



The University of the State of New York

The State Education Department

State Review Officer

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No. 20-147

Application of the NEW YORK CITY DEPARTMENT OF EDUCATION for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:

Howard Friedman, General Counsel, attorneys for petitioner, by Nathaniel R. Luken, Esq.

Law office of Irina Roller, PLLC, attorney for respondent, by Irina Roller, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from the decision of an impartial hearing office which ordered it to reimburse the respondent (the parent) for the costs of the student's tuition at York Preparatory School (York Prep) from September through December 2018 and Fusion Academy (Fusion) from January through June 2019, as well as for the cost of an independent educational evaluation (IEE). The appeal must be dismissed.

II. Overview—Administrative Procedures

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

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

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

III. Facts and Procedural History

The hearing record offers little information on the student's early educational history. At the time of the impartial hearing the student was fifteen years old and attended a "very small" private school for the 2019-20 school year (Tr. p. 176). For the 2015-16, 2016-17, and 2017-18 school years, the student attended a district middle school (Dist. Ex. 13 at p. 1).

The student's final report card for the 2016-17 school year (seventh grade) revealed that he received grades in his core academic subjects (ELA, math, science, social studies) ranging

between 66 and 77 (Parent Ex. I). The report card further indicated that the student ended the school year with a final weighted average of 72.85 (id.).¹

On March 17, 2017 a subcommittee of the CSE met for an annual review of the student's educational program (Parent Ex. G at pp. 3, 12). The March 2017 CSE subcommittee recommended that the student be found eligible for special education as a student with a speech or language impairment and that he attend a general education classroom and receive three periods of direct special education teacher support services (SETSS) in math per week, and three periods of direct SETSS in ELA per week (id. at p. 9). The CSE subcommittee also recommended that the student receive one period per week of indirect SETSS for math in a separate location and one period per week of indirect SETSS for ELA in a special education class (id.). In addition, the CSE subcommittee recommended the student for one forty-minute session per week of individual counseling services and one forty-minute session per week of group speech-language therapy (id. at pp. 9-10).

In a letter dated June 12, 2017, the district informed the parent that a subcommittee of the CSE would reconvene on June 16, 2017 for a requested review of the student's IEP (Dist. Ex. 1 at p. 1). The letter indicated that the subcommittee of the CSE would discuss whether integrated co-teaching (ICT) services or SETSS would best meet the student's academic needs during the 2017-18 school year (id.).

The CSE subcommittee reconvened on June 16, 2017 (Dist. Ex. 2).² The CSE subcommittee continued to find the student eligible for special education as a student with a speech or language impairment (Dist. Ex. 2 at pp. 4, 21).³ The IEP indicated that the parent was concerned about the student's inconsistent completion of homework, his unwillingness to get out of bed in the morning, and the negative impact of social media on the student's psyche (id. at p. 22). The CSE subcommittee discussed the benefits and drawbacks of both ICT services and SETSS (id.). The notes indicated that, initially, "the team" felt the student's consistently low academic performance in seventh grade, coupled with his need for support with executive functioning, made him a good candidate for ICT services (Parent Ex. G at p. 14; Dist. Ex. 2 at pp. 22-23). Ultimately, the CSE subcommittee decided that the student should remain in SETSS with the maximum amount of service permitted to ensure that he started eighth grade off "on solid emotional footing" (id. at p. 23). More specifically, the subcommittee of the CSE determined that ICT with related services would be too restrictive of a learning environment for the student, whereas SETSS with related services would foster the student's independence while providing him with ample structure and support in math and ELA (id.). The CSE subcommittee

¹ The report card noted that grades between 65 and 100 were passing grades (Parent Ex. I).

² The date of the IEP is listed at March 17, 2017; however, the attendance sheet includes a June 16, 2017 date (Dist. Ex. 2 at pp. 21, 25). It appears from the hearing record that the dates on the student's IEPs were only updated at certain meetings; however, the attendance sheets appear to have been printed out on the dates of the meetings (see Dist. Ex. 2 at pp. 21, 25; 5 at pp. 17, 20; 11 at pp. 18, 21).

³ The student's eligibility for special education programs and related services as a student with a speech or language impairment is not in dispute (see 34 CFR 300.8[c][11]; 8 NYCRR 200.1[zz][11]).

continued to recommend the same services as those outlined in the student's March 2017 IEP (compare Dist. Ex. 2, with Parent Ex. G).

The student attended the district's recommended placement for the 2017-18 school year (Parent Ex. D at p. 1). In a letter dated January 29, 2018, the district alerted the parent that the student's performance in his recommended educational program indicated that he might not meet the academic requirements for promotion to ninth grade in June 2018 (Parent Ex. F). Specifically, the letter indicated that the student was not yet performing at a level needed to meet his promotion criteria in mathematics and science (id.).⁴ The letter advised the parent that as a result, it was possible that the student might be held over in eighth grade for the 2018-19 school year (id.).

In January and February 2018, the parent sought and obtained a private neuropsychological evaluation in order to gain additional information about the student's then-current cognitive, academic, and social-emotional functioning to assist with educational and treatment planning (Parent Ex. D at p. 1).^{5, 6} Briefly, the report described the student as an intelligent young man whose full scale IQ of 109 was in the upper end of the average range of intellectual ability (id. at pp. 2, 7). The evaluators reported that the student consistently performed in the average range in all skill areas measured by the Wechsler Intelligence Scale for Children – Fifth Edition (WISC-V) except for processing speed, which was in the low average range (id. at pp. 2, 7, 10). The evaluators indicated that the student "was not as fast as he [wa]s intelligent, which c[ould] contribute to anxiety and frustration if he [wa]s unable to perform appropriately due to trouble working quickly" (id. at pp. 2, 7). According to the evaluators, the student's focus was variable on a computerized task of attention with difficulties noted in the areas of inattentiveness and impulsivity (id. at p. 7). In addition, the student performed variably on executive functioning tasks where he demonstrated strong planning ability but weak higher order attention and self-monitoring skills (id.). The evaluators reported that the student demonstrated average potential in reading, writing, and math but that his reading skills were variable (id.). They noted that behavior rating scales completed by the parent indicated that the student had difficulty with attention and self-regulation, and that he could become reactive and/or impulsive when he was upset or did not receive appropriate support (id. at pp. 7-8). The evaluators concluded that the student's performance and history were consistent with a diagnosis of attention deficit/hyperactivity disorder (ADHD) and that the student's difficulties with

⁴ The student's report card for the 2017-18 school year showed that for the second quarter the student received a grade of 65 for mathematics and 73 for science (Parent Ex. H). The student received a grade of 65 for social studies (id.).

⁵ The February 9, 2018 neuropsychological report indicated the student had previously been evaluated by the same office in 2015 (Parent Ex. D at p. 1). The results of the 2015 neuropsychological evaluation are reflected in the student's March 2017 and June 2017 IEPs (Parent Ex. G at pp. 2-3; Dist. Ex. 2 at p. 3).

⁶ A January 27, 2018 invoice from the private practice that conducted the student's neuropsychological evaluation indicated that the evaluation took place over three days in January 2018 (Parent Ex. E). The evaluation report indicates that testing took place over the same three days in January and over an additional day on February 9, 2018 (Parent Ex. D at p. 1). Based on this, the evaluation and the evaluation report will be referred to in this decision as a February 2018 evaluation.

attention and executive functioning had the potential to negatively affect his academic, social, and emotional functioning (id. at p. 8).

A CSE subcommittee convened on February 1, 2018 for the student's annual review and to develop the student's IEP for the coming year (Dist. Ex. 5).⁷ The February 2018 subcommittee of the CSE continued to find the student eligible for special education and related services as a student with a speech or language impairment (id. at p. 1). In addition, the CSE subcommittee recommended that the student continue to receive three periods per week of direct SETSS for math and three periods per week of direct SETSS for ELA in a general education classroom, one period of indirect SETSS for math in a separate location, and one period of direct SETSS for ELA in a special education classroom (id. at p. 12). The CSE subcommittee also recommended that the student receive speech-language therapy for one 40-minute sessions per week (id. at p. 4).⁸ In addition, the CSE subcommittee identified strategies to address the student's management needs and detailed the testing accommodations to be afforded to the student (id. at pp. 5, 14).

A district speech-language therapy progress report, completed on February 26, 2018, indicated the student presented with a moderate fluency disorder characterized by phoneme, part-whole and whole word repetitions, revisions, blocks, and occasional interjections (Dist. Ex. 8 at p.1). The progress report indicated the student was knowledgeable about stuttering and seemed to have become more desensitized to it, especially in the therapy room setting (id.). It further noted that the student could list several types of stuttering modification techniques (i.e., pausing, cancellations, pull outs) and had recently reported that he experienced success using cancellation and easy starts independently outside of the therapy room (id.). According to the progress report, the student reported having a mostly neutral attitude about stuttering and was not uncomfortable speaking about it (id.). Further, he stated that he would like to discontinue receiving speech services in school, as he felt he had become much more comfortable using learned strategies independently (id.). However, according to the progress report, the student had yet to master all speech goals, and his parent requested that speech services continue (id.). In addition, the student's speech provider recommended that he continue to receive speech-language therapy (id. at p. 2).

⁷ The request for review stated in a footnote that, although the affidavit by the assistant principal of the district middle school the student attended during the 2017-18 school year indicated an IEP meeting was held on February 1, 2018, and the resulting IEP was dated February 1, 2018, the meeting was actually held on March 1, 2018 (Dist. Ex. 4 at p. 1; Req. for Rev. at p. 3). Consistent with this allegation, the hearing record includes a February 15, 2018 meeting notice scheduling a CSE meeting for March 1, 2018 to discuss the student's educational needs (Dist. Ex. 4 at p. 1), and the February 1, 2018 IEP included the results from the February 9, 2018 neuropsychological evaluation report (Dist. Ex. 5 at p. 1). To add to the confusion, the IEP and a March 7, 2018 prior written notice regarding the IEP indicated the IEP meeting was held on February 1, 2018 (Dist. Exs. 5 at p. 17; 6 at p. 1) and the hearing record did not include any IEP dated March 1, 2018.

⁸ The hearing record reflects that due to a clerical error counseling was left off the student's February 2018 IEP (Tr. p. 36). However, the IEP included two counseling goals, the first, related to the student's ability to demonstrate self-control in frustrating situations and, the second, related to the student's ability to demonstrate accurate perceptions of events by taking responsibility for his behavior (Dist. Ex. 5 at p. 10).

On February 28, 2018, the parent signed an enrollment contract for York Prep and the Jump Start program at York Prep for the 2018-19 school year (Parent Ex. M). The contract indicated the student would enroll in York Prep as an eighth grader for the 2018-19 school year (id.).

On March 1, 2018, the district conducted a vocational interview with the student and the student's teacher (Dist. Ex. 7 at pp. 1-2, 4). A March 1, 2018 letter to the parent from the school case manager indicated that a parent vocational assessment was sent to the student's mother prior to the CSE meeting, with the CSE meeting notice (id. at p. 3). According to the letter, the parent assessment form was not returned at the time of the CSE meeting and therefore another parent vocational assessment was sent home, but the student's mother had not yet returned it to the school (id.).

