The University of the State of New York

The State Education Department
State Review Officer
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No. 20-177

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:
Judy Nathan, Interim Acting General Counsel, attorneys for petitioner, by Sarah M. Pourhosseini, Esq.

Law Offices of Neal H. Rosenberg, attorneys for respondent, Michael R. Mastrangelo, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from the decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to respondent's (the parent's) son and ordered the district to provide direct funding for the cost of the student's tuition at Happy Hour 4 Kids (HH4K) for the 2019-20 school year. The appeal must be sustained.

II. Overview—Administrative Procedures

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

§§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

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

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

III. Facts and Procedural History

The student has received diagnoses of autism spectrum disorder "with accompanying language impairment-no intelligible speech," attention-deficit/hyperactivity disorder-combined type (ADHD-C), intellectual disability, sensorineural hearing loss, and global developmental delay (Parent Exs. D at p. 8; F at pp. 1-2, 4; Dist. Exs. 2 at p. 4; 3 at p. 2).

The student demonstrated early delays in motor and speech-language development and received early intervention services on an inconsistent basis (Parent Ex. D at p. 2; Dist. Ex. 2 at p.

3). For the student's first year of preschool, he attended an 8:1+2 special class placement and received speech-language therapy, occupational therapy (OT) and services from "a management paraprofessional" (id.). His then-teacher reported that the student was often self-directed, cried and banged his head in response to displeasure, and was difficult to engage despite paraprofessional assistance for behavior (id.) For the student's second year of preschool, the student attended a 6:1+2 special class placement with the same related services and the addition of parent counseling and training (Dist. Ex. 2 at p. 3; IHO Ex. III at p. 1).[1]

For the student's kindergarten year (2018-19), a CSE convened on March 14, 2018 and determined that the student was eligible to receive special education services as a student with autism (IHO Ex. III at p. 1). The CSE recommended that the student attend a 6:1+1 special class in a specialized school, and receive related services of OT and speech-language therapy, as well as the services of a full-time, 1:1 crisis management paraprofessional (IHO Ex. III at pp. 14-15). In January 2019 the district performed a functional behavioral assessment (FBA) and developed a behavior intervention plan (BIP) (see Dist. Exs. 2; 9). A CSE convened on January 15, 2019 to consider the results of the FBA, and other in-school assessments that had been administered since October 2018 (IHO Ex. II at pp. 1-4; Dist. Exs. 2; 9). The January 2019 CSE recommended the same program for the student as found in the March 2018 IEP for the remainder of the 2018-19 school year with the addition of 6:1+1 special classes for art and science, parent counseling and training, and several program modifications and accommodations (compare IHO Ex. II at pp. 10-11, with IHO Ex. III at pp. 14-15).

At the January 2019 CSE meeting, the parent requested a physical therapy (PT) evaluation, which the district subsequently conducted on February 25, 2019 (IHO Ex. II at p. 4; Dist. Ex. 7). A CSE convened on March 26, 2019 to consider the results of the PT evaluation, as well as some updated in-school assessments, determined the student did not require PT services, and recommended the same program for the student found in the January 2019 IEP for the remainder of the 2018-19 school year (compare IHO Ex. I at pp. 1-5, 12-13, with IHO Ex. II at pp. 10-11; Dist. Ex. 7).

On June 20, 2019, the CSE convened to develop the student's IEP for the 2019-20 school year (first grade), and determined the student remained eligible for special education services as a student with autism (Dist. Ex. 1 at pp. 1, 16).[2] The June 2019 CSE recommended a 12-month 6:1+1 special class placement in a specialized school with related services including four 30-minute individual sessions per week of speech-language therapy, three 30-minute individual sessions per week of OT, and four 30-minute parent counseling and training classes/school visits per year as well as monthly workshops and a newsletter (id. at pp. 12-14). In addition, the CSE recommended the services of a full-time, 1:1 paraprofessional, several program modifications and

[1] IHO Exhibits I through III are not paginated. For the purposes of this decision, the page numbers of the documents are identified starting with the first page of each and continuing consecutively through the end of the document (IHO Exs. I at pp. 1-18; II at pp. 1-17; III at pp. 1-19).

[2] The date of the June 2019 IEP is identified in the hearing record as June 25, 2019 (Tr. pp. 32, 35 see Tr. pp. 43-44). According to the document, the date of the IEP meeting was June 20, 2019 (Dist. Ex. 1). For purposes of this decision, the IEP will be referred to as the June 2019 IEP and its related CSE as the June 2019 CSE.

accommodations, specialized transportation, supports for the student's management needs, and seven annual goals and corresponding short-term objectives (id. at pp. 6-13, 16).

In a prior written notice dated June 26, 2019, the district informed the parent of its program recommendations for the student for the 2019-20 school year, and the reports "used in the decision to propose" the program and placement (Dist. Ex. 10 at pp. 1-3).

In a ten-day notice letter, dated August 20, 2019, the parent informed the district of her intention to unilaterally place her son at HH4K for the 2019-20 school year; and seek reimbursement/direct funding from the district for tuition, transportation, and all associated costs (Parent Ex. P at pp. 1-3).

A. Due Process Complaint Notice

In an amended due process complaint notice, dated March 2, 2020, the parent asserted that the district failed to offer the student a free appropriate public education (FAPE) for the 2019-20 school year (Parent Ex. A).[3] After reviewing the student's educational history and citing the results and recommendations of a private neuropsychological evaluation, the parent indicated that she disagreed with the June 2019 CSE's recommendations because the student had not made progress in the same program during the prior school year and that she had requested placement in a State approved nonpublic school for students with autism (id. at pp. 2-4). The parent presented a number of alleged procedural and substantive violations related to the district's recommended program and placement (id. at pp. 4-5).

Initially the parent alleged that she did not receive the student's finalized IEP or a written notice prior to the start of the 12-month school year, a delay which impeded her ability to meaningfully consider the program prior to the 2019-20 school year, as well as to adequately plan for it (Parent Ex. A at p. 4). Next, the parent alleged that the 6:1+1 special class recommended by the district was inappropriate as the student had been unable to make meaningful progress in the same program during the 2018-19 school year (id.).

The parent stated that she had raised many concerns at the June 2019 CSE meeting about the recommended special education program and the CSE included these concerns in the IEP (Parent Ex. A at p. 5). However, the parent alleged that despite her concerns, the CSE continued to recommend a District 75 school placement for the student over her objection (id.). The parent further alleged that, as such, her right to meaningfully participate was impeded as the CSE had predetermined the program recommendation for the 2019-20 school year (id.). The parent also alleged that the CSE failed to adequately consider the evaluative material from the student's clinicians (id.).

