district failed to show that it performed a sufficiently comprehensive initial evaluation of the student prior to the January 2019 CSE meeting, and further contends that initial evaluation only included one district psychoeducational evaluation. However, a review of the available evaluative information considered by the January 2019 CSE shows that the required appropriate assessments and evaluations were present to determine factors contributing to the student's disability, and were sufficiently comprehensive to identify all of the student's special education and related services needs.

An initial evaluation of a student must include a physical examination, a psychological evaluation, a social history, a classroom observation of the student, and any other "appropriate assessments or evaluations" as necessary to determine factors contributing to the student's disability (8 NYCRR 200.4[b][1]). A CSE may direct that additional evaluations or assessments be conducted in order to appropriately assess the student in all areas related to the suspected disabilities (8 NYCRR 200.4[b][3]). Any evaluation of a student with a disability must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parent, that may assist in determining, among other things the content of the student's IEP (20 U.S.C. § 1414[b][2][A], [B]; 34 CFR 300.304[b][1][ii]; see Letter to Clarke, 48 IDELR 77 [OSEP 2007]). In particular, a district must rely on technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors (20 U.S.C. § 1414[b][2][C]; 34 CFR 300.304[b][3]; 8 NYCRR 200.4[b][6][x]). Whether it is an initial evaluation or a reevaluation of a student, a district must ensure that a student is appropriately assessed in all areas related to the suspected disability, including, where appropriate, social and emotional status (20 U.S.C. § 1414[b][3][B]; 34 CFR 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]). An evaluation of a student must be sufficiently comprehensive to identify all of the student's special education and related services needs, whether or not commonly linked to the disability category in which the student has been classified (34 CFR 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]; see Application of the Dep't of Educ., Appeal No. 07-018).

Here, the hearing record contains a district assessment planning document describing the evaluations to be conducted as part of the student's initial evaluation dated December 12, 2018 (Dist. Ex. 10). The assessment plan identified a social history conducted by district staff completed November 16, 2018, a psychoeducational evaluation conducted by a district school psychologist completed December 21, 2017, an occupational therapy (OT) evaluation conducted by school staff completed January 3, 2019, and a classroom observation conducted by school staff completed December 13, 2018 (id.). The hearing record includes copies of the January 3, 2019 OT evaluation report and the report of the December 13, 2018 classroom observation (Dist. Exs. 11-12).

Additionally, the parent submitted a report from a private neuropsychological evaluation conducted during August 2018 that included an academic addendum containing extensive recommendations for the CSE to consider when developing the student's IEP (Parent Ex F).[5] To

[5] The August 2018 neuropsychological evaluation report included a brief review of the results of the December 2017 district psychoeducational evaluation (Parent Ex. F at pp. 2-3).

the extent that the parent asserts that the CSE failed to meaningfully consider results of the private neuropsychological evaluation, I note the parent's contention at the impartial hearing was that only one district member of the CSE had read the evaluation report (see Tr. pp. 166-68). However, the contents of the private neuropsychological evaluation report were summarized in detail in the student's January 2019 IEP, including the recommendations in the academic addendum, and I do not find that the CSE failed to consider this evaluation (compare Parent Ex. F at pp. 7-8, 17, 18, with Parent Ex. B at pp. 2-3).

The hearing record also contains several assessments concerning the student's need for behavioral interventions. There is a November 15, 2018 document titled "Considerations of a Student's Need for Positive Behavior Supports, FBA, or a BIP" that recommended an FBA for the student (Dist. Ex. 18). Next, there is a teacher report, and an "FBA Parent/Guardian Interview" (Dist. Exs. 19-20). Finally, there is an FBA conducted prior to the January 2019 CSE meeting dated January 3, 2019, and a BIP developed pursuant to the FBA dated the same day (Dist. Exs 21-22).

Upon review of these assessments and evaluations, I find them sufficiently comprehensive for the CSE to develop an appropriate program for the student, and I decline to find a denial of FAPE arising from the evaluative information before the CSE.