A March 4, 2018 counseling progress report indicated that, in the counseling setting, the student behaved well and complied with the directions given (Dist. Ex. 9 at p. 1). However, according to the student's teachers, in the classroom, the student sometimes had to be given a directive multiple times before he complied (id.). With regard to his peers and adults, the student had a hard time respecting others' boundaries, which could look like the student was explicitly ignoring requests to not do something, or continuing to engage with a peer who was not interested in doing so (id.). When stressed, the student could get frustrated and sometimes chose to give up on a task or to complete the bare minimum (id.). According to the progress report, this frustration tended to lead the student to vocally doubt himself and put himself down (id.). The student had mixed feelings about his experience at the middle school (id.). The counseling progress report noted the student's strength was that he liked to make people laugh and that he found satisfaction in helping others and being looked to as a leader (id.). The report also noted the student's needs and stated that although the student made small steps in being accountable for his behavior, it continued to be an area of weakness for him that heavily affected his academic ability (id.). The student also struggled to use his coping techniques when managing his frustration with social situations and in the classroom (id.). The progress note indicated that the student needed to continue to work on a goal related to his perception of events and taking responsibility for his behavior (id. at p. 2).

By meeting notice, dated March 29, 2018, the district invited the parent to attend a requested CSE review scheduled for April 9, 2018 for the purpose of reviewing, and if appropriate revising, the student's IEP (Dist. Ex. 10 at p. 1).

A CSE subcommittee reconvened on April 9, 2018 (Dist. Ex. 11 at pp. 2, 18, 21). The April 2018 CSE subcommittee corrected the clerical error in the February 2018 IEP by adding counseling one time per week for 40 minutes to the student's IEP (id. at pp. 13, 18).^{9, 10} The CSE

⁹ Testimony by the assistant principal of the student's middle school indicated the student continued to receive counseling for the entire 2017-18 school year despite the clerical error in the February 2018 IEP (Tr. pp. 50-51; Dist. Ex. 13 at pp. 3-4). The start date for counseling on the IEP was March 1, 2018 (Dist. Ex. 11 at p. 21).

¹⁰ The May 14, 2020 affidavit by the assistant principal of the student's middle school was not signed or notarized (Tr. p. 28; see Dist. Ex. 13 at p. 4). The IHO stated on the record that due to current circumstances he was accepting unnotarized affidavits (Tr. p. 29). Additionally, the assistant principal testified she provided all of the information

continued to find the student eligible for special education as a student with a speech or language impairment, and continued the recommendations for direct group SETSS for ELA and math in the general education classroom for three periods per week each, direct SETSS for ELA one period per week in a special education classroom, and indirect SETSS for math for one period per week in a separate location (id. at pp. 12-13, 18). In addition to the counseling noted above, the CSE subcommittee also recommended that the student receive group (3:1) speech-language therapy one time per week for 40 minutes in a separate location (Dist. Ex. 11 at pp. 13, 18). The April 9, 2018 IEP continued the testing accommodations and classroom management strategies identified to support the student (id. at p. 5).

An April 9, 2018 a prior written notice summarized the discussion and recommendations with regard to the student's identification, evaluation, educational placement and/or provision of the student's special education services (Dist. Ex. 12). The April 2018 prior written notice listed counseling as a recommended related service (id. at p. 1).

Review of the student's final report card for the 2017-18 school year revealed that he received grades in his grade 8 core academic subjects (ELA, math, science, social studies) ranging between 65 and 76 (Parent Ex. H). The student received a final grade of 76 in Computers 8, a final grade of 100 in Art 8, and a final grade of 95 in Physical Education 8 (id.). He ended the school year with a final weighted average of 74.5 (id.).¹¹

In a July 17, 2018 letter from the student's father to the CSE chairperson, the parent raised a number of concerns regarding the district's recommended program asserting that it had not been supportive enough of the student and that his classes were too large (Parent Ex. B at p. 1).¹² The parent reported that the private neuropsychologist who evaluated the student agreed with them that the student should repeat eighth grade while attending a small school with small classes and specialized support (id. at pp. 1-2). The parent requested that another CSE meeting be held to consider a more supportive setting for the student and to consider whether the student was ready for high school (id. at p. 2). In addition, he alerted the district that he had reserved a spot for the student at York Prep for the 2018-19 school year in an eighth-grade class and further indicated that if no public school options were available, he would seek tuition funding at public expense, but reiterated his openness to working with the district (id. at p. 2).

In a follow-up letter to the CSE chairperson dated August 17, 2018, the parent reported that there had been no response to the July 2018 letter outlining the parent's concerns and indicated that the parent had unilaterally enrolled the student in an eighth-grade class at York Prep for the 2018-19 school year because he believed the student was not ready to move on to

included in the affidavit, but the district's attorney wrote the affidavit (Tr. pp. 29-30).

¹¹ The report card noted that a grade between 65 and 100 was a passing grade (see Parent Ex. H).

¹² The July 17, 2017 letter was sent to the CSE chairperson (with return receipt requested) and the middle school principal via certified mail (Parent Ex. 12 at pp. 2-3). The CSE chairperson signed for receipt of the letter on July 30, 2018 (Parent Ex. 12 at p. 4).

high school and was providing the district with notice that he would seek tuition reimbursement for York Prep at public expense (Parent Ex. C at p. 1).

In an automated email response dated August 17, 2018 the CSE acknowledged receipt of the parent's letter (Parent Ex. C at p. 2).

The student began attending York Prep on or around September 6, 2018 and continued attending York Prep through December 2018_(see Parent Exs. A at p. 3; P). The student began attending Fusion on January 8, 2019 through the end of the 2018-19 school year (Parent Exs. V at p. 1; W; see Tr. pp. 175-76).

During the 2018-19 school year when the student attended both York Prep and Fusion, the student repeated eighth grade and/or eighth grade courses because, in part, the student's private neuropsychologist recommended the student was not ready for a high school environment and the parent agreed (Tr. pp. 144-46; Parent Exs. B; C; J; K; M at pp. 1-2, 4; see Parent Exs. S; U at p. 1).

A. Due Process Complaint Notice

In a due process complaint notice dated February 24, 2020, the parent alleged that the February 1, 2018 IEP did not meet the student's complex academic and social emotional needs for the 2017-18 school year, as demonstrated by his lack of progress (Parent Ex. A at pp. 2-3).¹³ The parent also alleged the same IEP would not meet the student's complex academic and social emotional needs for the 2018-19 school year, in part because the student was not ready for transition to high school, and that the district denied the student a free appropriate public education (FAPE) for the 2018-19 school year (id.). The due process complaint notice indicated that the student was unilaterally placed at York Prep for the Fall 2018; however, his needs changed during the 2018-19 school year and (per neuropsychological evaluation results and recommendations by the student's neuropsychologist), it was determined that the student would benefit from a 1:1 program to meet his unique academic and social emotional needs for the second part of the 2018-19 school year and the parent withdrew the student from York Prep and unilaterally enrolled at Fusion Academy in January 2019 for the second part of the 2018-19 school year (id. at p. 3). The parent sought tuition reimbursement for his unilateral placements of the student at York Prep with Jump Start from September through December 2018 and Fusion Academy from January 2019 through June 2019 (id.).

According to the parent, the February 2018 IEP and the subsequent (April 2018) IEP were procedurally and substantively flawed and denied the student a FAPE for the 2018-19 school year (Parent Ex. A at p. 5). The parent alleged that the CSE ignored the parent's concerns, depriving him of meaningful participation; that the CSE was not duly constituted as attendees did not meet the necessary criteria and the CSE did not include a school psychologist

¹³ The DPCN incorrectly indicated that the February 2018 CSE determined the student was eligible for special education programs and services as a student with an other health impairment (Parent Ex. A at p. 3). As discussed above, the February 1, 2018 CSE determined the student was eligible for special education as a student with a speech or language impairment (Dist. Ex. 5 at p. 17).

or social worker; that annual goals were not developed at the meeting and the parent had no input; that aside from the speech goals the CSE did not discuss the student's progress towards his prior annual goals; that the CSE did not conduct its own evaluations of the student aside from a counseling report; that the district did not conduct a classroom observation of the student; that the program recommendation was predetermined and the CSE did not consider other programs; that based on discussion during the meeting, it would have been impossible to understand the student's present levels of performance in any area; that there was no planning for the student's transition into high school for the 2018-19 school year; and that the CSE could not provide any information with regard to how the student's IEP would be implemented in high school (*id.* at p. 6). According to the parent, the CSE failed to conduct a vocational assessment to determine the student's post-secondary vocational interests and failed to conduct a functional behavioral assessment or provide a behavioral intervention plan (*id.* at p. 8). The parent included additional challenges to the February 2018 IEP, specifically with respect to the assessments the district used, the student's present levels of performance, the annual goals, and the included management needs (*id.* at p. 7). Finally, the parent asserted that he did not receive a proper/timely school location letter for the student and that the district failed to provide a prior written notice (*id.* at p. 8).

The due process complaint notice indicated that equitable considerations favored the parent, and specified that the parent provided the district timely notice stating that if an appropriate program and placement was not provided to the student, the parent would place the student at York Prep for the 2018-19 school year and seek tuition funding (Parent Ex. A at p. 8).

The parent requested that an IHO find the parent was entitled to reimbursement for tuition for York Prep from September 1, 2018 through December 2018, reimbursement for tuition for Fusion from January 1, 2019 through June 30, 2019, costs and fees, compensatory education for the student for the lack of progress he made in public school during the 2017-18 school year, and any additional relief as the IHO determined was appropriate (Parent Ex. A at pp. 7-8).

B. Impartial Hearing Officer Decision

During a March 30, 2020 pre-hearing conference call, the IHO and the parent's attorney confirmed that the matter was originally before the IHO under a different case number for the 2018-19 school year and that the prior matter was withdrawn on November 1, 2019 (Tr. p. 2). At that time, the parent's attorney thought the original case was going into settlement, but it did not (Tr. p. 2). The IHO directed the district to get back to the parent with its position with regard to settlement or go forward with the instant matter (Tr. pp. 2-3).

The parties proceeded to an impartial hearing on May 21, 2020, which concluded on June 24, 2020 after two days of hearings (Tr. pp. 7-185). In a decision dated July 29, 2020, the IHO found that the district did not offer the student a FAPE for the 2018-19 school year (IHO Decision at p. 15). The IHO determined that the IEP developed for the 2018-19 school year "had two meetings," one in February 2018 and the other in April 2018 (*id.* at p. 14). The IHO found that the April 2018 CSE meeting was held to add counseling because it was not placed on the February 2018 IEP due to a clerical error (*id.*). The IHO noted that the CSE had the updated

neuropsychological evaluation the night before the February 2018 meeting but did not have sufficient time to review the report thoroughly (*id.* at pp. 14-15). The IHO further noted that during the 2017-18 school year, the student was given a promotion in doubt letter and barely passed his core subjects (*id.* at p. 15). The IHO determined that it should have been clear that the CSE needed to change the student's program recommendation because the student was struggling academically, the teachers and parent raised the same concerns as in the last IEP, and the neuropsychological evaluation report included a diagnosis of ADHD (*id.*). According to the IHO, the same recommendation from one year to the next with a documented decline in progress was sufficient to demonstrate the recommendations did not work and more than likely would not provide the student with FAPE for the 2018-19 school year (*id.*).