In addition, the parent asserted that the IEP failed to outline appropriate management needs and strategies to address the student's behavioral and learning needs; failed to provide for appropriate annual goals, rather reflecting goals that were unrealistic for the student to attain in the recommended program; and failed to provide adequate strategies and support to ensure that skills

[3] The IHO Decision indicates that the original due process complaint notice was dated October 29, 2019; however, the original due process complaint notice was not submitted with the hearing record.

could be generalized to the student's home (id.). With respect to related services, the parent asserted that the district's recommendation was insufficient to provide enough support and treatment for the student's occupational therapy and speech needs (id.). Moreover, the parent alleged that being pulled out of the classroom as many times as mandated by the IEP would be problematic for the student and cause severe disruption, thereby impeding his ability to make meaningful progress (id.). The parent alleged that CSE failed to recommend physical therapy services for the student and that the recommended 6:1+1 program did not adequately address the development of physical skills (id.).

The parent alleged that the June 2019 CSE failed to adequately address the student's behavioral challenges including his self-injurious behaviors, tendency to leave the classroom, and overall frustration tolerance issues (Parent Ex. A at p. 4). The parent asserted that the student's behaviors would be exacerbated by placement in a classroom with six students, that the student required 1:1 support from a professional specifically trained to provide behavior therapy to a student with an autism spectrum disorder, and that the IEP failed to include ABA therapy or another type of proven behavioral treatment and therefore did not align with the recommendations of the student's clinicians (id.).

In terms of the behavior plan recommended for the student, the parent asserted that it was inadequate to address the severity and frequency of the student's targeted behaviors and was not adequate and timely reviewed and therefore was not appropriate for the start of the 2019-20 school year (Parent Ex. A at p. 4). The parent alleged that given the student's challenge with staying in the classroom during the 2018-19 school year, the recommended program would do little to ensure that the student would remain in the classroom during instructional periods (id.).

The parent further alleged that the recommended school placement was "much too large" for the student in terms of both student population and building size and that the student would have trouble transitioning, resulting in the possibility of unsafe behaviors when walking through a large school building (Parent Ex. A at p. 4). The parent alleged that the program recommended for the student was inappropriate in that the students in the program were not functioning similarly to her son and, as such, the student would not be able to make social/emotional progress (id.).

The parent asserted that in order to make appropriate progress the student required "a very small, full-time special education school with intensive 1:1 support from trained behavioral providers" in a program that focused on addressing the needs of students with autism (Parent Ex. A at p. 5). The parent asserted that HH4K had been an appropriate placement for the student as it was able to provide consistent 1:1 educational and behavioral support using instructional techniques designed to address the needs of students with autism (id.). In addition, the program would also provide related services at a frequency that would enable the student to make meaningful progress (id.). The parent asserted that placement at HH4K provided the student with educational instruction specifically designed to meet his unique needs, supported by such services as necessary to permit him to benefit from instruction (id.). In addition, the parent asserted that equitable considerations supported her request for reimbursement for the 2019-20 school year as she repeatedly gave the district the opportunity to provide the student with a FAPE, openly expressed her concerns regarding the proposed program with the district during CSE meetings and in writing, and provided the district with the requisite legal notice indicating her intention to

unilaterally place the student at HH4K and reserving her right to seek tuition funding through an impartial hearing (id.).

As relief, the parent requested findings that the district failed to provide the student with a FAPE for the 2019-20 school year, that the parent's unilateral placement of the student at HH4K was appropriate, and that equitable considerations supported the parent's request (Parent Ex. A at p. 5). The parent requested an order directing the district to pay for the cost of the student's tuition, related services, and transportation to and from HH4K for the 2019-20 school year.

B. Impartial Hearing Officer Decision

The parties proceeded to an impartial hearing on March 27, 2020, which concluded on July 24, 2020 after six days of proceedings (Tr. pp. 1-612). In a final decision dated October 13, 2020, the IHO reviewed the evidence in the hearing record and found that the district did not meet its burden of showing that its recommended program was sufficient to address the student's needs and provide him with academic benefit, and therefore failed to offer the student a FAPE for the 2019-20 school year (IHO Decision at pp. 7-20).[4]

As an initial matter, the IHO found that although the June 2019 CSE received the private evaluations provided by the parent, it did not discuss them and, as a result, the parent was denied meaningful participation at the CSE meeting (IHO Decision at p. 18). The IHO found that while the student's IEP noted the private evaluators' recommendations for ABA and a 1:1 special education setting, and further noted the neuropsychologist's opinion that a District 75 placement was not appropriate for the student, the CSE did not consider the evaluators' recommendations (id. at pp. 18-19). The IHO found that the CSE did not consider any "more restrictive programs" for the student despite the opinions of the private evaluators that the student's needs could not be met in the recommended program (id.). The IHO specifically noted that outpatient session notes by the neuropsychologist stated that due to the student's significant safety concerns alternative or residential placement options should be considered (id.).

The IHO credited the February 2019 physical therapist's evaluation report, which described the student's difficulty keeping up with his peers and his need for constant intervention from his paraprofessional, as "accurate" (IHO Decision at p. 19). According to the IHO, the PT evaluation report indicated the student exhibited screaming, crying, kicking, aggressive behaviors toward his paraprofessional, and self-injurious behavior (id.). In addition, the report also indicated that the student could remain in his classroom chair for between six and twenty-seven seconds (id.). The IHO noted that the student's teacher confirmed the physical therapist's observations and reported that the student's behavior, as recorded by the physical therapist, represented progress (id.). The IHO then found the assistant principal's testimony about the student's progress, in regard to how long he could sit for, to be "discrepant" and did not credit her testimony in that regard (id.).

Next the IHO credited the January 2019 neuropsychological evaluation report, which reported that the student's teacher indicated a District 75 placement might not be an appropriate

[4] The IHO Decision is not paginated. For the purposes of this decision, and consistent with the IHO Decision, the cover page of the decision is designated as page 1 with the remaining pages assigned page numbers 2-28.

setting for the student and that many of the strategies employed by the classroom to address the student's dysregulation had not been effective (IHO Decision at p. 19). The IHO noted that although the teacher refuted this during her testimony, the IHO believed the information reported in the neuropsychological evaluation report was accurate (id.). The IHO cited a March 2019 progress report and the student's June 2019 IEP as evidence that the student's behavioral and academic issues continued throughout the school year (id. at pp. 19-20). The IHO noted the student's teacher testified that, based on data in the student's profile, there was an 80% decrease in the student's maladaptive behaviors; however, the IHO indicated that the student's profile was not produced as evidence during the hearing and that the teacher's testimony on this point contradicted other testimony she provided (id. at p. 20). As a result, the IHO found the teacher's testimony was not credible (id.). The IHO further indicated that the testimony describing the student's behavior upon entering HH4K showed that the description of the student in the June 2019 IEP was not accurate (id.). The IHO found that the evidence in the hearing record did not provide sufficient proof that the student made the progress testified to by district staff and that if any progress was made it was minimal and not sufficient to enable to the student to receive meaningful academic benefit (id.). The IHO further found that the student did not appear to make any progress using a structured learning approach, and that the approach was not a research-based methodology that appeared to be effective for the student or enable him to make progress academically, behaviorally, or socially (id.). The IHO stated that "a child with severe behavioral issues and dysregulation would appear to not benefit from this type of approach" (id.).