4. Educational Placement and Services

The parent contends that the student required a smaller class size and that one of the student's teachers "specifically stated that a general education classroom would not meet the student's needs" (Req. for Rev. at p. 16). The parent is referring to a teacher report completed on December 5, 2018 by the student's 3rd grade teacher in the general education classroom the student attended wherein she noted that the then-current placement in the general education classroom was not meeting the student's needs (Dist. Ex. 19 at p. 8). In answering a query about what program the teacher felt would best support the student, the teacher responded "[the student] needs constant support. He . . . anything without constantly being told . . . him what to do from the time he co . . . classroom in the morning until dism . . . afternoon" (id.).[6]

The August 2018 private neuropsychological evaluation report did not include a specific recommendation for a smaller classroom ratio; however, it included the following recommendation with respect to a classroom placement for the student:

> Because [the student] exhibits exceptional intellectual ability, it is recommended that he be placed in a gifted and talented and/or other academic enrichment. This placement will likely facilitate increased engagement in the academic setting. Some of the difficulties that [the student] is reported to experience in the classroom (e.g., missing material due to lack of interest), may be a consequence of [the student] feeling bored and/or unchallenged by the material. This will also provide him with a more appropriate vehicle for social interaction, as he will be surrounded

[6] The copy of the teacher's report in the impartial hearing record is not entirely legible, a line of darkness covers the far right edge of the report obscuring some of the words (see Dist. Ex. 19).

by peers who are similarly gifted and who may share similarly sophisticated interests. This may also increase his motivation to socialize with peers

(Parent Ex. F at p. 17).

The January 2019 CSE recommended related services to enable the student to participate in the general education curriculum (Parent Ex. B at pp. 5, 8). More specifically, the CSE recommended one 30-minute session per week of individual counseling, one 30-minute session per week of group counseling, and one 30-minute session per week of individual OT (id. at p. 8). The January 2019 IEP stated that other options considered included a general education placement without related services, but that was rejected because it was found to be insufficient to address the student's social/emotional and OT needs, and other programs were considered too restrictive for the student (id. at p. 13).

In testimony the district school psychologist who participated in the January 2019 CSE meeting explained that the CSE discussed and considered placing the student in a 12:1+1 classroom but decided against it due to the student's cognitive functioning, because the student needed a challenging environment and the district did not have a challenging environment in a 12:1+1 special class (Tr. pp. 121-22). The CSE meeting notes stated that the parent was in agreement with the counseling and OT services, as well as the BIP, but had "brought up the G+T program, but it was pointed out that she did not apply (she thought he would not get in due to his aggressive behaviors) and it is now no longer possible to apply" (Dist. Ex. 14 at p. 16). Both the CSE meeting notes and the IEP note that the parent also requested a 1:1 paraprofessional for the student (Parent Ex. B at p. 13; Dist. Ex. 14 at p. 16). According to the IEP, the district did not recommend a 1:1 paraprofessional for the student because the school staff at the meeting agreed that the student's "significant behaviors . . . have greatly decreased at this time" (Parent Ex. B at p. 13).

The parent contends without elaboration that the OT recommendation in the student's January 2019 IEP was "inconsistent" with the recommendations in the OT evaluation report (Req. for Rev. at p. 16). However, a review of the OT evaluation report reveals that OT was recommended for the student to address weakness in attention and sensory processing with a recommended mandate of one 30 minute session per week in a 1:1 setting in a separate location, "all therapy areas" (Dist. Ex. 11 at pp. 6-7). Meanwhile the January 2019 IEP recommended OT for the student as an individual service once per week for 30 minutes in a "Separate Location : classroom, all therapy areas" (Parent Ex. B at p. 8). To the extent that the differences in wording between the OT evaluation report and the January 2019 IEP constitutes an "inconsistency," I decline to find that there is any resulting inappropriateness in the IEP's OT recommendation.

5. Special Factors - Behavioral Needs and Support

Turning to the crux of the parties' dispute, the parent argues that the IHO erred in not finding that the January 2019 IEP failed to offer the student a FAPE because the IEP did not provide a 1:1 paraprofessional to support the student's behavioral and attentional needs in the recommended program. For the reasons set forth below, I agree with the parent and find that the January 2019 IEP did not adequately address the student's behavioral and attention needs.