With regard to the appropriateness of the parent's unilateral placements, for the 2018-19 school year, the IHO determined that the proper test was to analyze the appropriateness of each unilateral placement at the time the student went to each school (IHO Decision at p. 17). Relying on the testimony of the neuropsychologist who conducted the February 2018 neuropsychological evaluation, the IHO found that the parent's decision to place the student at York Prep was appropriate because "the student needed to repeat 8th grade in a small class size environment with a level of support available at [] JumpStart" (*id.* at pp. 17-19). The IHO also found that the parent's placement of the student at Fusion was appropriate, finding that when the student stopped making progress at Jump Start, the student "needed a more intense one on one academic instruction that FUSION was able to provide" (*id.*).

The IHO also found that equitable considerations supported the parent's request for tuition reimbursement (IHO Decision at p. 19). The IHO found that the parent notified the CSE to set up a meeting, he attended the CSE meetings, he provided independent evaluations, and he expressed his concerns that the recommendations in the IEP were not appropriate for the student (*id.*). Therefore, the IHO concluded that the parent was entitled to tuition reimbursement for both York Prep and Fusion (*id.*).

With regard to the neuropsychological evaluation obtained by the parent, the IHO reviewed the parties' arguments and awarded the parent reimbursement for the cost of the February 2018 neuropsychological evaluation (IHO Decision at pp. 19-20). In particular, the IHO noted the district's argument that the parent did not request an IEE, but found that there was no requirement in federal regulations that the parent notify the district that they are seeking an IEE and requesting reimbursement (*id.*).

The IHO ordered the district to reimburse the parent for the cost of tuition and fees for York Prep and Fusion for the 2018-19 school year, and to reimburse the parent for the cost of the February 2018 neuropsychological evaluation (IHO Decision at p. 20).

IV. Appeal for State-Level Review

The district appeals from the IHO's determinations that the student's placements at York Prep and Fusion were appropriate, and that the district was required to reimburse the parent for the cost of the February 2018 neuropsychological evaluation. With regard to York Prep, the district alleges that the parent failed to demonstrate that the program was likely to produce progress and further alleges that the testimony by the Jump Start teacher did not demonstrate

how the student benefitted from the program or how the student made progress in his areas of weakness. The district contends that the student regressed at York Prep as the student's grades declined and he became overwhelmed and dysregulated. In addition, the district contends that testimony by the neuropsychologist that indicated the student needed York Prep as a "transitional placement" should not be used to justify the parent's unilateral placement of the student there because the neuropsychologist's opinion was retrospective, and there was no evidence in the hearing record to show how York Prep facilitated the student's transition from a general education program to his program at Fusion.

With regard to Fusion, the district appeals from the IHO's finding that Fusion was "able to provide a more structured academic environment to help the [S]tudent focus on academics and decreas[e] the interfering social-emotional issues with one on one academic instruction," and contends the parent failed to establish that Fusion's program was specially designed to meet the unique needs of the student.

The district also appeals from the IHO's decision to order the district to reimburse the parent for the cost of the February 2018 neuropsychological evaluation, asserting that there was no indication in the hearing record that the parent disagreed with a district evaluation, or that the parent requested an IEE be conducted at public expense.

In an answer dated September 29, 2020, the parent responds to the district's allegations and generally argues that an SRO should uphold the IHO Decision and dismiss the district's appeal in its entirety.

V. Applicable Standards

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

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP" (Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). The Supreme Court has indicated that "[t]he IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement" (Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S.

___, 137 S. Ct. 988, 999 [2017]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ. of the Chappaqua Cent. Sch. Dist., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). "The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created" (Endrew F., 137 S. Ct. at 1001). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Endrew F., 137 S. Ct. at 1001 [holding that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"]; Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132).

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

200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).¹⁴

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).

V. Discussion

A. Unilateral Placement

As the district does not appeal the IHO's finding that it failed to offer the student a FAPE for the 2018-19 school year, the main issue to be determined on appeal relates to the parent's unilateral placement of the student and, more specifically, whether the IHO erred in determining that York Prep and Fusion were appropriate for the student for the 2018-19 school year and whether equitable considerations supported the parent's request for reimbursement.

A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak, 142 F.3d at 129). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (Carter, 510 U.S. at 13-14). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ. of the City Sch. Dist. of Yonkers, 231 F.3d 96, 104 [2d Cir. 2000]).

¹⁴ 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).

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

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

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

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

1. The Student's Needs

Prior to addressing the appropriateness of the parent's unilateral placements and whether those placements addressed the student's special education needs, I must first review the student's needs at the time the parent made the decision to unilaterally place the student.

The evaluation most contemporaneous with the parents' decision to unilaterally place the student at York Prep for the 2018-19 school year is the February 2018 neuropsychological evaluation obtained by the parents (Parent Ex. D). At the time the neuropsychological evaluation report was written, the student was attending an eighth-grade mainstream classroom at a district

middle school (id. at p. 1). The evaluation was conducted by a clinical psychologist and clinical neuropsychologist who assessed the student's cognitive functioning, executive functioning, academic achievement, and social, emotional, behavioral, and adaptive functioning (id. at pp. 2-7). The evaluators also collected background information on the student and made behavioral observations of him during testing (id. at pp. 1-2).

In terms of background information, the evaluators reported that the student was described as very funny but also stubborn at times (Parent Ex. D at p. 1). His hobbies included photography, designing websites, and technology (id.). The evaluators noted that the student had an IEP and was classified by the CSE as a student with a speech or language impairment (id.). He received SETSS for math and ELA three times per week as a push-in within a small group, and once individually (id.). The evaluators indicated that the student received once-weekly speech-language therapy and counseling sessions, as well as testing accommodations, including extended time (time-and-a-half), separate location/room, on-task focus prompts, breaks, and preferential seating (id.). According to the evaluators, reports from the student's parents and school indicated that the student had trouble making appropriate progress academically, his motivation for school was declining, and he also struggled socially and emotionally (id.).

Based on their observation of the student during several testing sessions, the evaluators reported that the student was very polite and outgoing, and a working rapport was easily established (Dist. Ex. D at p. 2). The evaluators reported that the student's speech was normal for rate, volume, and tone, with evidence of a stutter (id.). They noted that the student was very well engaged, spontaneously spoke about his interests, including photography and website design, and demonstrated his strong vocabulary and affable personality throughout testing; although at times he was somewhat formal and concise (id.). The student made and maintained strong eye contact and displayed his strong sense of humor and quick wit (id.). He presented as intelligent and concerned with performing well (id. at p. 2). The evaluators stated that the student made adaptive use of strategies on novel tasks and spontaneously shared how he found those strategies helpful (id.). For instance, he spoke aloud to himself when solving problems and he used his verbal abilities to mediate demands placed on him by nonverbal tasks (id.). The evaluators reported that the student worked slowly and carefully the majority of the time (id.). He also readily admitted when he did not know an answer and was willing to move on to subsequent questions (id.). The evaluators noted that the student coped well with the demands of testing in this structured and supportive environment and asked for breaks when appropriate (id.). In addition, he solicited feedback about his performance and used this feedback to inform his approach to tasks (id.).

The evaluators indicated that it was important to note that their results were obtained in a structured and supportive 1:1 environment (Dist. Ex. D at p. 2). The student was provided with opportunities for breaks and chances to discuss topics of his choice as well as extra time to respond to all test questions, even when he was unable to earn credit (id.). In addition, assessments were performed in an environment with minimal distractions and care was taken to minimize his anxiety (id.).

The evaluators reported that in order to assess the student they administered the Wechsler Intelligence Scale for Children-Fifth Edition (WISC-V), the Wechsler Individual Achievement

Test-Third Edition (WIAT-III), the Conners Continuous Performance Test-Third Edition (CPT-3), the Cognitive Assessment System-Second Edition (CAS-2), the Gray Oral Reading Test-Fifth Edition (GORT-5), the Behavior Assessment System for Children-Third Edition (BASC-3): Self-Report, the Behavior Assessment System for Children-Third Edition (BASC-3): Parent Report, and the Rorschach Inkblot Test: Exner Comprehensive Scoring System (Parent Ex. D at pp. 1-2).

With regard to the student's overall cognitive functioning, the results of the evaluators' administration of the WISC-V indicated that the student performed at the "upper end of the [a]verage range overall" and attained a full scale IQ of 109, which was at the 73rd percentile (Parent Ex. D at p. 2). He performed consistently within the average range in all skill areas except for processing speed, where his composite score was in the below average range (id. at pp. 2, 10). The evaluators opined that the student was not as fast as he was intelligent, which could contribute to anxiety and frustration if he was unable to perform appropriately due to trouble working quickly (id. at p. 2). According to the evaluators, the student had typical verbal comprehension and reasoning skills for his age, although, at times anxiety as well as difficulty accessing and organizing his thoughts efficiently adversely effected his performance (id. at p. 3). They suggested that the student benefited from structure to help refine his answers and time to work at his own speed (id.). The evaluators reported that the student displayed nonverbal skills that were average for his age. (id.). He made adaptive use of strategies on nonverbal problem-solving tasks and worked slowly and diligently (id.).

With regard to working memory and attention, the evaluators indicated that although the student's working memory abilities on the WISC-V were within the average range, he demonstrated stronger verbal than visual memory skills (Parent Ex. D at pp. 4, 10). Administration of the CPT-3 yielded results indicative of difficulties related to inattentiveness and sustained attention (id. at pp. 4, 10-11). The evaluators noted that weakness in the student's processing speed might contribute to anxiety and frustration when he was unable to perform appropriately due to trouble working under time constraints, or difficulty balancing demands on his speed and accuracy (id. at pp. 4, 10).

With regard to the student's executive functioning skills, the evaluators' administration of the CAS-2 revealed that the student's executive functioning skills were variably developed (Parent Ex. D at p. 5). Although he was able to plan and select an appropriate strategy for some tasks, the student had trouble using his focus adaptively, which contributed to inconsistent performances on other tasks (id.).

Turning to academics, the evaluators reported that the overall results of their administration of the WIAT-III and the GORT-5 revealed that the student displayed average potential for reading, writing, and math, although his reading skills were variable (Parent Ex. D at pp. 5-7, 11-12). In reading, the student struggled when he did not have a chance to reread texts (id. at p. 5). He effectively answered concrete questions but struggled as questions became more abstract or placed demands on his ability to make inferences (id.). The student worked best with time to work at his own speed, structure to help organize his responses, and opportunities to reread materials or apply learned strategies (id. at pp. 5, 7). On a timed-essay task, the student wrote an essay that was brief for his age but included an introduction, transitions, and the

required number of reasons (id. at p. 6). The evaluators reported that qualitatively speaking the student's handwriting was an area of weakness and while the student's work was semantically appropriate, he sometimes struggled with grammar and mechanics (id.). In math, the student demonstrated skills that were consistently within normal limits for his age although he sometimes had difficulty conceptualizing how to solve more complex problems and his lack of attention to detail contributed to difficulties on multi-step problems (id.).