Based on the above, the IHO determined that the information used to make recommendations in the June 2019 IEP did not accurately reflect the student's special education needs (IHO Decision at p. 19). The IHO found that, given the student's lack of progress, placing him in the same program for the 2019-20 school year that he had attended the prior school year was not appropriate (id.). As a result, the IHO determined that the district failed to offer the student a FAPE for the 2019-20 school year (id.).

Turning to the parent's unilateral placement of the student at HH4K, the IHO found that the parent met her burden of showing that HH4K was an appropriate placement for the student (IHO Decision at p. 20). The IHO noted that HH4K was a 1:1, 12-month therapeutic program that provided intensive behavioral, therapeutic, and academic support to students with disabilities, including students with autism spectrum disorders (id.). She noted that the school delivered instruction using behavioral principles that were applied in the classroom and in the community and that the program included home visits, and trained parents to implement the behavioral principles (id.). The IHO reviewed additional elements of the HH4K program and noted that each student in the program worked directly with a trained behavior therapist or registered behavior technician in a group setting, under the guidance of a board-certified behavior analyst (id.). Program staff also included occupational therapists, speech and language pathologists, and a social worker, all of whom were trained in working with students with autism (id.).

The IHO noted the program's use of direct instruction and data driven curriculums and that students' learning objectives were based on common core standards and were differentiated to meet each student's individual needs (IHO Decision at p. 21). She found that there was evidence from the HH4K program director and the parent that the program was addressing the student's specific behavioral and academic needs and that the student was receiving individualized instruction within a group (id.). The IHO noted that the student received OT and speech-language therapy and the

therapists were often in the classroom using "the methodologies" in their individual sessions (id. at pp. 21-22). The IHO cited examples of the student's performance as reported by the program director, such as the student's ability to wait for preferred items for five seconds and maintain self-regulation for 83% of the day, along with a decrease in the student's aggressive behaviors from twelve to eight occurrences per day, as evidence of the student's progress at HHour4K (id. at p. 22). The IHO cited additional reports of the student's progress such as his ability to follow directions, point to preferred items, and progress in expressive communication and following directives (id.). The IHO also referenced reports from the parent that the student had done a "'360"' since starting at the school, was engaging with other students, and that his behaviors had improved (id.). The IHO cited a January 2020 HH4K progress report that showed that between September 2019 and December 2019 the student had made progress toward most of his goals (id.).[5] Based on the foregoing, the IHO found that HH4K was an appropriate placement for the student (id.).

With respect to equitable considerations, the IHO found that the parent participated in all of the student's CSE meetings and provided the district with reports and other necessary evaluations (IHO Decision at p. 23). The IHO noted that although, based on reports from her doctors and clinicians, the parent believed that ABA would be beneficial for the student, she continued the student's placement in the district program through summer 2019 (id.). The IHO stated that the district's pilot ABA program was not offered to the parent by the June 2019 CSE and in any event was not available and the student would have been placed on a waiting list (id.). The IHO found that based on the hearing record the parent would have considered any district recommended program had it been appropriate to meet the student's needs (id.). The IHO concluded that based on her actions, the parent cooperated with the district and an analysis of equitable considerations offered no basis to rule against her (id.). The IHO further found that the parent was eligible for an award of direct funding for the tuition for HH4K for the 2019-20 school year because the parent lacked the means to pay for the student's tuition up front (id. at pp. 23-24).

The IHO ordered the district to provide direct funding for the student's tuition at HH4K for the 2019-20 school year in an amount not to exceed $128,416, upon proof of the student's attendance and submission of appropriate proof of delivery of services via remote learning, due to any COVID-19 school closures (IHO Decision at p. 24).

IV. Appeal for State-Level Review

In its request for review, the district raises two main issues for appeal, asserting that the IHO erred in finding that the district failed to consider all available evaluative material and in finding that the district failed to prove that the recommended program was appropriate. On the first point, the district asserts that all available evaluations, including the private evaluations, were considered by the CSE and discussed in detail in the June 2019 IEP. The district further asserts that even if the CSE did not discuss the private evaluations at the June 2019 CSE meeting, the requirement that the CSE consider such evaluations does not necessitate substantive discussion or that every member of the CSE read the document. The district acknowledges that the private

[5] While the IHO referred to the progress report (Parent Ex. E) as being written in January 2019 and covering the period from September 2018 to January 2019, the report itself is dated January 2020 and indicates that it covered the period from September 2019 to December 2019 (id. at p. 1).

evaluations recommended 1:1 ABA instruction for the student, as well as deferral to the CBST and consideration of private or alternative placements but disagrees with the IHO's determination that the district failed to consider these alternative "more restrictive programs," because it failed to consider all available evaluative material.[6] The district alleges that ABA methodology was explicitly considered and discussed at the CSE meeting when the district representative discussed the district's pilot program that employed ABA. The district argues that although the CSE did not consider deferral to a residential placement, a private school ABA program, or other more restrictive programs, this did not constitute a denial of a FAPE. Rather, the district asserts that the IDEA requires that the CSE recommend a program in the least restrictive environment and the CSE determined that a recommendation for placement in a private school setting providing ABA was "more restrictive" and unnecessary since the student was making progress. In addition, the district asserts that it is not required to accord the private evaluations any particular weight or adopt the private evaluators recommendations over those of district personnel. The district concludes that it sufficiently considered all available evaluations, including the private ones, and as a result afforded the parent meaningful participation in the CSE meeting and the IHO erred in finding that the district denied the student a FAPE for the 2019-20 school year on this basis.

Next, the district argues that the IHO erred in finding that the district failed to prove its recommended program offered the student a FAPE and argues that the IHO's credibility determinations regarding the student's progress are not entitled to due deference. According to the district, the student made appropriate progress in light of his circumstances and therefore, the June 2019 CSE was justified in continuing the student in a similar program. The district asserts that the student's teacher testified at length regarding the student's progress. Moreover, the district argues that the IHO committed reversible error when she credited the January 2019 neuropsychological evaluation that contained a disputed statement by the student's teacher, over the testimony of the teacher. The district asserts that the teacher's testimony was not inconsistent with prior evaluations, rather the testimony reflected more up to date information. The district further argues that the IHO did not discuss the non-testimonial evidence found in the district's BIP in her decision. The district asserts that non-testimonial evidence in the hearing record justifies a conclusion contrary to that reached by the IHO and her credibility findings regarding the student's teacher are not entitled to deference.