Under the IDEA, a CSE may be required to consider special factors in the development of a student's IEP. Among the special factors in the case of a student whose behavior impedes his or her learning or that of others, the CSE shall consider positive behavioral interventions and supports, and other strategies, to address that behavior (20 U.S.C. § 1414[d][3][B][i]; 34 CFR 300.324[a][2][i]; see 8 NYCRR 200.4[d][3][i]; see also E.H. v. Bd. of Educ., 2009 WL 3326627, at *3 [2d Cir. Oct. 16, 2009]; A.C., 553 F.3d at 172; J.A. v. East Ramapo Cent. Sch. Dist., 603 F. Supp. 2d 684, 689 [S.D.N.Y. 2009]; M.M. v. New York City Dep't of Educ., 583 F. Supp. 2d 498, 510 [S.D.N.Y. 2008]; Tarlowe, 2008 WL 2736027, at *8; W.S., 454 F. Supp. 2d at 149-50). To the extent necessary to offer a student an appropriate educational program, an IEP must identify the supplementary aids and services to be provided to the student (20 U.S.C. § 1414[d][1][A][i][IV]; 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v][a], [b][3]; Piazza v. Florida Union Free Sch. Dist., 777 F. Supp. 2d 669, 673 [S.D.N.Y. 2011]; Gavrity v. New Lebanon Cent. Sch. Dist., 2009 WL 3164435, at *30 [N.D.N.Y. Sept. 29, 2009] [discussing the student's IEP which appropriately identified program modifications, accommodations, and supplementary aids and services]; P.K. v. Bedford Cent. Sch. Dist., 569 F. Supp. 2d 371, 380 [S.D.N.Y. 2008]).

State regulation defines an FBA as the process of determining why a student engages in behaviors that impede learning and how the student's behavior relates to the environment" and

> include[s], but is not limited to, the identification of the problem behavior, the definition of the behavior in concrete terms, the identification of the contextual factors that contribute to the behavior (including cognitive and affective factors) and the formulation of a hypothesis regarding the general conditions under which a behavior usually occurs and probable consequences that serve to maintain it

(8 NYCRR 200.1[r]). According to State regulations, an FBA shall be based on multiple sources of data and must be based on more than the student's history of presenting problem behaviors (8 NYCRR 200.22[a][2]). An FBA must also include a baseline setting forth the "frequency, duration, intensity and/or latency across activities, settings, people and times of the day," so that a BIP (if required) may be developed "that addresses antecedent behaviors, reinforcing consequences of the behavior, recommendations for teaching alternative skills or behaviors and an assessment of student preferences for reinforcement" (8 NYCRR 200.22[a][3]).

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

With respect to the adequacy of the FBA, the January 2019 FBA identified the target problem behavior as follows:

> Physically [a]ggressive behaviors including hitting, punching, kicking, pushing, peers/adult and/or throwing objects such pencils, chairs, books, etc. at peers/adults calling peers and adults names; making 'menacing gestures' at peers stare or react

to his behaviors; pushing a student into the radiator in the stairwell (resulting in a head injury), hitting a girl in the face, she was in his spot in the cafeteria, he hit her before she could move) asking a student for a piece of his snack, when the student refused, he took it

(Dist. Ex. 21 at p. 1).

The FBA identified influencing factors as "ongoing conflicts with several peers in/outside of class," and noted that the behaviors began in spring 2017 and escalated during the 2017-18 school year, and that the behaviors had persisted with less intensity beginning "late Fall this school year" (Dist. Ex. 21 at p. 3). The FBA indicated that behaviors occurred throughout the day, but more often during less structured activities, identifying: gym, cafeteria, recess, and the after school program, with the more serious behaviors also occurring during these activities (id. at pp. 4, 5). However, the FBA also identifies transitions to non-preferred activities as a setting event, a condition that increases the likelihood of the behaviors (id. at p. 6). The FBA identified the frequency and duration of the behaviors as one or more incidents daily and lasting from 0-2 minutes (id.).[7]