With regard to the student's social and emotional functioning, the student and his father independently completed versions of the BASC-3, which the evaluators described as an assessment consisting of behaviors from several domains rated regarding their frequency of occurrence (Parent Ex. D at p. 6). The parent ratings indicated that the student had difficulty with attention (attention problems/94th percentile) and self-regulation (hyperactivity/96th percentile) that could lead to impulsive, reactive, and verbally aggressive behavior when he was upset or overwhelmed (aggression/90th percentile; conduct problems/94th percentile) (id.). According to the evaluators, the parent also rated the student as having difficulty adjusting to unwanted changes (adaptability/15th percentile) and occasional trouble working collaboratively with peers (leadership/6th percentile) (id.). By parent rating, the student also had trouble communicating his thoughts and feelings effectively (functional communication/18th percentile) and required occasional reminders and support to complete independent living tasks and chores (activities of daily living /4th percentile) (id. at pp. 6-7). In contrast, the evaluators noted that the student's own ratings were overwhelmingly positive suggesting he felt happy, well adjusted, and normal for his age overall (id. at p. 7). The only elevations on the student's self-report were within the domain of attitude to school (87th percentile) because he did not like his then-current school or feel like he was appropriately supported (id.). He also responded in a manner that suggested he experienced physical complaints and symptoms more than his peers (somatization/93rd percentile) (id.). The evaluators indicated that in children and young adults a high level of somatic complaints were often associated with negative emotions that may not be adequately expressed, or poor coping skills (id.).

According to the evaluators, results of the Rorschach Inkblot test indicated that the student felt most comfortable in clearly defined and structured situations, and that he preferred simplicity to ambiguity (Parent Ex. D at p. 7). The student perceived events as well as the actions of others appropriately and understood the limits of appropriate behavior with strong reality testing skills (id.). The evaluators reported that the student was a logical person but at times he might not pay adequate attention to others or his surroundings, and he could make decisions hastily (id.). They also indicated that the student might be prone to making negative comparisons between himself and others, and that he might have superficial relationships or seem aloof because he had difficulty connecting with others on a deep emotional level (id.).

The evaluators opined that when results from the BASC-3 and Rorschach were viewed in conjunction, it was clear that the student presented as a young man who struggled to cope with negative emotions and communicate his thoughts and feelings. (Parent Ex. D at p. 7). He also compared himself negatively to peers and struggled to connect with others as well as he might like (id.). The evaluators suggested that, as a result, the student might prefer to avoid situations that were ambiguous or that placed increasing demands on his interpersonal/coping skills, in favor of situations that were predictable, structured, and/or supportive (id.).

As noted earlier, the evaluators concluded that the student's performance and history were consistent with a diagnosis of ADHD (Parent Ex. D at p. 8). Furthermore, they opined that the student's difficulties with attention and executive functioning had the potential to negatively affect his academic, social, and emotional functioning (id.).

The evaluators recommended that "[g]iven his intelligence in addition to his areas of difficulty [the student] required a structured and supportive class and school placement for intelligent students that offer[ed] smaller class sizes and opportunities for direct instruction throughout the day, as well as access to special educators" (Parent Ex. D at p. 8). The evaluators suggested that the student required access to typical peers and positive behavioral role models, in addition to a curriculum that was appropriately challenging, supportive, and engaging (id.). In addition they noted that given the student's poor academic performance in recent years, he might not be ready for high school and, in light of his young age for an eighth grader, he might be well served by repeating the eighth grade (id.). The evaluators opined that repeating eighth grade should be considered as an option for the student, not only to gain academic skills, but also to alleviate his declining self-esteem and social/emotional struggles (id.). The evaluators further opined that this should be considered carefully and only in the context of a new school setting where the student would not feel stigmatized (id.).

Additional recommendations offered by the evaluators included testing modifications (time and one-half, separate location with minimal distractions) to address the effect the student's ADHD had on his performance and suggestions for educators' delivery style (i.e., clear and animated voice, gestures, slower speaking rate, chunking instructions, and repetition of material and directions as needed) (Parent Ex. D at p. 8). The evaluators also included recommendations for preferential seating, prompts, frequent breaks to reduce mental fatigue and to provide the student with opportunities to self-regulate, and teacher check-ins (id. at p. 9). The evaluators recommended that due to the student's ADHD the family should consult with a physician about the possibility of medication to improve the student's attention (id.). They also recommended ongoing communication between the student's parents and teachers to encourage generalization of positive outcomes and to monitor the student's need for further interventions (id.). Lastly, given the nature of the student's difficulties and increasing academic demands that would arise, the evaluators recommended periodic neuropsychological re-evaluations to assess the student's continued cognitive, academic, and emotional needs (id.).

2. Specially Designed Instruction and Progress

a. York Prep and Jump Start

The district argues that the IHO erred in his determination that York Prep and Jump Start constituted an appropriate unilateral placement because he erroneously found that the student made progress in the placement and benefited from the supportive, structured environment at York.¹⁵

¹⁵ The district also contends that to the extent the IHO relied on testimony from the clinical neuropsychologist who conducted the February 2018 neuropsychological report that York was an appropriate interim step between

At the impartial hearing, the clinical neuropsychologist testified that he was in constant contact with the student's parents about their decision to place the student at York Prep for the 2018-19 school year (Tr. p. 69). He noted that the parents' decision was "completely in line" with the recommendations in the neuropsychological evaluation report and fulfilled the needs outlined in the report (Tr. p. 69; Parent Ex. D).

According to a program description of York Prep, the initial mission of the school was to create an environment in which students could succeed (Parent Ex. L at p. 1). York Prep created a tracking system to create an environment in which students were grouped according to their ability (id.). Generally, there were three different tracks in all main academic subjects in the middle school and five tracks in the high school (id.). The tracks were scheduled at the same time, which allowed York Prep to place students in tracks appropriate for them and also provided the school with the flexibility to move students to another track during the year as appropriate, without disrupting that student's schedule (id.). The program description explained that a student who had challenges in math could be placed in a slower track, and that same student could have strengths in English and be placed in a higher track, to make sure they were being challenged appropriately (id.). According to the program description, due to the emotional fragility that sometimes accompanied learning issues, York Prep employed two experienced "psychologically qualified" personnel on a full-time basis (id.). Although York Prep offered a variety of foreign languages, students with a foreign language exemption were offered a fundamentals of reading and writing course and the option of taking American Sign Language (id.). The program description indicated that class sizes at York Prep were small, with about 12 students per class in middle school and 15 to 16 students per class in the high school (id.).

With regard to Jump Start, described as York Prep's special education program,, students in the program were assigned to a State-certified special education teacher or to a teacher certified in a remedial specialty such as literacy (Tr. p. 106; Parent Ex. L at p. 2).¹⁶ According to the program description, students in the Jump Start program needed to have an IEP, or a neuropsychological or psychosocial evaluation to be admitted to the program (Parent Ex. L at p. 2). The purpose of this requirement was to ensure that students accepted into the Jump Start program could be offered the accommodations to which they were entitled (id.). The York Prep psychologist reviewed the above noted documentation to determine whether a student was appropriate for the program (id.). Approximately one-third of York Prep's population, or 125 out of 350 students, were in Jump Start (id.). A Jump Start teacher typically had a caseload of about

a general education program and the one-to-one instruction the student ultimately received at Fusion, such reliance was misplaced because there was no evidence that the student either required an interim placement prior to enrolling at Fusion or that York Prep succeeded in providing one to the student. As discussed below, the parent's decision to place the student at York Prep is assessed based on the information that the parent had at the time he made that decision and the hearing record indicates that the student's circumstances changed during the course of the school year. Accordingly, the argument that York Prep was a necessary interim placement is not supported by the hearing record, but it also not determinative as to whether York Prep was an appropriate placement.

¹⁶ The student's Jump Start teacher was in the process of transferring an out-of-State license to a full-time State license (Tr. p. 105).

11 students and met with each student individually two times a week for one period during a non-academic subject such as art, music, drama, or physical education (id.). The Jump Start teacher provided skills-based instruction to address students' learning deficits (id.). In addition, the Jump Start teacher met with his/her students in a group both before and after school (id.). In the group sessions, the Jump Start teacher focused largely on executive functioning skills related to homework, organization, and test taking, and skills-based problems when necessary (id.). Each Jump Start student met with their assigned Jump Start teacher 12 times per week (id.). The program description noted that York Prep believed in inclusive education so that average or above average learning-disabled students had the "least restrictive environment" (id.). In addition, it noted that many Jump Start students graduated out of the program while still attending York Prep (id.).

The program description also indicated that the school had a computer-based, password protected information system called "Canvas," which students and parents could access (Parent Ex. L at p. 2). Classroom teachers regularly posted documents on Canvas, including homework assignments, PowerPoint presentations, and handouts (id.). York Prep teachers posted students' test scores and homework grades, as well as information about any missing assignments (id.). According to the program description, Canvas helped students with executive functioning deficits who struggled with remembering assignments or losing materials, as needed materials were posted on it (id. at pp. 2-3). As York Prep recognized that parents needed to be a part of their child's educational team, the Canvas program enabled parents to see exactly what was going on in their child's classes on a weekly basis so that they could be actively involved in supporting them (id. at p. 3). Canvas also helped parents assist student's by conveying what assignments were due and notifying them of upcoming exams in a timely manner (id.).

The York Prep program description further indicated the classroom teachers and Jump Start teachers worked together (Parent Ex. L at p. 3).¹⁷ It characterized the Jump Start teacher as the "point person" and advocate for the Jump Start student at York Prep (id.). According to the program description, the Jump Start teacher supported the classroom teachers and helped them modify their instruction to meet the needs of the Jump Start students (id.). In addition, classroom teachers typically modified instruction to meet the students' needs since many York Prep students had learning issues (id.). The teachers often incorporated a variety of special education techniques and strategies into their instruction as well, including the chunking of material, repetition, checking in for understanding, refocusing and redirection (id.). Classroom teachers also provided accommodations to their students including extended time and "quiet rooms" for test taking, preferential seating, language exemptions, and use of a laptop computer in the classrooms (id.). In addition, York Prep employed outside speakers as well as members of the Jump Start team to provide teacher development to classroom teachers for learning how to teach the learning challenged child (id.).

¹⁷ The Jump Start teacher testified that Jump Start teachers were not present in individual academic classrooms (Tr. p. 106). However, as Jump Start teachers' schedules were based on a caseload of students, there were opportunities for Jump Start teachers to push in and observe academic-subject classes per their individual schedules (Tr. p. 107). The student's Jump Start teacher indicated she was able to push in and observe the student a few times, specifically for science class or math class (Tr. p. 107).

Consistent with the above noted description of the Jump Start program, testimony by the student's Jump Start teacher during the time he attended York Prep indicated there were three components to the Jump Start program (Tr. pp. 95-97). The first component was a morning group meeting with the Jump Start teacher before school (Tr. p. 95). The purpose of the morning Jump Start group was to work on executive functioning; make sure students were prepared for the day; provide time to look at Canvas, where all assignments were posted for every class; and for the teacher to check in with each student individually to make sure they were prepared for the day (Tr. pp. 95-96).