In an answer, the parent responded to the factual allegations found in the district's request for review and argued for upholding the IHO decision. In addition, the parent noted that because the district did not appeal the IHO's findings regarding the appropriateness of the parent's unilateral placement of the student at HH4K or equitable considerations, the IHO's determinations regarding these issues are final and binding.

[6] Although not explicitly defined in the hearing record in this matter, CBST likely refers to the district's central based support team, an entity which facilitates placement in nonpublic schools (see Tr. pp. 181-85; see, e.g., Application of a Student with a Disability, Appeal No. 15-054; Application of a Student with a Disability, Appeal No. 15-051).

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]).[7]

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).

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

VI. Discussion

A. Consideration of Evaluative Material

On appeal, the district asserts that the IHO erred in finding that the June 2019 CSE failed to consider all available evaluative material in the development of the student's IEP for the 2019-20 school year, and therefore failed to consider alternative, more restrictive programs for the student which, the IHO found, denied the parent meaningful participation in the June 2019 CSE meeting. The appeal must be sustained.

The IDEA sets forth procedural safeguards that include providing parents an opportunity "to participate in meetings with respect to the identification, evaluation, and educational placement of the child" (20 U.S.C. § 1415[b][1]). Federal and State regulations governing parental participation require that school districts take steps to ensure that parents are present at their child's IEP meetings or are afforded the opportunity to participate (34 CFR 300.322; 8 NYCRR 200.5[d]). Although school districts must provide an opportunity for parents to participate in the development of their child's IEP, mere parental disagreement with a school district's proposed IEP and placement recommendation does not amount to a denial of meaningful participation (see F.L. v. Bd. of Educ. of Great Neck Union Free Sch. Dist., 735 Fed. App'x 38, 40 [2d Cir. Aug. 24, 2018] [noting that "'[a] professional disagreement is not an IDEA violation'"], quoting P.K. v. Bedford Cent. Sch. Dist., 569 F. Supp. 2d 371, 383 [S.D.N.Y. 2008]; T.F. v. New York City Dep't of Educ., 2015 WL 5610769, at *5 [S.D.N.Y. Sept. 23, 2015]; A.P. v. New York City Dep't of Educ., 2015 WL 4597545, at *8, *10 [S.D.N.Y. July 30, 2015]; E.F. v. New York City Dep't of Educ., 2013 WL 4495676, at *17 [E.D.N.Y. Aug. 19, 2013] [stating that "as long as the parents are listened to," the right to participate in the development of the IEP is not impeded, "even if the [district] ultimately decides not to follow the parents' suggestions"]; Sch. for Language & Commc'n Dev. v. New York State Dep't of Educ., 2006 WL 2792754, at *7 [E.D.N.Y. Sept. 26, 2006] ["Meaningful participation does not require deferral to parent choice"]). When determining whether a district complied with the IDEA's procedural requirements, the inquiry focuses on whether the parents "had an adequate opportunity to participate in the development" of their child's IEP (Cerra, 427 F.3d at 192). Moreover, "the IDEA only requires that the parents have an opportunity to participate in the drafting process" (D.D-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at *11 [E.D.N.Y. Sept. 2, 2011], aff'd, 506 Fed. App'x 80 [2d Cir. Dec. 26, 2012], quoting A.E. v. Westport Bd. of Educ., 463 F. Supp. 2d 208, 216 [D. Conn. 2006]; see T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 420 [2d Cir. 2009] [noting that the IDEA gives parents the right to participate in the development of their child's IEP, not a veto power over those aspects of the IEP with which they do not agree]).

One aspect of the parents' right to participate is the requirement that the CSE must consider private evaluations obtained at private expense, provided that such evaluations meet the district's criteria, in any decision made with respect to the provision of a FAPE to a student (34 CFR 300.502[c]; 8 NYCRR 200.5[g][1][vi]). In developing the recommendations for a student's IEP, the CSE must consider the results of the initial or most recent evaluation; the student's strengths; the concerns of the parents for enhancing the education of their child; the academic, developmental and functional needs of the student, including, as appropriate, the student's performance on any general State or district-wide assessments as well as any special factors as set forth in federal and State regulations (34 CFR 300.324[a]; 8 NYCRR 200.4[d][2]). It is well settled that a CSE must

consider privately-obtained evaluations, provided that such evaluations meet the district's criteria, in any decision made with respect to the provision of a FAPE to a student (34 CFR 300.502[c]; 8 NYCRR 200.5[g][1][vi]). However, "consideration" does not require substantive discussion, that every member of the CSE read the document, or that the CSE accord the private evaluation any particular weight (T.S. v. Bd. of Educ. of the Town of Ridgefield, 10 F.3d 87, 89-90 [2d Cir. 1993]; G.D. v. Westmoreland Sch. Dist., 930 F.2d 942, 947 [1st Cir. 1991]; but see A.M. v. New York City Dep't of Educ., 845 F.3d 523, 544-45 [2d Cir. 2017] [finding that recommendations included in private evaluation created a consensus as to what the student required where the district did not conduct any evaluations of its own to call into question the opinions and recommendations contained in the private evaluations]).

The hearing record shows that in developing the student's IEP for the 2019-20 school year, the June 2019 CSE considered an April 2017 letter from a developmental-behavioral pediatrician, a September 2018 modified barium swallow study, a December 2018 neuropsychological evaluation report, a December 2018 pediatric psychology outpatient session note, a February 2019 PT evaluation report, a March 2019 OT progress report, a March 2019 speech and language progress report, a March 2019 IEP, a May 2019 letter from a developmental-behavioral pediatrician, June 2019 classroom assessments and June 2019 behavioral progress monitoring data (Dist. Ex. 10 at p. 2; see also Dist. Ex. 1 at pp. 1-6). The June 2019 IEP indicated that "[a]ll of the parent provided report[s]" were "discussed at the IEP meeting" (Dist. Ex. 1 at p. 3) and portions of these reports, evaluations, letters and assessments were included in the IEP (Dist. Ex. 1 at pp. 1-6). For example, the June 2019 IEP included information from the December 2018 neuropsychological report and December 2018 pediatric psychology outpatient session note, including a recitation of the recommendations in those reports for ABA therapy at home and in school and a notation from those reports that the student had the potential to benefit from ABA (compare Dist. Ex. 1 at p. 2, with Parent Ex. F at pp. 4-5; Dist. Ex. 8 at p. 3). Further, the June 2019 IEP included information from the December 2018 pediatric psychology out-patient session note that recommended the student be deferred to the CBST for consideration of alternative or residential placement; and which indicated that a District 75 placement was not an appropriate setting for the student (Parent Ex. F at p. 5; Dist. Ex. 1 at p. 2). Likewise, information from the May 2019 letter from the developmental-behavioral pediatrician included in the June 2019 IEP highlighted the student's diagnoses, the parent's observations of the student, and the physician's recommendation for placement in a small, specialized class with a low student-to-teacher ratio where the student could receive individualized support (Dist. Exs. 1 at p. 1; 12 at pp. 1-2). The June 2019 IEP reflected the developmental pediatrician's assertion that the student should be in a class that utilized a behavior-based approach, such as ABA, and her opinion that the student required home-based ABA (Dist. Exs. 1 at p. 1; 12 at pp. 1-2).