The FBA described a functional hypothesis of the student's behaviors as follows:

When [the student] is told that Writing Class is beginning (Setting Event, a non-preferred activity). and the teacher tells the class to take out their Writing Workbooks which will include writing assignments that he perceives as difficult (Antecedent) [the student] usually takes out a book (a novel or other chapter book) and begins to read it (Target Problem Behavior) (Immediately, no Latency period). Within a few seconds, the teacher notices this and tells him to take out his Writing Workbook and participate in the Writing lesson. [The student] sometimes does not respond. (Targeted Problem Behavior) The teacher usually says it two more times. [The student] will scream, "I heard you!" and keeps reading (Problem Behaviors escalate). After a moment, the teacher says, "NOW [the student]." One or more students may react to [the student's] behavior after the teacher reprimands him. He has hit, kicked, punched, and thrown objects at classmates during these incidents. [The assistant principal] was called and removed [the student] from the classroom whenever this happened. [The student] has also made "menacing, lunging motions" towards these students. These behaviors take place and escalate within 0 to 2 minutes after the antecedent. These kinds of behaviors happen almost daily during Writing class and sometimes in Math class. [The student] is redirected after these behaviors if the teacher can do so before they have not escalated too far. If he has to be removed, he gets the attention of adults and avoids a non-preferred activity. These behaviors are most likely to occur when a non-preferred activity or when confronted by provocative peers in or outside of the classroom

[7] The intensity of the behaviors was designated using numbers 1-5, with the numerical scale being described as "1- impacts only the student, 2-impacts neighboring peers, 3-impacts entire class, 4-impacts neighboring classes, 5-impacts the whole school/violent behavior" (Dist. Ex. 21 at p. 6).

(Dist. Ex. 21 at p. 7).

The FBA set forth additional data including the school staff who participated in the FBA team process, a list of the direct and indirect data used to formulate the functional hypothesis, influences and setting events related to the targeted problem behaviors, a description of the antecedents of the targeted problem behaviors, a description of the consequences and function of the behaviors, the skill and performance deficits related to the behaviors, baseline data, a functional hypothesis, behavioral supports and interventions previously tried, behavioral supports and interventions currently in place, a list of the student's interests and possible reinforcers, and a description of replacement behaviors that serve the same function and strategies for teaching new behaviors (Dist. Ex. 21 at pp. 1-9).

Based on the evidence above, the January 2019 FBA included the required information as set forth in the standard above.

With respect to the adequacy of the student's BIP, State regulation requires that the BIP shall identify: (i**)** the baseline measure of the problem behavior, including the frequency, duration, intensity and/or latency of the targeted behaviors . . . ; (ii) the intervention strategies to be used to alter antecedent events to prevent the occurrence of the behavior, teach individual alternative and adaptive behaviors to the student, and provide consequences for the targeted inappropriate behavior(s) and alternative acceptable behavior(s); and (iii) a schedule to measure the effectiveness of the interventions, including the frequency, duration and intensity of the targeted behaviors at scheduled intervals (8 NYCRR 200.22[b][4]). However, neither the IDEA nor its implementing regulations require that the elements of a student's BIP be set forth in the student's IEP ("Student Needs Related to Special Factors," Office of Special Educ. [April 2011], available at http://www.p12.nysed.gov/specialed/formsnotices/IEP/training/QA-411.pdf). However, once a student's BIP is developed and implemented, "such plan shall be reviewed at least annually by the CSE or CPSE" (8 NYCRR 200.22[b][2]).

A review of the January 2019 BIP reveals that it identified the baseline measure of the targeted problem behavior, including the frequency, duration, and intensity (Parent Ex. 22 at pp. 1-2). The BIP also set forth additional data including the school staff who participated in the BIP development; it identified the targeted problem behaviors, baseline data, a functional hypothesis, influences and setting events related to the targeted problem behaviors, replacement behaviors that serve the same function and strategies for teaching new behaviors; it provided a description of the antecedents of the targeted problem behavior, intervention strategies, a method of progress monitoring, and an attached template for conducting a progress monitoring review meeting (id. at pp. 1-9).