The teacher testified that the second component of the Jump Start program was individual, 1:1 meetings that were conducted during elective periods so that students did not miss any of their core academic classes (Tr. p. 96). According to the Jump Start teacher, the 1:1 meetings involved more skill-based learning (Tr. p. 96). She described the meetings as "very fluid," and noted that they were used primarily to address any immediate needs of a student and a lot of accommodations and assignments were reviewed during the meeting and there was work on skills (Tr. p. 96).

According to the teacher, the third component of Jump Start was the afternoon portion consisting of the Jump Start teacher's small group caseload of approximately 11 students (Tr. pp. 95, 97). The teacher indicated the afternoon portion was another time where students could prioritize and learn about time management and executive functioning skills, and could make sure they were prepared for any homework they needed to complete that night (Tr. p. 97). In addition, both morning and afternoon small groups were times for Jump Start teachers to individually meet with subject teachers as well as to go over any assignments or any concepts (Tr. p. 97).

Testimony by the Jump Start teacher indicated that she was familiar with the student as she had been his Jump Start teacher (Tr. p. 97). In terms of the student's strengths and struggles at the beginning of the 2018-19 school year, the Jump Start teacher described the student as a "very polite, encouraging young man" who appeared to want to do well in his academic career (Tr. pp. 97-98). According to the Jump Start teacher, the student's weaknesses included time management, prioritizing assignments, and issues in ELA with written structure and some aspects of reading comprehension (Tr. p. 98). The Jump Start teacher testified that she supported the student in terms of his executive functioning and time management needs by meeting with him within the morning and afternoon group setting (Tr. p. 98). She explained that she assisted the student with going through Canvas and looking at prioritizing his assignments and making a checklist of them (Tr. p. 98). She provided the student with prompts to think critically (i.e., "why would this English assignment that has an earlier due date be more important than another assignment?") (Tr. p. 98). The teacher reported that together she and the student would reread instructions for homework assignments as needed, and she would have the student rephrase the directions back to her to ensure he understood the assignment (Tr. p. 98).

With regard to how the Jump Start teacher addressed the student's difficulties with written language, the teacher testified that she used a graphic organizer, specifically one that employed a "point, illustration, explanation format, making sure there was a point to [the student's] paragraph, a quote, or some other statistic[al] information that illustrated his point, and

then how he explained it" (Tr. pp. 98-99). She explained that during the editing process, she and the student would reread his finished work to look at tone and audience, and that also helped them work on sentence structure and syntax (Tr. p. 99).

To address the student's difficulties with reading comprehension, the Jump Start teacher testified that she previewed the questions the student would have to answer with him and through the use of prompting questions tried to help the student understand words that needed explaining and what the questions were asking (Tr. p. 99). She explained that they would chunk reading assignments by paragraph (Tr. pp. 99-100). If the student had to read a chapter for English, he and the teacher would "go paragraph by paragraph, and then take turns reading aloud" (Tr. p. 100). The Jump Start teacher testified that she would have the student read aloud, stop at the end of the paragraph, discuss the paragraph, and then continue (Tr. p. 100).

With regard to collaborating with subject teachers to support the student, the Jump Start teacher testified that during her 1:1 sessions with the student, subject teachers were allowed to email her to schedule a meeting with "just the three of them" (Tr. p. 100). She indicated she was in communication with the student's subject teachers two to three times a week via email or in person to address concerns in the student's academic subject classes (Tr. pp. 100, 114). The Jump Start teacher noted that when subject teachers asked her how they could differentiate instruction to meet the student's needs she would offer suggestions such as chunking information into smaller pieces for longer assignments or instead of reading a full-on version of "Romeo and Juliet," the student could read a graphic novel version of the story to reduce the amount of reading for him (Tr. p. 114). She opined that the student benefitted from the supports he received for the duration of the time he attended York Prep during the 2018-19 school year (Tr. p. 100).

The Jump Start teacher testified that there were no more than 15 or 16 students in the student's main academic classes but with tracking, the average class size was about eight or nine students (Tr. pp. 101, 108). She noted that at York Prep, students were placed in a track where they would be most able to succeed (Tr. p. 101). According to the Jump Start teacher, not everyone in a lower track class was a special education student (Tr. p. 111). Mainstream students without an IEP might be placed in a lower track class, based on their abilities (Tr. p. 111). She explained that, for example, a class labeled "eight, one" would be a regular average-level class (Tr. p. 102). A class labeled "eight, two" would be the lower level for that class, which meant that it was more differentiated and "a little more scaffolded" (Tr. p. 102). Concepts were simplified as much as possible to meet the cognitive abilities of the students in the class (Tr. p. 102). A review of the student's academic schedule revealed he was in "8-1" classes for English 8, Early US History, Intro to American Sign Language, physical education, and study hall-writing lab (Parent Ex. K). The same academic schedule revealed the student was in "8-2" classes for Math 8 and physical science, as well as for Health and Wellness 8 (Parent Ex. K). The Jump Start teacher reported that the student benefitted from the small class size at York Prep, as well as from the teacher previewing homework assignments and chunking major projects into smaller time-managed steps with different deadlines so the student would not be overwhelmed (Tr. pp. 102-03). In addition, the student had accommodations available to him, including preferential seating and extended time on tests (Tr. p. 103). Although the student did not receive mandated counseling services at York Prep, the student had access to York Prep's

school psychologist, whom he met with regularly to develop skills to self-regulate in the classroom (Tr. pp. 103, 109). In addition, the student was able to drop in to see the psychologist during the day if he was struggling (Tr. pp. 103, 109).¹⁸ The Jump Start teacher opined that as York Prep was a small school in terms of population, the student "did not get lost," all teachers were very concerned about his progress, and the small class setting and small school setting allowed for a collaborative effort on how to address the student's needs (Tr. p. 104).

With respect to the student's progress at York Prep, a finding of progress is not required for a determination that a student's unilateral placement is adequate (Scarsdale Union Free Sch. Dist. v. R.C., 2013 WL 563377, at *9-*10 [S.D.N.Y. Feb. 4, 2013] [noting that evidence of academic progress is not dispositive in determining whether a unilateral placement is appropriate]; see M.B. v. Minisink Valley Cent. Sch. Dist., 523 Fed. App'x 76, 78 [2d Cir. Mar. 29, 2013]; D.D-S. v. Southold Union Free Sch. Dist., 506 Fed. App'x 80, 81 [2d Cir. Dec. 26, 2012]; see also Frank G., 459 F.3d at 364).¹⁹ However, a finding of progress is, nevertheless, a relevant factor to be considered (Gagliardo, 489 F.3d at 115, citing Berger, 348 F.3d at 522 and Rafferty v. Cranston Public Sch. Comm., 315 F.3d 21, 26-27 [1st Cir. 2002]; see T.K. v. New York City Dept of Educ., 810 F.3d 869, 878 [2d Cir. 2016]).

As noted above, a review of the student's eighth grade report card from the district middle school revealed that he received final grades in his core academic subjects (ELA, math, science, and social studies) ranging between 65 and 76 (Parent Ex. H). In addition, the student received a January 2018 promotion-in-doubt letter that indicated he was not currently performing at a level needed to meet his promotion criteria for math and science (Parent Ex. F). For the 2017-18 school year the student received a final grade of 65 in Math 8 and a grade of 67 for Science 8 (Parent Ex. H). A review of the student's York Prep eighth grade report card shows that for the first quarter of the 2018-19 school year he achieved a grade of 87 for Math 8 and a grade of 90 for Physical Science, indicative of improved performance in these courses as compared to his grades for the same subject areas at the district middle school (compare Parent Ex. H and Parent Ex. J). With regard to the rest of the student's academic courses at York Prep, the student received grades between 71 and 90 (Parent Ex. J). His final average for the first quarter at York Prep was 82, only three points away from qualifying for the honor roll for that quarter (id.).²⁰ With regard to effort in his academic courses, the report card showed that during the first quarter

¹⁸ The student's Jump Start teacher reported that the student did not receive speech services at York Prep (Tr. 110).

¹⁹ The Second Circuit has found that progress made in a unilateral placement, although "relevant to the court's review" of whether a unilateral placement was appropriate, is not sufficient in itself to determine that the unilateral placement offered an appropriate education (Gagliardo, 489 F.3d at 115; see Frank G., 459 F.3d at 364 [holding that although a student's "[g]rades, test scores, and regular advancement [at a private placement] may constitute evidence that a child is receiving educational benefit, . . . courts assessing the propriety of a unilateral placement consider the totality of the circumstances in determining whether that placement reasonably serves a child's individual needs"]).

²⁰ The York Prep report card indicated that "only major courses count[ed] towards [a student's] average"; the report card did not define "major courses" (Parent Ex. J). For purposes of discussion herein, English 8, Math 8, Early US History and Physical Science were considered to be the student's major academic courses (see Parent Ex. J). The student's average would have been slightly higher if all course grades were counted (see Parent Ex. J).

of the 2018-19 school year at York Prep, the student received ratings of "2," equivalent to "satisfactory" in Math 8, US History, and Physical Science (*id.*). The student also received an effort rating in English 8 of "2-3," which indicated his performance in the class was "satisfactory-unsatisfactory" (*id.*). A review of the student's York Prep attendance report revealed the student did not miss any days of school between September 6, 2018 and October 12, 2018 (Parent Ex. P).

Moving to the second quarter of the 2018-19 school year, the parent testified that the student's placement changed "mid 2018" to Fusion because the student had "a lot of emotional issues," and "a lot of issues going on in family life, and certainly the executive functioning issues were still there" (Tr. p. 160). The parent explained that while the student had a good start for the first two or three months at York Prep and that the student benefited from being there, by October or November 2018 the student was "really struggling and going downhill rapidly again and it wasn't working for him" and "Even though he had... the Jump Start help, his own therapist, it just wasn't working" (Tr. pp. 161, 178).²¹ The parent testified he had multiple conversations with the headmaster of York Prep, who provided him with "wisdom and comfort," as well as suggestions about what should be done for the student, specifically with respect to the possibility of 1:1 instruction (Tr. pp. 161, 172).

Testimony by the student's private clinical neuropsychologist indicated that the student did significantly better during the first quarter at York Prep than he had done the previous school year at the district middle school; however, he also testified that even with repeating the eighth grade, the smaller class size, and the specialized program, it still "proved to be too much" for the student (Tr. pp. 91-92). The student's report card for the second quarter at York Prep showed the student's grade in English 8 dropped significantly to a failing grade of 61 and an effort rating of "3-4," denoting "unsatisfactory-unsatisfactory conduct" (Parent Ex. J). The student's grade in Math 8 remained somewhat stable from the previous quarter as he received a grade of 83 and a satisfactory rating for effort (*id.*). In Early US History, the student's grade dropped to 67 with an unsatisfactory rating for effort (*id.*). In Physical Science, the student's grade fell to 65 and a rating of unsatisfactory for effort (*id.*). His final average for the second quarter was 71 (*id.*). Despite the downward trend in his academic grades, the student passed all of his academic courses for the first semester of the 2018-19 school year with an average grade of 76 (Parent Ex. J).²²

According to the Jump Start teacher, there came a time when a decision was made for the student to transition into a 1:1 setting at Fusion (Tr. pp. 103-04; see Tr. pp. 108-09). Although she was not involved in the discussion about the matter, she was aware there was a collaborative discussion between the parents, York Prep's head of school, and York Prep's middle school

²¹ The student's father testified that the student had been seeing a private therapist weekly for between five to seven years, including during the 2018-19 school year and during the time of the impartial hearing (Tr. pp. 152-53, 164; 174-75).