Generally, the hearing record supports finding that the CSE made recommendations based on consideration and review of the district's assessments as well as the private evaluations available to it at the time (Tr. pp. 397-98, 410, 436; Dist. Exs. 1 at pp. 1-6, 17). In addition, the hearing record indicates that the June 2019 CSE discussed the private evaluators' and the parent's request for an ABA based program. For example, the assistant principal, who served as the district representative at the June 2019 CSE meeting, testified that based on the curriculum, structured teaching, and behavior-support paraprofessional provided to the student the district was seeing progress and recommending an ABA program would have amounted to a more restrictive

environment for the student (Tr. pp. 105-06). According to the assistant principal, the CSE did not discuss bringing ABA into the student's classroom because "we don't do ABA. We can't do that. . . It's not something our program provides" (Tr. p. 183). In addition, the assistant principal testified that at the June 2019 CSE meeting, given the student's progress, staff did not feel that a private school setting providing ABA was justified (id.). The assistant principal explained, "If a student is making progress, the team is not going to recommend a more restrictive environment" (Tr. p. 106). According to the assistant principal, the parent asked for ABA at the CSE meeting, she "seemed like she had a school in mind that she wanted," and she mentioned "wanting ABA and wanting Happy Hour 4 Kids" (id.). The assistant principal testified that she advised the parent that because the student was making progress, the CSE could not make a recommendation for placement in a more restrictive environment (id.). The assistant principal testified that "[b]ecause [the parent] was so strong on the ABA" she suggested that she consider a district "pilot school" that was trialing ABA (Tr. pp. 106, 180; Dist. Ex. 1 at p. 5).[8] The assistant principal reported that she contacted the placement officer prior to the CSE meeting and suggested to the parent that she "put [the student] on the waiting list because there wasn't a seat," if that was what the parent really wanted (Tr. p. 107). According to the assistant principal, the parent declined the offer (Tr. p. 107; Dist. Ex. 1at p. 5). The assistant principal testified that although the student would have been fine remaining in his then-current school, the CSE suggested the pilot ABA program to the parent because of her "continual concerns about the ABA" (Tr. p. 195).[9] The assistant principal explained that committee members thought the pilot program would be a different alternative and that the parent might like it better because it offered more of an "intensive ABA approach" (id.).

The assistant principal further testified that the parent neither requested a deferral to the CBST at the June 2019 CSE meeting, nor did she ask for a placement in a State approved non-public school (Tr. p. 181). According to the assistant principal, the parent "expressed that she wanted [the student] in Happy Hour 4 Kids and that she wanted, maybe a program" but she did not ask for a deferral to CBST and the team determined that it was more restrictive and the student was making progress and therefore it was not appropriate (Tr. pp. 181-82). The assistant principal further recalled that the parent indicated that she disagreed and wanted an ABA program but never said HH4K or that she wanted to defer to the CBST (Tr. p 182-83). The assistant principal explained that the CSE could not refer a student to the CBST when it felt the student's program was appropriate, rather that it had to refer a student to the CBST when it felt the student's program was not appropriate (Tr. p. 182). She reported that based on the interventions the CSE had already put in place, the CSE recommended program was appropriate for the student because the student was making progress and this progress was shared with the parent at the CSE meeting (Tr. p. 183). The assistant principal reported that "there was no discussion to be had" about why the student would not be appropriate for a more restrictive setting, such as a State-approved non-public school

[8] The assistant principal testified that the ABA pilot program was a 6:1+1 special class with more approaches "infus[ed]" into it (Tr. pp. 180). She indicated that it was not a "full BCBA-run ABA program, like what [the parent] wanted at Happy Hour" but that some ABA methodology was used in the classroom (Tr. p. 180, 195-96).

[9] Although the parent initially refused the offer to visit the pilot ABA program, she later emailed the assistant principal on July 16, 2019, and indicated that she was interested in observing the student's then-current classroom, as well as the pilot ABA program (Tr. p. 107; Dist. Ex. 11 at p. 2). The assistant principal testified that staff provided the parent with a date and time to visit the student's then-current classroom and the pilot ABA program and that although the parent initially agreed to visit, she later cancelled both visits (Tr. p. 107-08; Dist. Ex. 11).

because the student made progress (Tr. pp. 183-84). The assistant principal explained that the CSE never put private schools down as "other options considered" by the CSE because that was something the CBST had to do (Tr. pp. 184-85).

The student's special education teacher who attended the June 2019 CSE meeting agreed that district staff had the December 2018 neuropsychological evaluation when they prepared for the meeting, but could not recall whether the CSE discussed the content of the evaluation at the meeting (Tr. pp. 286, 292-93, 298-300). In addition, the teacher did not recall if the June 2019 CSE discussed whether a deferral to the CBST would be appropriate, in accordance with the neuropsychological evaluation, or if the CSE made recommendations other than the 6:1+1 special class in a specialized school placement (Tr. pp. 298-300; see Parent Ex. F at p. 5). However, she did recall that the CSE offered the parent the opportunity to visit a district school that used the ABA approach and that the student would be on a waiting list for the placement (Tr. pp. 299-300). She testified that the CSE offered the pilot ABA program to the parent because the parent was asking for the student to go to an ABA school (Tr. p. 300). She further testified that the parent believed that it would be appropriate for the student to receive ABA because "she was always saying that [the student] was not making progress" (Tr. p. 301).

The district school psychologist who attended the June 2019 CSE meeting testified that the parent provided a letter from the student's doctor, and that the letter and its recommendations were reviewed and discussed at the meeting (Tr. pp. 386-87, 397, 405-06; see Dist. Ex. 12). The psychologist noted that the parent was concerned about the student's feeding therapy and felt that he had regressed (Tr. pp. 387-88). In addition, the parent brought up ABA therapy and the assistant principal responded by suggesting a different district specialized school "that provide[d] a similar method to [] ABA," but the parent was not interested (Tr. pp. 387-88, 405-08, 411-13; Dist. Ex. 1 at p. 5). With respect to evaluations reviewed at the June 2019 meeting, the psychologist testified that the CSE members "reviewed all the reports provided to" them "by the parent" and that the CSE discussed what they were seeing inside the school (Tr. p. 391, see Tr. pp. 435-36).