Accordingly, as described above, a review of the January 2019 FBA shows that it accurately identified the student's interfering behaviors, and the January 2019 BIP addressed the student's problem behaviors and included progress monitoring data that tracked the frequency, intensity, and duration of the targeted problem behaviors. Therefore, the hearing record supports the IHO's finding that the January 2019 FBA and January 2019 BIP were sufficient to offer the student a FAPE. However, as discussed below, the IEP contained insufficient supplementary aids and services to appropriately implement the BIP and support the student's social, emotional, behavioral, and attentional needs in the classroom.

While not set forth as a special factor in the IDEA or federal regulation, State regulation includes as a special factor a CSE's consideration of "supplementary school personnel (or one-to-one aide) to meet the individualized needs of a student with a disability" (8 NYCRR 200.4[d][3][vii]; see 20 U.S.C. § 1414[d][3][B]; 34 CFR 300.324[a][2]). A CSE must consider a number of factors before recommending a 1:1 aide on a student's IEP, including: the student's management needs, goals for reducing the need for 1:1 support, the specific support the 1:1 aide would provide, other supports or accommodations that could meet the student's needs, the extent (e.g., portion of the day) or circumstances (e.g., transitions between classes) the student needs the 1:1 aide, staffing ratios,[8] how the support of a 1:1 may enable the student to be educated with nondisabled peers, any potential harmful effect of having a 1:1 aide, and training and support that will be provided to the aide to help the aide understand and address the student's needs (8 NYCRR 200.4[d][3][vii]). Further, a State guidance document, dated January 2012 contemplates that a "goal for all students with disabilities is to promote and maximize independence," and provides examples of student needs that may require a CSE to consider a recommendation for the services of a one-to-one aide, including: the student "presents with serious behavior problems with ongoing (daily) incidents of injurious behaviors to self and/or others or student runs away and student has a functional behavioral assessment and a behavioral intervention plan that is implemented with fidelity"; the student "cannot participate in a group without constant verbal and/or physical prompting to stay on task and follow directions"; the student "needs an adult in constant close proximity for direct instruction," "requires individualized assistance to transition to and from class more than 80 percent of the time," and "needs an adult in close proximity to supervise social interactions with peers at all times" ("Guidelines for Determining a Student with a Disability's Need for a One-to-One Aide," Office of Special Educ. Field Advisory [Jan. 2012], at p. 1 & Attachment 2, available at http://www.p12.nysed.gov/specialed/publications/1-1aide-jan2012.pdf).

In the district's December 2017 psychoeducational evaluation report, the student's classroom teacher during the 2017-18 school year reported that the student was defiant, refused to do anything which was not of interest to him, angered easily, and had trouble calming down (Dist. Ex. 2 at p. 1). The teacher also noted that the student was unpredictable and would "just come up and punch kids" (id.). Because the teacher found his outbursts so distracting to the classroom, she stated that another staff member would be helpful (id.).

The August 2018 private neuropsychological report recommended, among other things, an FBA for the student and provision of a 1:1 paraprofessional for the student for the following reasons:

[8]In a Question and Answer document—published subsequent to the promulgation of the provision in State regulation requiring CSEs to consider certain factors before offering a student 1:1 aide services—it was further explained that "[i]n classrooms that have a high staff-to-student ratio, or students with fewer needs, existing staff may be able to support a student with increased needs, and a one-to-one aide may not be necessary" ("Amendment of Sections 200.4, 200.16 and 200.20 of the Commissioner's Regulations Relating to Recommendations for One-to-One Aides for Preschool and School-Age Students with Disabilities and Preschool Special Education Programs and Services: Questions and Answers," at p. 1, Office of Special Ed. [June 2016], available at http://www.p12.nysed.gov/specialed/publications/documents/q-and-a-preschool-regs.pdf).