²² For the second quarter at York Prep the student's grade in American Sign Language 8 improved nine points from the first quarter (71 to 80) with consistent satisfactory ratings for effort (Parent Ex. J). In Visual Arts 8, the student's grades for both quarters were consistent (90 to 91 with satisfactory ratings for effort) (*id.*).

academic dean, and she indicated that from what she "heard" from the school psychologist and the student's teachers, the student had difficulty with his social-emotional dysregulation in the classroom and had meltdowns during class (Tr. pp. 104-05, 112). The Jump Start teacher indicated she noticed one or two meltdowns over the course of the time she worked with the student (Tr. p. 112). She noted that during the time of the collaborative discussions between the parents, York Prep's head of school and the York Prep middle school academic dean, she was asked about her impressions of the student at that time (Tr. pp. 112-113). The Jump Start teacher recalled saying that at the beginning of the year (first quarter), the student was "very eager" to be at York Prep and attend his classes (Tr. p. 113). He was a very polite student (Tr. p. 113). However, according to the Jump Start teacher, before the winter break, the student seemed more emotionally dysregulated and had more meltdowns (Tr. p. 113). She affirmed that it was the student's difficulties with emotional regulation that led to a change in his placement (Tr. p. 113). The Jump Start teacher testified that the student's academic needs were supported during the time he was a York Prep (Tr. p. 114). She also indicated that generally, the student's social-emotional needs were supported by his access to the school's counselor (Tr. p. 115). She noted that as the semester went on, it became apparent that the student needed "a more kind of one-on-one setting with a break from the mainstream classroom" (Tr. p. 115).

Testimony by the parent with regard to whether the student benefited from York Prep revealed he had "no doubt at all" that the student did benefit (Tr. p. 178). At the time, York Prep seemed like a great idea because it was smaller and offered therapeutic interventions with Jump Start (Tr. p. 178). The father testified that when it turned out York Prep was not "quite enough" for the student the 1:1 seemed very sensible, "not just from the academics" (Tr. p. 178; see Tr. p. 72).

I note that the hearing record offered no information about what York Prep/Jump Start did, if anything, to address the student's meltdowns in class and/or adjust its instruction for the student in light of the downward trend in his academic performance and effort during the second quarter of the first semester. Although testimony by the Jump Start teacher indicated the student saw the school psychologist at least once a week and the psychologist was also available on an "as needed" basis, the service was not an official part of the student's schedule, and the hearing record offered no information as to what the school psychologist focused on with the student or how she generally supported the student's social-emotional needs (Tr. pp. 103, 109-110, 114-15). While this level of support met the student's social-emotional needs at the time he entered York Prep and Jump Start based upon the evaluative information in the hearing record, the record is silent with respect to how York Prep specifically addressed the student's behavioral needs when the student began experiencing "meltdowns" in the class that interfered with his ability to receive instruction.

While the lack of information as to how York Prep addressed the student's difficulties in the second quarter of the 2018-19 school year is concerning, based on the progress shown in the student's grades for the first quarter of the 2018-19 school year and, based, in particular, on the Jump Start's teacher testimony as to how York Prep addressed the student's special education needs by providing scaffolding, 1:1 instruction, consultation with subject teachers, teacher previewing of homework assignments ahead of time and chunking major projects into smaller time-managed steps, and accommodations including preferential seating and extended time on

tests available to the student, the hearing record does not support overturning the IHO's finding that York Prep was an appropriate placement for the student. Additionally, the parent's decision to place the student at York Prep in its Jump Start program was reasonable at the time it was made as the program the student received at York Prep met the recommendations set forth in the February 2018 neuropsychological evaluation report. Finally, to the extent that the student's placement at York Prep no longer adequately addressed the student's social-emotional needs at some point during the second quarter of the 2018-19 school year, the parent did not leave the student in an inappropriate placement and instead moved the student to Fusion for the remainder of the school year, the adequacy of which is discussed below.

b. Fusion

The district argues that the IHO erred in finding Fusion was an appropriate unilateral placement for the student because the hearing record failed to demonstrate that Fusion provided specially designed instruction tailored to the student's individual needs, and the 1:1 instruction provided to the student at Fusion would generally benefit any student.

The student's father testified that, during the time the student attended York Prep, he had already been in contact with the evaluators who conducted the February 2018 neuropsychological evaluation (Tr. p. 161-62; Parent Ex. D). With regard to the student's mid-year change in placement and the parent's desire to help the student focus and reset himself, the student's father indicated that the evaluators recommended a 1:1 setting to "X out all the other stuff that gets in the way, the peer pressure...the hubbub at school, the other activities" (Tr. p. 162). In addition, the student's father reported that the York Prep headmaster suggested the student receive 1:1 instruction (Tr. p. 172).

Testimony by the student's clinical neuropsychologist indicated he was in touch with the student's parents and he saw the student during the time he attended York Prep (Tr. pp. 69-70, 89). He also testified "we" spoke to the student's teachers and directors at York Prep, and with the student, a number of times (Tr. pp. 89-90). The clinical neuropsychologist testified that although the student was getting tremendous support for his baseline set of needs at York Prep, the student needed even more individualized instruction and he was supportive of the student's placement change to Fusion (Tr. pp. 70-71). According to the clinical neuropsychologist, given all of the student's deficits, even in a small class at York Prep with the intense Jump Start program (and repeating eighth grade), there was a mix of too many things that would crop up and overwhelm the student "across the board" (Tr. pp. 71, 91). The student was having a tough time managing the different demands (Tr. p. 90). The neuropsychologist testified that day-to-day, the student had difficulty internally managing his attention and impulsivity (Tr. p. 90). In addition, his difficulties with executive functioning, planning, organizing, multitasking, and compartmentalizing affected him from a learning perspective (Tr. p. 90). By three to four months into the 2018-19 school year, the student's situation had changed to the extent that the level of exposure to typical peers initially recommended for the student in the February 2018 neuropsychological evaluation report was too overwhelming for him (Tr. p. 83-84; Parent Ex. D at p. 8). The neuropsychologist opined that the student needed to just focus on the learning, as opposed to having to also focus on his peers, the transitions, the managing and organization, and the social aspects of school because it was too overwhelming for him during the 2018-19 school

year, especially in navigating the social milieu with regard to -his- social and internal emotional reactions (Tr. pp. 71, 90-92; see Tr. p. 84). The neuropsychologist further opined that "everything was boiling up to the point where [the student] just wasn't able to perform" (Tr. p. 90). He testified that he met with the student a few times and the student was in distress (Tr. p. 90). The student wanted to do well and although there were things working from a learning perspective, the student was not able to manage the full curriculum at York Prep, and therefore the evaluators recommended that the student attend Fusion for the rest of the 2018-19 school year (Tr. 90).

Consistent with the information about Fusion, discussed in more detail below, the clinical neuropsychologist indicated the student worked with the Fusion teacher in a 1:1 environment (Tr. p. 71). He characterized the school as intense and supportive and "very strong curriculum-wise," something warranted for the student based on his intelligence (Tr. p. 71). The clinical neuropsychologist called Fusion a "game changer" for the student as it was a way for the student to "reboot" and "just focus on him and his learning and take a breath from it all and make appropriate progress" (Tr. 72).

A Fusion profile, specific to the campus the student attended, indicated that Fusion Academy was a private, comprehensive school for grades 6 through 12 that was part of a nationwide network of schools (Parent Ex. T at p. 1). Courses were offered at essential, college prep, and honors levels (id.). The profile included an extensive list of "sample" course offerings, some of which were honors courses and/or Regents Lab courses (id. at p. 2). According to the profile, Fusion's holistic curriculums promoted self-awareness, resourcefulness, creativity, and critical thinking (id. at p. 1). The profile indicated that the school celebrated multiple pathways to success and prepared students to navigate their journey with confidence and competence (id.). In addition, the school offered 1:1 instruction, meaning one student and one teacher in every classroom, a homework café so that homework did not go home, and personalized scheduling (id.).

In her June 22, 2020 affidavit the head of school at Fusion described Fusion as a private middle and high school, that provided all classes in a 1:1 learning environment (Parent Ex. Y at p. 2). She reported that all teachers at Fusion had a minimum of a bachelor's degree in the area they were teaching (id. at p. 3). In addition, the school had a special education lead teacher who was State certified and who provided support and consultation with all teachers who worked with students with IEPs (id. at p. 3). The special education lead teacher consulted and developed IEP notes that were similar to IEP goals (id.). The Fusion teachers worked with the special education lead teacher to modify goals as needed (id. at p. 4). The head of school stated that Fusion followed State curriculum standards (id. at p. 3).

According to the head of school, the classrooms at Fusion were small office areas with white boards and other forms of technology that teachers used to teach (Parent Ex. Y at p. 2). Some classes were taught more typically with the teacher at the board providing instruction and some classes were taught with the teacher and the student sitting at a desk next to one another (id.). The head of school reported that the 1:1 instruction allowed Fusion to customize each student's program based on their individual needs, where for example, if a student was struggling with a math concept, the teacher could slow down the instruction to ensure the student mastered

the concept before moving on to something else (id.). Or, if a student was advancing faster than expected, the teacher could modify the instruction to make sure that the student was being challenged (id.). According to the head of school, Fusion provided an educational program to a broad range of students, such as professional athletes, students with high IQs and disabilities ("twice exceptional" students), students who had been bullied in their public school, or students who had anxiety and refused to attend their public school (id.). When a student enrolled at Fusion, she created a formal education program that provided information on the student's disabilities, learning needs, and educational levels. (id.). At the same time, the special education lead teacher reviewed the student's IEP and determined appropriate IEP notes/"special ed" lead notes, which were similar to goals (id.). The head of school's affidavit indicated that Fusion followed a schedule that was similar to a college program, whereby the students attended the same classes on Monday/Wednesday and Tuesday/Thursday each week (id.). Each student's schedule was individualized based on his or her needs (id.). Students took classes they needed to graduate and that met their individual needs and interests (id.).

The Fusion head of school's affidavit indicated every student attended a homework café, an area in the school where there were a few tables and students completed their homework (Parent Ex. Y at pp. 2). There was one café that allowed students to talk and discuss their work and one cafe that was silent (id. at pp. 2-3). Students could use either café depending on how they worked best or depending on the work they needed to complete that day (id. at p. 3). The head of school explained that there was always one teacher in each café, which she suggested was similar to a resource room in a public school (id.). The monitor supported students who needed help with homework and monitored whether they had completed the homework before they could check out of the café (id.). A student's teachers and lead teacher also had to review and confirm that a student completed his homework before he left for the day (id.). According to the head of school, the homework café also helped students advocate for themselves (id.). If they had questions about their homework, the monitor helped them draft emails to teachers or confer with other students (id.).

The head of school reported that, at Fusion, students had access to clubs during lunch and received individualized physical education (Parent Ex. Y at p. 3). The school took two field trips per month; some trips worked on community involvement and others were purely recreational (id.).