Based on the foregoing, I find that the June 2019 CSE considered the private evaluations, letters, and reports available to them at the time of the CSE meeting and accordingly, the parent was not denied participation in the June 2019 CSE meeting on that basis. Further, the hearing record supports finding that the June 2019 CSE discussed the parent's request for an ABA program for the student . The CSE was not required to adopt the recommendations of the private evaluators (J.C.S., 2013 WL 3975942, at *11 [holding that "the law does not require an IEP to adopt the particular recommendation of an expert; it only requires that that recommendation be considered in developing the IEP"]; Watson v. Kingston City Sch. Dist., 325 F. Supp. 2d 141, 145 [N.D.N.Y. 2004] [holding that a CSE's recommendation is not necessarily rendered inappropriate by "[t]he mere fact that a separately hired expert has recommended different programming"], aff'd, 142 Fed. App'x 9 [2d Cir. July 25, 2005]).

Finally, turning to the IHO's finding that the June 2019 CSE did not consider more restrictive placement options for the student, once the June 2019 CSE determined what it believed to be an appropriate class placement for the student, it was not obligated to consider a more restrictive setting, such as a nonpublic school (see B.K., 12 F.Supp.3d at 359 [indicating that "once the CSE determined that a 6:1:1 placement was appropriate for [the student], it was under no obligation to consider more restrictive programs"]; E.F., 2013 WL 4495676, at *15 [explaining

that "under the law, once [the district] determined . . . the [LRE] in which [the student] could be educated, it was not obligated to consider a more restrictive environment"]; A.D. v. New York City Dep't of Educ., 2013 WL 1155570, at *7-*8 [S.D.N.Y. Mar. 19, 2013] [finding that "[o]nce the CSE determined that [the public school setting] would be appropriate for the [s]tudent, it had identified the [LRE] that could meet the [s]tudent's needs and did not need to inquire into more restrictive options"]). Accordingly, the IHO's determinations regarding the parent's lack of participation in the June 2019 CSE meeting must be overturned. However, to the extent that the IHO found that the district erred by not following the recommendations made by the private evaluators, that claim is better viewed as a substantive claim regarding the content of the June 2019 IEP and the appropriateness of the program recommendation to meet the student's needs. That question is addressed below.

B. June 2019 IEP

The district contends that the IHO erred in finding that the June 2019 CSE did not recommend an appropriate program for the student for the 2019-20 school year because the CSE recommended the same program that the student had attended the previous school year (2018-19), in which the IHO found the student did not make progress. Further, the district asserts that the IHO's determination as to the credibility of district witnesses regarding the student's progress was improper because it did not take nontestimonial evidence into account.

For the 2018-19 school year the student attended a 6:1+1 special class and was provided with the support of a 1:1 paraprofessional (Tr. p. 235; IHO Ex. III at pp. 14-15). According to the student's teacher, all of the students in the class were on the autism spectrum and four of the students were supported by 1:1 paraprofessionals (Tr. pp. 235-36, 306). The class employed "structured teaching" which included small group and 1:1 instruction, as well as independent work (Tr. pp. 306-07). In addition, as noted above, the student was first provided with an FBA and a BIP in January 2019 (see Dist. Exs. 2; 9).

For the 2019-20 school year, the June 2019 CSE continued a similar recommendation as what was recommended for the student for the 2018-19 school year, recommending a 12-month 6:1+1 special class placement in a specialized school with related services including four 30-minute individual sessions per week of speech-language therapy, three 30-minute individual sessions per week of OT, along with parent counseling and training and the support of a full-time, 1:1 paraprofessional (compare IHO Ex. III at pp. 14-15, with Dist. Ex. 1 at p. 13).

As noted above, the parent expressed concerns about the student's lack of progress in the district's programs during the 2018-19 school year and at the June 2019 CSE meeting and requested an ABA based program for the student (Dist. Ex. 1 at p. 5; IHO Exs. I at p. 3; II at p. 3). In support of her request for an ABA based program, the parent provided the district with, among other things, a December 2018 neuropsychological evaluation report and a May 2019 letter from a developmental-behavioral pediatrician (Dist. Exs. 1 at pp. 1-2; 10 at p. 2; see Parent Ex. F; Dist. Ex. 12). As noted above, both reports recommended that the student's educational program include the use of ABA (Parent Ex. F at p. 5; Dist. Exs. 1 at p. 1-2; 12). The district contends that the June 2019 CSE's decision to continue the student's program from the prior school year was appropriate because the student had been making progress in that program.

One of the essential functions of a CSE when conducting an annual review is to review the IEP currently in place to determine if the student is making progress as expected, and if not to attempt to ascertain why if possible. A student's progress under a prior IEP is a relevant area of inquiry for purposes of determining whether an IEP has been appropriately developed, particularly if the parents express concern with respect to the student's rate of progress (see H.C. v. Katonah-Lewisboro Union Free Sch. Dist., 528 Fed. App'x 64, 66-67 [2d Cir. 2013]; Adrianne D. v. Lakeland Cent. Sch. Dist., 686 F.Supp.2d 361, 368 [S.D.N.Y. 2010]; M.C. v. Rye Neck Union Free Sch. Dist., 2008 WL 4449338, *14-*16 [S.D.N.Y. Sept. 29, 2008]; see also "Guide to Quality Individualized Education Program (IEP) Development and Implementation," at p. 18, Office of Special Educ. Mem. [Dec. 2010], available at http://www.p12.nysed.gov/specialed/publications/iepguidance/ IEPguideDec2010.pdf). The fact that a student has not made progress under a particular IEP does not automatically render that IEP inappropriate, nor does the fact that an IEP offered in a subsequent school year which is the same or similar to a prior IEP render it inappropriate, provided it is based upon consideration of the student's current needs at the time the IEP is formulated (see Thompson R2–J Sch. Dist. v. Luke P., 540 F.3d 1143, 1153-54 [10th Cir.2008]; Carlisle Area Sch. Dist. v. Scott P., 62 F.3d 520, 530 [3d Cir. 1995]; S.H. v. Eastchester Union Free Sch. Dist., 2011 WL 6108523, at *10 [S.D.N.Y. Dec. 8, 2011]; D. D-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at *12 [E.D.N.Y. Sept. 2, 2011], aff'd, 506 Fed. App'x 80 [2d Cir. 2012]; J.G. v. Kiryas Joel Union Free Sch. Dist., 777 F. Supp. 2d 606, 650 [S.D.N.Y. 2011]). Conversely, "if a student had failed to make any progress under an IEP in one year," at least one court has been "hard pressed" to understand how the subsequent year's IEP could be appropriate if it was simply a copy of the IEP which failed to produce any gains in a prior year (Carlisle Area Sch. Dist., 62 F.3d at 534 [noting, however, that the two IEPs at issue in the case were not identical]).