> As reiterated above, although [the student] has exceptional intellectual ability, he will nonetheless require significant support services to display his full academic potential due to discrepancies in his profile (i.e., behavioral, emotional, and social difficulties). As such, individualized support within this setting is recommended (i.e., a paraprofessional). The goal of 1:1 assistance should be to help promote compensatory strategies and to reinforce on-task behavior and appropriate participation in classroom activities. Such an individual should help focus [the student's] attention and help guide positive peer interactions, in addition to assisting in implementing his IEP and coordinating academic services. It is important that this individual be available to assist [the student] when he is struggling to ensure that he is absorbing and assimilating information being presented in the classroom. At the same time it is important that this individual also provide him with the opportunity to develop compensatory strategies independently, when possible.
>
> (Parent Ex. F at pp. 17-18).

Although the January 2019 IEP indicated that the school staff reported that the student's behavior had improved such that the CSE did not need to recommend a 1:1 paraprofessional, as late as November 2018, the district was documenting the student's aggressive and defiant behaviors in the classroom, which had persisted since the prior year (Parent Ex. B at p. 13; Dist. Exs. 2 at pp. 1-2, 8-9; 14 at p. 16; 18). In a December 2018 teacher report, there seemed to be some improvement in the student's behaviors as the student was responding to strategies such as having his seat changed, only leaving the room with the teacher, and having the teacher speak in a lower voice (Dist. Ex. 19 at p. 3). However, in the same report, the teacher indicated that the student needed "constant support," had difficulty maintaining self-control, and needed constant redirection to follow directions (id. at pp. 7-8). The FBA developed in January 2019 still listed aggressive behavior as a target, which occurred in the classroom and in less structured settings which may require frequent removal from the classroom, albeit with recent reported improvement (Dist. Ex. 21 pp. 1, 4-5, 7-8).[9]

The district school psychologist who participated in the January 2019 CSE meeting stated that the student's behaviors "did not go away" but at the time of the CSE they had lessened, and that she was aware that at the time of the CSE meeting the student was spending a large amount of class time not performing any work (Tr. p. 120). The parent's submitted additional evidence, in the form of e-mails between several district staff and the parent, also identifies several aggressive behavioral incidents that occurred in school and during after school programs beginning in 2017 and continuing through as late as November 2018 (see SRO Exs. L-N; P-U).

The parent specifically requested a 1:1 paraprofessional at the January 2019 CSE meeting, but the CSE ultimately decided against adding a paraprofessional to the student's IEP (Parent Ex.

[9] The district conducted a December 2018 classroom observation during the student's math class (Dist. Ex. 12 at p. 1). During the observation, the student was reading another book on top of his math book; the teacher noticed and redirected the student and the student stopped reading his other book without argument (id.). In another interaction during the observation the student was asked to bring his agenda to the teacher and "[h]e became irritable" and "escalated slightly" (id.). However, for the remainder of the observation, the observer reported that the student worked "diligently" and "calmly" (id.).

B at p. 13; Dist Ex. 14 at p. 16).[10] The district school psychologist testified that although the support of a 1:1 paraprofessional was considered and rejected, the CSE did not consider any other additional adult support in the classroom such as a classroom aide or a shared aide (Tr. pp. 119-21). The January 2019 CSE recommended related services only, recommending two 30-minute session of counseling per week (one individual and one group) and one 30-minute session of OT per week with all of counseling services provided in the counselor's office and the OT in "[c]lassroom, all therapy areas" (Parent Ex. B at p. 8). In addition, the IEP noted that counseling and the BIP, discussed above, addressed the student's social/emotional needs while the OT services addressed the student's difficulties in sensory processing and self-regulation (Parent Ex. B at p. 5).

Regarding the student's management needs, the January 2019 IEP recommended: redirection to increase participation and task completion; verbal and visual cues; breaking down tasks; checklists of schedules for assignments and due dates; highlighters and note cards for complex material; preferential seating; use of a study carrel; breaks during testing and long assignments; on task focusing prompts; frequent praise and encouragement; behavior charts and incentives for appropriate behaviors; and the use of a BIP (Parent Ex. B at p. 5).