The head of school indicated that Fusion addressed its students' social needs holistically within the school's program and every student had individualized goals for their academic, social, and emotional success (Parent Ex. Y at p. 3). In the homework cafes, students had opportunities to socialize with other students (id.). In addition, the homework monitor could support and provide structure for social opportunities (id.). The head of school noted that if a student encountered peer issues, they could address them in this small setting immediately (id.). The monitor could also communicate with the other teachers through Fusion's management system, to provide additional support and reinforcement (id.).²³

²³ The affidavit by the head of school reported that Fusion Academy provided a life skills class and a "community minds" class; however, the hearing record does not indicate that the student was registered for

According to the head of school, the 1:1 instruction at Fusion ensured that a student did not miss instruction because they needed to leave class for a sensory break or had another service to attend (Parent Ex. Y at p. 4). If a student needed a break during class, they could take it without missing instruction (id.).

The head of school noted that Fusion used down lighting as overhead lighting could affect students' sensory issues (Parent Ex. Y at p. 4). There were lamps in the entrance, classrooms, and common areas (id.). The head of school reported that the classrooms at Fusion had windows with natural light and the school provided soft couches, blankets, and pillows in its common areas so that students felt comfortable and ready to learn (id.). The school also had a "zen den" with a huge bean bag where students could go if they felt anxious and overwhelmed (id.). The zen den also had a sand garden designed to help students relax (id.).

The head of school reported that all teachers at Fusion had to attend a two-day training called "NFO" (New Fusionite Orientation) to learn the school's culture, curriculum, and pedagogy (Parent Ex. Y at p. 4). Teachers also spent between 10 and 20 hours of training learning how to use Fusion's learning management system (id.). Fusion had online training for teachers that offered different modules or online courses in areas such as crisis management, modified instruction, and teaching rubrics (id.). These trainings were offered to teachers quarterly to provide on-going support and resources in creating and differentiating the curriculum (id.).²⁴

As detailed by the head of school, Fusion's teachers communicated and often collaborated with each other and with students' families (Parent Ex. Y at p. 4). The school's learning management software program provided information on the students' classes, assignments, grades and progress and students could also access the program to review their grades or their missing assignments, which helped them build independence and advocacy skills (Parent Ex. Y at p. 4). Fusion emphasized communication with parents and each teacher provided a daily note to parents on how the student did in class that day (id.). If parents had a question or wanted to follow up on something, they could email the teacher directly from that note (id.).

The head of school reported that Fusion also had a post-secondary counselor who had a background in special education and was familiar with local post-secondary and community college programs (Parent Ex. Y at pp. 4-5). The post-secondary counselor met with students and their families to develop future plans after they graduated from Fusion (id. at p. 5). The counselor

either class (Parent Exs. S; Y at p. 3). The community minds class helped prepare students to engage in appropriate social interactions by providing support with initiating conversations and working to implement interactions in different settings like the homework café (id.). In the life skills class, students completed resumes, were taught how to write professional emails, worked on an individual budget, and received help to prepare them for more independent living (id. at pp. 3-4).

²⁴ Testimony by the Fusion head of school indicated teachers received 16 hours of professional development both on the Fusion campus and off campus (Tr. pp. 128-29). Trainings included a variety of topics including differentiating instruction or assigning meaningful homework and ranged in time from 45 minutes to three hours (Tr. pp. 128-29).

helped students prepare for traveling independently and attending vocational programs, work, and community or four-year college programs (id.).

The Fusion head of school indicated that during the student's 1:1 academic classes he did not interact with peers (Tr. p. 126). She noted it was not a requirement that Fusion teachers have State special education certification, but that some of them did (Tr. p. 126). She explained that Fusion used a collaborative team-teaching approach where teachers were able to get support from people within the school's staff, some who had years of teaching experience and were certified (Tr. pp. 126-27). Teachers met weekly and attended staff meetings every other week (Tr. p. 127).

The student's Fusion daily schedule showed that during the second semester of the 2018-19 school year he received two hours per week each of instruction in pre-algebra, English 8, Language Arts 8, Early US history, Physical Science, and Foundations of Personal Fitness (Parent Ex. S). In addition, the student's schedule included three hours of homework café on Mondays and Wednesdays and two hours of homework café on Tuesdays and Thursdays (id.). The student did not have any classes or café time scheduled for Friday (id.).

The Fusion head of school's testimony indicated that nothing was noted on the student's schedule for Fridays because the school used Fridays as a "mastery day" where students who were falling behind were required to come to the program and receive extra support in the homework café (Tr. pp. 129-30; see Parent Ex. S). Also, students who were doing well could voluntarily come to the program on Fridays to work on their assignments in a comfortable environment (Tr. p. 130). The head of school reported that Fridays were also an opportunity for more socialization (Tr. p. 130). She noted that a lot of trips were hosted on a Friday, and since many students did not have classes on Fridays, it was easier for more students to participate (Tr. p. 130).

When questioned about homework café, the head of school indicated that at her campus there were three homework café spaces (Tr. p. 131). Although the spaces had a teacher in them to support students, one space was considered a social homework café space and another space was considered a silent homework café space (Tr. p. 131).²⁵ The head of school testified that at Fusion, the priority was for students to complete their work, but that the school also wanted students to learn how to communicate with other students (Tr. p.131). With regard to the student in this matter, the head of school affirmed he was able to receive assistance with his assignments during homework café (Tr. p. 133). She opined that, "A lot of people view[ed] a one-to-one school as very isolating, but every other aspect of [Fusion] offer[ed] socialization" (Tr. p. 137). She noted that Fusion recognized that a social skill or a social interaction could affect a student's academics and the school tried to create goals around that (Tr. p. 138).

The head of school confirmed that at the time the student attended Fusion he did not receive any related services (Tr. pp. 133-34). She indicated that if a parent retained an outside related service provider, Fusion could customize a student's schedule and provide space for the

²⁵ The Fusion head of school's testimony did not clarify whether the third space was social or silent (see Tr. p. 131).

related service to occur (Tr. p. 134). Fusion did not offer counseling for therapeutic social-emotional support, but it did have a post-secondary counselor for its high school students, primarily those in the eleventh or twelfth grade (Tr. p. 134-35). Also, since instruction was 1:1, when relationships were built between teachers and students, students often felt comfortable sharing information (Tr. pp. 135-36). In those instances, Fusion contacted the family (Tr. pp. 135-36). If a student had an outside provider, Fusion staff would connect with that provider to make sure whatever skills used outside of school would be incorporated into school (Tr. p. 136).

With regard to the student in this matter, the Fusion head of school indicated she was not working at his campus when he started at Fusion mid-way through the 2018-19 school year and although she could comment on Fusion's typical admissions process, she was unable to comment on whether anyone at Fusion spoke with anyone from the student's prior school (Tr. pp.136-37). She also was unsure why the student was no longer attending Fusion at the time of her testimony (Tr. p. 137). However, in her affidavit the head of school indicated that the student had attended Fusion from January through June 2019 (Parent Ex. Y at p. 5). According to the head of school, based on teacher reports, the student appeared to adjust to Fusion and make progress (id.). The head of school reported that the student presented with the following strengths: strong critical reasoning, the ability to think abstractly and learn theoretical concepts, and the ability to apply skills learned in class to solve problems on homework and assessments (id.) In addition, he attended every class on time and came prepared to learn, and he was able to cover advanced concepts (id.).²⁶ The head of school reported that the student presented with weaknesses and deficits in focusing, organization, time management, and self-esteem (id.). With regard to his focus, the student was easily distracted and needed to be redirected (id.). He would start conversations about topics unrelated to course material but returned to focus when prompted (id.). With regard to his difficulties with organization, the head of school reported that the student had trouble with skills including keeping track of homework assignments and due dates (id.). He was given support in the homework café to help him stay on track with his work (id.). With regard to time management, because the student occasionally forgot to do his homework or did not set aside time to complete it, he was coached to prioritize completing his assignments (id.). Homework café support was used to help the student with his time management skills (id.). With regard to self-esteem, the Fusion head of school indicated that the student initially had low confidence and self-esteem (id.). The student was encouraged to participate academically, and his successes were celebrated in class and in the homework café (id.).

The Fusion head of school indicated that all of the student's teachers noted that he benefited from positive reinforcement and consistent praise, organization, and redirection (Parent Ex. Y at p. 5). Further, she noted that Fusion developed individualized goals for the student that targeted his ability to improve his grades and confidence by focusing on homework completion by finding a system that worked for him and helped him keep track of his assignments (id.). Another goal targeted the student's development of coping strategies to help relieve stress in his life (id.). An additional goal indicated that as the student wanted to build more friendships at Fusion, he would join more clubs and get involved with peer activities on campus (id.).

²⁶ A March 26, 2020 Fusion attendance statement certified that for the period beginning January 8, 2019 and ending May 22, 2019 the student was absent for one full day (Parent Ex. W).

The head of school indicated that teachers at the school used techniques including chunking, positive reinforcement, prompting, modeling, and repetition of material and directions (Parent Ex. Y at p. 6). She stated that the student's school environment at Fusion was quiet, with minimal distractions (id.). The student was given breaks as needed during class and extended time on tests as needed (id.). The student's parents received daily academic narratives that outlined how each class went for the day and they also received monthly progress notes (id.).

A February 21, 2019 monthly progress report from Fusion indicated that the student's course grades at that time, were as follows: Physical Science A-, Pre-Algebra A, Early US History A+, Language Arts A+, English 8 A-, and Foundations of Personal Fitness A+ (Parent Ex. R).

The student's father opined that the student benefited from Fusion's 1:1 instruction as he bonded with at least two of his teachers and for the first time the parent saw the student "actually learning stuff" (Tr. p. 163). The father opined that by taking away all the other things and focusing on the 1:1 instruction, the student had the opportunity to learn how to "fix" things himself (Tr. p. 163). With regard to the lack of counseling services at Fusion, the student's father indicated that the student "had plenty of his own counseling" and that he continued to obtain private weekly counseling services for the student (Tr. pp. 173-74). With regard to the lack of speech-language therapy at Fusion, the father reported that the student did not want intervention for his speech impediment (Tr. pp. 173-74). The father explained that had the student wanted speech-language therapy it would have been provided privately, as it had been in the past (Tr. pp. 173-74). The father testified that the student did not return to Fusion after the 2018-19 school year because "Fusion did what it needed to do" for the student (Tr. p. 175).

In summary, the hearing record shows that at the time the parent decided to withdraw the student from York Prep and place him at Fusion the student was emotionally overwhelmed and required a different educational setting (Tr. pp. 70-71, 105, 160-61). The parent, in collaboration with the neuropsychologist who had evaluated the student and staff from York Prep, determined that the student required more individualized instruction and a break from a mainstream setting and the "peer pressure" and "hubbub" that accompanied it (Tr. pp. 70-71, 89-90, 104, 161-62). The neuropsychologist opined that although it was reasonable to think that the amount of support the student received at York Prep could have worked, it did not, and given all of the student's deficits even the small classes at York Prep coupled with the intense Jump Start program could not keep the student from becoming overwhelmed (Tr. pp. 70-72; 90). He further opined that due to the student's social/emotional state at the time, the student required less exposure to typical peers than he had originally recommended (Tr. pp. 84-85).