With respect to the student's progress during the 2018-19 school year, the student's teacher and his related services providers reported that the student had made improvement in transitioning, maintaining his attention on tasks for a longer duration (preferred task for 15 minutes and nonpreferred task for 10 minutes); and increasing his ability to engage in school activities (Dist. Ex. 1 at pp. 4- 5).[10] The student's occupational therapist reported that the student displayed improved attention when combined with sensory regulation skills that she initiated (Dist. Exs. 1 at p. 6; 4 at p. 2). In addition, she noted that the student had improved his bilateral integration skills, and ability to manipulate scissors (Dist. Exs. 1 at p. 6; 4 at p. 2). The student's speech-language therapist indicated that the student was able to transition to speech therapy sessions, was beginning to follow the routines of his classroom, was able to sit in his seat and attend to activities for short periods of time, and was able to follow simple one-step commands in both his classroom and therapy sessions (Dist. Ex. 6 at pp. 1-2). However, the speech-language therapist also noted

[10] The February 2019 PT evaluation report indicated that the student remained seated in his classroom chair for 6 to 27 seconds with close supervision before demonstrating many of his targeted behaviors and the student demonstrated periods of being calm for approximately six to ten minutes when sitting in a quiet corner of the classroom in a beanbag chair (Dist. Ex. 7 at p. 3). With respect to the PT evaluation, the student's teacher opined that the behaviors included in the "classroom activities" section of the report indicated progress in that at the beginning of the school year "it was like that and worse"; she noted that although the student still demonstrated many of the behaviors, he was now able to stay seated where he had been "unable to sit down at all" (Tr. pp. 329-32).

that the student "w[ould] often engage in self-injurious and aggressive behaviors" during nonpreferred activities (id. at p. 3).

The student's June 2019 IEP noted that according to BIP data between January and March 2019 the student demonstrated a decrease in the frequency, duration, and intensity of target behaviors and between March and June 2019 the intensity of the student's target behaviors had decreased; the IEP noted improvements in the student's in-school behavior (Dist. Exs. 1 at pp. 5, 6; 9 at pp. 4-5). More specifically, the student's January 15, 2019 BIP indicated that baseline data of the student's target behaviors was collected for the FBA for 10 days from December 17, 2018 to January 8, 2019 (Dist. Ex. 9 at p. 1).[11] According to the BIP, during that time the student engaged in target aggressive behaviors 59 times, averaging 5.9 times per day (range of 1 to 11 times per day), lasting for an average of 6.1 minutes (range of 1 to 36 minutes), and at an intensity level of an average of 3.3 (range of 1 to 5) (id.). Based on the functional hypothesis from the FBA, the district developed intervention strategies in the BIP, including setting event, antecedent, behavior teaching and consequence strategies (id. at pp. 2-3). With respect to progress monitoring, the BIP included the results of data gathered for the 10-week interval of March 28, 2019 to June 4, 2019 (id. at pp. 4-5). The data for that time period shows that the frequency of the student's targeted aggressive behaviors was reduced from a baseline average of 5.9 times per day to 1.7 times per day; the intensity was reduced from an average of 3.3 to an average of 2.76; and the duration increased from an average of 6.1 minutes to an average of 6.4 minutes (id. at pp. 4-5). The BIP further indicated that on June 5, 2019 it was determined that the BIP should be continued because the student's observed behaviors still warranted this level of intervention as they still presented as disruptive to the student and his surrounding students (id. at p. 5). Due to the downward trend in the target behavior and the continued use of the replacement behavior, it was determined that the BIP would remain unmodified (id. at p. 5).

The assistant principal testified that the student had made progress and that "a lot of his progress was related to the behaviors" (Tr. p. 167). She explained that in reviewing the student's IEP at the beginning of the 2018-19 school year, staff realized "that there was a glitch from his Turning-5 CSE meeting, where they gave him a behavior support para but they never completed an FBA or BIP" (Tr. pp. 65-66, 71; 74-75). The assistant principal reported that she reached out to the student's mother and told her that the district would have to "open" the student's IEP "to rectify the situation, to develop an FBA and BIP, which [the parent] agreed to" (Tr. pp. 71-72). She explained that conducting the FBA and BIP took a little time but even prior to that staff noticed that the student was really struggling with behaviors (Tr. p. 76). Therefore, the student's behavior support paraprofessional, the school's instructional coach, the classroom teacher, the counselor, the parent and the student's occupational therapist collaborated to develop a sensory diet for the student (Tr. pp. 76-77; see Dist. Ex. 5). The assistant principal testified that when the student first entered the school, he had difficulty staying in is seat, socializing, and traveling up and down stairs (Tr. p. 67). She noted that the student displayed many maladaptive behaviors such as falling to the floor and banging his head "pretty severely" (Tr. p. 67). The assistant principal stated that to address the student's needs the district "first and foremost" tried to reduce the student's behaviors

[11] The student's aggression was defined as any occurrence of hitting with an open or closed fist; kicking or biting a peer, staff, or himself; and/or propelling his head forward or backward toward a peer, staff, or object (Dist. Ex. 9 at pp. 1-2).

in order for him to be able to attend to academic tasks, participate socially, and be "active in the classroom setting"; the main focus initially when the student came in was to reduce the student's self-injurious behaviors in order to increase learning and engagement (Tr. pp. 66-67, 97-98).

According to the assistant principal, in the beginning of the school year it was very difficult for the student to attend (Tr. p. 91). He was constantly frustrated and displayed self-injurious behaviors (Tr. p. 91). However, as the school year went on and staff modified the sensory diet and behavior plan the student was able to transition easier and engage in tasks easier and for longer periods of time (Tr. p. 91). She noted that there were times when the student would get up and wander and needed to be redirected, but he wasn't getting up, throwing himself on the floor and headbanging (Tr. p. 91). In addition, the intensity of the student's biting was reduced (Tr. p. 91). With regard to the IEP statement that the student had difficulty remaining in is seat for one minute, the assistant principal testified that she assumed it was true and explained that although sitting in a chair for a minute may not seem like much progress, for a student who was on the floor headbanging it was "quite an improvement" (Tr. pp. 166-67). The assistant principal testified that although the student's behaviors "still exist[ed]," the intensity, duration, and frequency had decreased and the fact that the student's behaviors had improved showed that the BIP was successful (Tr. pp. 168-69). Further, the assistant principal reported that according to the student's assessments, he had made progress with some of his academic skills and social and communicative skills (Tr. p. 103).