Considering the extent of the student's management needs, the teacher's description of the student's need for constant support and redirection, that he was spending large amounts of class time not completing work, and the student's need for the implementation of a BIP, the January 2019 IEP was deficient due to the lack of recommended support for the student in the classroom. Although the teacher reported progress for a short period of time leading up to the January 2019 CSE meeting, there are numerous management needs listed in the IEP, as well as the strategies and actions for staff listed in the BIP, that the general education teacher would be required to implement seemingly on her own. Additionally, given the student's history of aggressive, defiant, and inattentive behaviors there is not sufficient basis in the hearing record to find that it would be reasonable to expect a general education teacher to handle the student's management needs as well as the full implementation of the student's BIP. Given all these factors, the failure of the January 2019 CSE to recommend additional adult support in the student's classroom resulted in the January 2019 IEP not offering the student a FAPE. Further, as discussed above, the failure of the January 2019 IEP necessarily results in a denial of FAPE for the relevant portions of the two school years at issue, 2018-19 and 2019-20.

C. Unilateral Placement

A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak, 142 F.3d at 129). A parent's failure to select a program approved by the State in favor of an unapproved option is

[10] The hearing record contains an update to the private neuropsychological report that was conducted after the January 2019 CSE meeting, and is not relevant to the CSE's development of the January 2019 IEP. The update seems to attribute some recent improvement in the student's behavior to a change in medication, however, the parent continued to report executive functioning and peer relation problems in the classroom, even if the aggressive behaviors had declined (Parent Ex. F at pp. 21-23). The evaluator continued to stand by his previous recommendation for a 1:1 paraprofessional among his other recommendations in the August 2018 neuropsychological evaluation report (id.).

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

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

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

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

There is no dispute as to the appropriateness of Lang as a unilateral placement for the student during the 2018-19 and 2019-20 school years, as the district concedes Lang provided instruction specially designed to meet the unique needs of the student (Answer ¶ 13, n.3). Furthermore, the parent submitted prima facia evidence of Lang's appropriateness during the impartial hearing (Parent Exs. L at p. 2; M at pp. 2-3; O; Q).

Specifically, in an affidavit the director for school psychologists and therapeutic services at Lang (director) testified that Lang offered "a smaller campus size and learning environment" of approximately 55 students in second through twelfth grade (Parent Ex. Q at p. 2).[11] The director stated that Lang initially assessed the student's academic skills, reviewed his educational records, and discussed the student's prior public school experiences with the parents (id.). The student received instruction in subjects such as math, ELA, Spanish, science, social studies, engineering, applied logic, civics, music, and physical education (Parent Ex O). According to the director, the student was in a class of 14 students in fourth and fifth grade, who were functionally group by skill levels and learning needs (Parent Ex. Q at p. 3). Academic instruction was provided in a "co-teaching format" by a certified special education teacher and a certified regular education teacher (id.).

Lang identified that reading and language-based skills were an area of strength for the student, math was a subject that could "trigger frustration" and that handwriting was an area of relative weakness; however, the student's "primary are of need" was his "social/emotional cognition and management (Parent Ex. Q at p. 3). To address the student's needs, Lang provided individual and group OT, individual speech-language therapy, individual counseling, and individual instructional support with a learning specialist, each on a weekly basis (id. at p. 4; see Parent Ex. O). Lang provided targeted instruction on appropriate social interactions to help the student develop an understanding of how to manage his frustrations in a healthy way (Parent Ex. Q at p. 5). School staff intervened to resolve peer conflicts and provide the student with space, time, 1:1 counseling to deescalate the situation and discuss the issue, and mediation with the students involved (id.). According to the director, the student was "doing very well and progressing at Lang" in that he was academically engaged and required minimal supports to stay on task (id.). Additionally, while at Lang the student had learned to express himself and his feelings about triggering events with providers/teachers, rather than reacting impulsively (id.). Therefore, the evidence included in the hearing record supports a finding that Lang was an appropriate unilateral placement for the student during the 2018-19 and 2019-20 school years.