Consistent with the neuropsychologist's revised recommendation, Fusion offered the student differentiated grade-level instruction in a setting that reduced the social and attentional demands placed on him (see Parent Exs. S; Y at p. 3). The school developed three goals for the student that targeted his need to develop a system for keeping track of his assignments and completing his homework, develop coping strategies to help relieve stress, and building friendships by joining clubs and getting involved with peer activities on campus (Parent Ex. Y at p. 5). To address these goals, in addition to receiving 1:1 instruction, the student was assigned to the homework café for 10 hours per week; the homework café functioned similar to a resource

room where the student could receive assistance with his schoolwork (Tr. p. 133; Parent Ex. Y at p. 3). In addition, the homework café provided the student with opportunities to socialize with the support of the monitor who provided structure and support (Parent Ex. Y at p. 3; see Tr. pp. 130-31, 137-38).

Finally, while the district raises legitimate concerns over the student solely receiving 1:1 instruction, the parent shared some of those concerns, noting that Fusion "was always going to be a temporary solution" and that the hope was for the student to be in a school with "lots of kids in classes and other curriculum" (Tr. p. 175). The parent testified that Fusion was a helpful step in getting the student to attend a new school for ninth-grade, something the parent did not believe he would have been able to do when he left the public school after the 2017-18 school year (Tr. p. 175). The parent reported that when the student arrived at his new general education private school for ninth grade, he "hit the ground running" compared to when he left the district middle school (Tr. pp. 175-76). Although the student still displayed some defiance, forgot things sometimes, and had a little bit of executive functioning difficulties, the father estimated the student was "probably 75 percent better compared to [zero] before" (Tr. p. 176).

Based on the above, I find that Fusion met the student's needs at the time of his placement there. Accordingly, there is no basis to disturb the IHO's finding with regard to reimbursing the parent for the cost of tuition and fees for the student's attendance at Fusion for the second half of the 2018-19 school year.

B. Equitable Considerations

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

Here, the hearing record demonstrates that equitable considerations weigh in favor of the parent's request for tuition reimbursement. The hearing record supports finding that the parent cooperated with the CSE process and to the extent any minor irregularities can be attributed to the parent as he navigated that process, none rose to the level of non-cooperation. Although circumstances developed during the 2018-19 school year that led to the student leaving York Prep for Fusion in the middle of the year, the district has not alleged that the parent failed to inform the district of the student's change in placement, nor has it alleged that it attempted to develop a new IEP for the student due to his changed circumstances. Accordingly, such a change in circumstances does not weigh against the parent for purposes of assessing equitable considerations.

C. Reimbursement for Neuropsychological Evaluation

The district seeks to overturn the IHO's decision to award the parent's reimbursement for the cost of the privately obtained February 2018 neuropsychological evaluation. The district argues that the parent is not entitled to an IEE as the parent did not disagree with a district evaluation, nor did the parent request an IEE be conducted at public expense.

As an initial matter, the parent's due process complaint notice did not include a request for reimbursement for an IEE (see Parent Ex. A). With respect to the February 2018 neuropsychological evaluation, the due process complaint notice merely alleged that the evaluation was conducted, listed a few of the recommendations contained in the report, and indicated that the parent gave a copy of the evaluation report to the CSE (id. at pp. 2, 6).

During the hearing, the parent's attorney posed questions about the invoice for the neuropsychological evaluation and the district's attorney requested clarification about whether the parent sought reimbursement for the neuropsychological evaluation as such request was not in the parent's due process complaint notice (see Tr. pp. 72-74). When the IHO asked the parent's attorney to show her where in the due process complaint notice the parent requested reimbursement for the evaluation, the parent's attorney referred the IHO to a request for "any additional relief that the IHO would deem necessary and appropriate," and indicated the parent would be arguing that reimbursement for the evaluation would be a "necessary and appropriate item of relief" in their closing brief based on legal arguments (Tr. p. 74).

During the last day of the hearing, the IHO indicated she was unclear what the parent was specifically seeking in terms of possible reimbursement for the neuropsychological evaluation and with regard to the amounts paid to York Prep and Fusion (Tr. p. 183). The IHO instructed the parent's attorney to be "very clear" in her written closing remarks with regard to "exactly" what she was asking the IHO to consider (Tr. p. 183). Review of the parent's closing statement indicated that the parent argued he was entitled to reimbursement for the February 2018 neuropsychological evaluation because the district "improperly shifted the burden to conduct an up to date evaluation to the Parent" (IHO Ex. 1 at pp. 6-7).

Under these circumstances, the parent's request for reimbursement for the cost of the February 2018 neuropsychological evaluation did not meet the statutory framework under which a parent has a right to obtain an IEE at public expense. The IDEA and State and federal regulations guarantee parents the right to obtain an IEE (see 20 U.S.C. § 1415[b][1]; 34 CFR

300.502; 8 NYCRR 200.5[g]), which is defined by State regulation as "an individual evaluation of a student with a disability or a student thought to have a disability, conducted by a qualified examiner who is not employed by the public agency responsible for the education of the student" (8 NYCRR 200.1[z]; see 34 CFR 300.502[a][3][i]). Parents have the right to have an IEE conducted at public expense if the parent expresses disagreement with an evaluation conducted by the district and requests that an IEE be conducted at public expense (34 CFR 300.502[b]; 8 NYCRR 200.5[g][1]; see K.B. v Pearl Riv. Union Free Sch. Dist., 2012 WL 234392, at *5 [S.D.N.Y. Jan. 13, 2012] [noting that "a prerequisite for an IEE is a disagreement with a specific evaluation conducted by the district"]; R.L. v Plainville Bd. of Educ., 363 F. Supp. 2d. 222, 234-35 [D. Conn. 2005] [finding parental failure to disagree with an evaluation obtained by a public agency defeated a parent's claim for an IEE at public expense]). As the hearing record does not indicate that the parent expressed disagreement with any evaluation conducted by the district, the parent was not entitled to an IEE at public expense. To the extent that the parent alleged the district did not conduct a current evaluation of the student and shifted the burden for conducting an evaluation to the parent, such an allegation "does not necessarily imply the evaluation was not appropriate at the time it was conducted" (D.S. v Trumbull Bd. of Educ., 2020 WL 5552035, at *13 [2d Cir. Sept. 17, 2020]).

However, this does not end the inquiry as the parent's arguments in his closing statement and answer demonstrate that the parent did not request an IEE through the statutory framework but requested it as additional equitable relief due to the district's denial of a FAPE to the student (Answer at pp. 4-5; see IHO Ex. 1 at pp. 6-7). This type of relief has been granted in at least one other administrative proceeding at this level (see Application of a Student with a Disability, Appeal No. 20-049 [granting reimbursement for a neuropsychological evaluation based on equities where "the district ha[d] not taken its obligation to evaluate the student seriously for a long period of time"]).

Under the IDEA, a district must conduct an evaluation of a student where the educational or related services needs of a student warrant a reevaluation or if the student's parent or teacher requests a reevaluation (34 CFR 300.303[a][2]; 8 NYCRR 200.4[b][4]); however, a district need not conduct a reevaluation more frequently than once per year unless the parent and the district otherwise agree and at least once every three years unless the district and the parent agree in writing that such a reevaluation is unnecessary (8 NYCRR 200.4[b][4]; see 34 CFR 300.303[b][1]-[2]). 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]). An 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]; 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]). 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]).

Here, the hearing record does not include a district evaluation, particularly a psychoeducational or neuropsychological evaluation, for the student for the 2016-17, 2017-18 or 2018-19 school years (see Parent Ex. G at pp. 2-13; Dist. Exs. 2 at pp. 1-2; 3 at p. 1; 5 at pp. 1-2; 6 at p. 1; 11 at pp. 1-2; 12 at p. 1). According to the parent's testimony, the district never evaluated the student and the first time the parent had the student evaluated was approximately three years prior to the February 2018 evaluation in 2015 (Tr. pp. 151-52; see Parent Ex. D at p. 1). Review of documentary evidence revealed the student's June 2017 IEP included test results from a 2015 neuropsychological evaluation and the February 2018 IEP and April 2018 IEP included test results from the February 2018 neuropsychological evaluation report (Tr. p. 76; Parent Ex. D; see Dist. Exs. 2 at p. 1-2; 3 at p. 1; 5 at pp. 1-2; 6 at p. 1; 11 at pp. 1-2; 12 at p. 1).

Consistent with the parent's testimony that he provided the CSE with a copy of the February 2018 neuropsychological evaluation report, testimony by the assistant principal for special education at the district's middle school indicated that for the February 2018 CSE meeting, the district was aware that the parent was conducting evaluations outside of school (Tr. pp. 54, 146-47). Further, although the parent did not ask the district to conduct its own neuropsychological evaluation of the student, the hearing record reflects that the CSE was provided with the February 2018 neuropsychological evaluation report the night before the February 2018 CSE meeting (Tr. pp. 54, 170). During the hearing, when the IHO asked the assistant principal of the middle school if the district conducted any neuropsychological evaluations of the student, the assistant principal testified, "We did not have a school psychologist available to do those assessments at that time that we received the assessments from the neuropsych. So we had to rely on our prior cognitive testing and then also our teacher reports and academic assessments" (Tr. p. 55).²⁷

Based on the above, although the parent did not challenge an evaluation conducted by the district and did not request reimbursement for the February 2018 neuropsychological evaluation until the hearing, more specifically in his closing statement and in his answer on appeal, a prominent feature of this proceeding is that the district has not attempt to defend against the parent's claim that a reevaluation of the student was needed and that the district failed to conduct one (see Parent Ex. A at p. 6). Additionally, the hearing record does not include any evaluations conducted by the district, nor does it include any requests by the district to obtain parental consent to conduct any evaluation of the student. While I am aware that permitting the parent to obtain reimbursement for the cost of the February 2018 neuropsychological evaluation without first requesting an evaluation from the district runs the risk of bypassing the evaluation process (see D.S., 2020 WL 5552035, at *11 [rather than seeking an IEE based on an objection to a particular assessment, a functional behavioral assessment, that was not part of the student's last

²⁷ The hearing record reflected that the cognitive testing the assistant principal referred to as "our prior cognitive testing" came from a 2015 neuropsychological evaluation obtained by the parent (Tr. pp. 151-52; Parent Ex. D at p. 1; Dist. Exs. 2 at p. 2; 3 at p. 11; 5 at pp. 1-2; 11 at pp. 1-2).

reevaluation, the parents could have requested that the district conduct another reevaluation of the student]), under the circumstances presented in this matter, and particularly in light of the lack of evidence that the district made any attempt over the course of over three school years to evaluate the student, there is insufficient basis to depart from the IHO's equitable award of reimbursement for the cost of the February 2018 neuropsychological evaluation.

VI. Conclusion

The hearing record supports the IHO's findings that the parent should be reimbursed for the costs of the student's attendance at York Prep and Fusion for the 2018-19 school year. In addition, the hearing record does not provide sufficient basis to overturn the IHO's decision to award the parent reimbursement for the cost of the February 2018 neuropsychological report.

THE APPEAL IS DISMISSED.

**Dated: Albany, New York
October 30, 2020**

**STEVEN KROLAK
STATE REVIEW OFFICER**