D. Equitable Considerations

The final criterion for a reimbursement award is that the parent's claim must be supported by equitable considerations. Equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; R.E., 694 F.3d at 185, 194; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 68 [2d Cir. 2000]; see Carter, 510 U.S. at 16 ["Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable"]; L.K. v. New York City Dep't of Educ., 674 Fed. App'x 100, 101 [2d Cir. Jan. 19, 2017]). With respect to equitable considerations, the IDEA also provides that reimbursement may be reduced or denied when parents fail to raise the appropriateness of an IEP in a timely manner, fail to make their child available for evaluation by the district, or upon a finding of unreasonableness with respect to the

[11] Although the Lang director's affidavit was not initially admitted into evidence, the reason was that the IHO required the parent to present the witness for cross-examination prior to accepting the affidavit and the parent presented the witness for cross-examination during the hearing (Tr. pp. 35, 140).

actions taken by the parents (20 U.S.C. § 1412[a][10][C][iii]; 34 CFR 300.148[d]; E.M. v. New York City Dep't of Educ., 758 F.3d 442, 461 [2d Cir. 2014] [identifying factors relevant to equitable considerations, including whether the withdrawal of the student from public school was justified, whether the parent provided adequate notice, whether the amount of the private school tuition was reasonable, possible scholarships or other financial aid from the private school, and any fraud or collusion on the part of the parent or private school]; C.L., 744 F.3d at 840 [noting that "[i]mportant to the equitable consideration is whether the parents obstructed or were uncooperative in the school district's efforts to meet its obligations under the IDEA"]).

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

At the outset of the impartial hearing the district's counsel affirmed that there was no allegation that equitable considerations weighed against tuition reimbursement at the parent's unilateral placement and has made no arguments on appeal related to equitable considerations (Tr. pp. 19-20). Furthermore, there is sufficient evidence in the hearing record showing the parent's cooperation with the CSE and the district and that the parent gave appropriate notice of her intent to unilaterally place the student at Lang (Tr. pp. 163-68; Parent Exs. C; E). Accordingly, I find that equitable considerations support the parent's requested relief of tuition reimbursement at Lang during the relevant portions of the 2018-19 and 2019-20 school years.

VII. Conclusion

Having determined that the evidence in the hearing record supports finding that the January 2019 IEP did not offer the student a FAPE for the relevant portions of the 2018-19 and 2019-20 school years, and having determined that Lang was an appropriate unilateral placement for the student, and that there are no equitable considerations barring tuition reimbursement, the necessary inquiry is at an end.

I have considered the remaining contentions and find it is unnecessary to address them in light of my determinations above.[12]

THE APPEAL IS SUSTAINED.

IT IS ORDERED THAT the IHO's decision dated May 28, 2020 is modified by reversing those portions which found that the district offered the student a FAPE for a portion of the 2018-19 school year and the 2019-20 school year; and

IT IS FURTHER ORDERED that the district shall reimburse the parent for the cost of the student's attendance at Lang for a portion of the 2018-19 school year and for the 2019-20 school year.

Dated: **Albany, New York**
September 10, 2020

CAROL H. HAUGE
STATE REVIEW OFFICER

[12] Concerning the parent's request for an order for door-to-door special transportation to and from Lang with a maximum commute time of 60-minutes each way, and reimbursement for expenses the parent paid to transport the student to Lang during the school years at issue, there is insufficient information in the hearing record to support such an award. In particular, while the parent testified that she was sending the student to and from school using a car service (Tr. p. 168), there is no indication as to whether the parent attempted to access the district's transportation. Additionally, although the hearing record included a note from the student's doctor recommending that the student's commute time be under 60 minutes each way, the same exhibit includes a number of incomplete forms that appear to be the process for obtaining special transportation from the district (Parent Ex. G at pp.). As there is no indication that the parent ever requested transportation from the district, or that the district's transportation would have been inadequate for the student (that it would have taken more than 60 minutes each way), there is no basis to award reimbursement for the parent's use of a car service to transport the student to and from school.