The student's teacher testified that the student's behavior plan was effective (Tr. p. 255). She reported that at the beginning of the school year there were a lot of behaviors that would not allow the student to do better academically but at the end of the school year he was able to hold a pencil and make scribbles (Tr. pp. 255-56, 274). In addition, the student was able to sit down for a longer period of time with his peers and do an activity (Tr. pp. 255-56). The teacher also indicated that the plan for the student was effective as indicated by "assessments," "the paper trail," and "the portfolio" and that at the beginning of the year, the student's behaviors interfered with his academic performance, and there was "a lot of improvement by the end" of the school year (Tr. pp. 255-56, 275-76). Further, the student's teacher noted that the student's attention had improved and he was able to make eye contact for longer, sit for more than five minutes, and pay attention to her or to his peers by the end of the year (Tr. pp. 262-63). According to the teacher, at the beginning of the 2018-19 school year, the student engaged in "all the behaviors" (crying, running, head banging) for hours during the school day and although at the end of the school year, the student still engaged in the behaviors four to five times a day, they had decreased by "eighty percent" (Tr. pp. 314-320).[12] She attributed the reduction to the fact that the student was more engaged in academics and was more aware of his behavior (Tr. p. 317). The teacher testified that she recorded data on the student's behavior in his portfolio and that it was part of the student's behavior plan (Tr. pp. 318-19).

The district school psychologist testified that, at the June 2019 CSE meeting, the parent expressed concern regarding the student's progress and indicated that she felt the student had

[12] As noted above, the behavioral data included as a part of the student's BIP indicated that the frequency of the student's targeted behaviors was significantly reduced (see Dist. Ex. 9 at pp. 4-5), which supports the teacher's testimony.

regressed (Tr. pp. 387-88). In order to address the parent's concerns, she noted that "all of his providers spoke about" how he demonstrated "progress throughout the school year" (Tr. p. 389). The student's occupational therapist and speech-language therapist provided feedback to the parent on how his behavior, attention, and ability to engage in therapies and activities had improved (Tr. p. 389). In addition, a second district psychologist, who was part of the 2019 FBA process, talked about the student's behavior progress and the student's classroom teacher spoke about his academic progress (Tr. pp. 389-90). Additionally, the psychologist noted that, in an effort to convey the student's progress, the CSE used the FBA, a teacher conducted classroom assessment, a speech therapy report, an OT report, and a sensory diet (Tr. pp. 389-90; see also Tr. p. 283).

The neuropsychologist who conducted the December 2018 neuropsychological evaluation reported that based on a January 8, 2019 consultation with the student's teacher, the student was academically behind (Parent. Ex. F at p. 5). He noted that according to the teacher, the student could identify some colors and shapes but that his learning was hindered by behavioral and emotional dysregulation including biting and headbanging when frustrated (id.). In addition, many strategies that had been implemented such as the sensory diet, use of a bean bag chair, and telling the student to calm down had not been effective (id.). The neuropsychologist reported that the student's teacher expressed concern that the student's small class of six students and four adults might not be the appropriate setting for the student (id.). The neuropsychologist noted that, at the time of the consultation, district staff had collected data for analysis and implementation of a behavior plan (id.). According to the neuropsychologist, the student's teacher indicated the student was the lowest student in her class in terms of functioning (id.). He reported that completion of the BASC-3 by the student's teacher indicated that the student exhibited significant hyperactivity and inattention, lacked emotional and anger control, struggled with demonstrating age-appropriate pro-social skills and functional communication, and had a hard time adapting to change (id.).

The student's teacher confirmed that a doctor called her at work, but she did not know who he was (Tr. p. 286). She reported that the assessment and strategies took time and when the conversation took place in December, the student was making progress (Tr. p. 289). The teacher reported that by the end of the school year the student was the same as the rest of the students, meaning that he was academically similar to the other kindergarteners in his class (Tr. pp. 289-90). The teacher testified that at the time she spoke to the neuropsychologist the student was among the lowest functioning students in the class but not the lowest one (Tr. pp. 290-91). She denied that she told the neuropsychologist that the district program was not appropriate for the student and stated that she had never thought about that and was surprised to see it in the neuropsychologist's report (Tr. pp. 291-92).[13] The teacher explained that, when the neuropsychologist called her, she was in her classroom and it was a very short conversation as she was not supposed to take outside calls (Tr. p. 293). She reported that she did not speak with the neuropsychologist again (Tr. pp. 293-94).

[13] Contrary to the report that the student's teacher did not believe the district's placement was appropriate for the student, the teacher opined that the 6:1+1 special class was the best setting for the student, not the 1:1 intervention by a certified ABA therapist recommended by the neuropsychologist (Tr. pp. 313-14). This testimony was particularly relevant as the student's teacher also testified that she had ABA training and worked as an ABA therapist outside of her district teaching job (Tr. p 312-13).

The IHO raised valid concerns regarding the information provided by the district in support of its position; in particular, although the student's teacher referred to the student's portfolio, neither the portfolio nor documentation from SESIS was entered into the hearing record (see IHO Decision at p. 20; Tr. pp. 242, 256, 283, 318-19). On this point, the IHO is correct in that objective evidence of progress is preferable to the subjective statements made by the student's teachers (see R.H. v. Bd. of Educ. Saugerties C. Sch. Dist., 2018 WL 2304740, at *7 [N.D.N.Y. May 21, 2018], aff'd, 776 Fed. Appx. 719 [2d Cir. 2019] [finding insufficient evidence of a student's progress at a unilateral placement where the hearing record did not include objective evidence, such as report cards, progress notes, work samples, standardized assessments, or progress towards written goals]). However, the IHO did not sufficiently account for the student's behavioral progress as identified in the student's BIP and the IHO's determination that the student's teacher gave conflicting testimony regarding the decrease in the student's behaviors is not supported by the hearing record. Rather, as discussed above, the hearing record, including the student's teacher's testimony, as well as the student's BIP, reflects that the student exhibited significant behavioral concerns throughout the 2018-19 school year, but that the student's ability to attend to tasks increased and his behaviors decreased throughout the 2018-19 school year—particularly after implementation of the BIP.

Additionally, even assuming the accuracy of the summary of the conversation between the student's teacher and the neuropsychologist as provided in the December 2018 neuropsychological report, the summary indicates that as of the time of the conversation—January 2019—strategies, such as the sensory diet and the use of a bean bag had been ineffective and the teacher expressed concern that the class may not have been appropriate for the student (Parent Ex. F at p. 4). However, that conversation reportedly took place on January 8, 2019, just after the district had completed taking the baseline information for the student's BIP, and prior to the creation of the January 2019 FBA or the implementation of the student's BIP (Parent Ex. F at p. 4; Dist. Ex. 2; 9). Considering the progress that the student made behaviorally, as reported by the district staff and documented in the BIP, the CSE's decision to continue the student's program was reasonable at the time it was made.[14]

VII. Conclusion

Under the circumstances presented in this matter, the June 2019 CSE was reasonable in recommending a similar program as was recommended for the student for the 2018-19 school year, under which the student made progress in light of his circumstances and under which the June 2019 CSE reasonably expected the student would continue to make progress. Accordingly, the district offered the student a FAPE for the 2019-20 school year (see S.H. v. Eastchester Union Free Sch. Dist., 2011 WL 6108523, at *10-11 [S.D.N.Y. Dec. 8, 2011] [decision to recommend

[14] In addition, to the extent that the IHO relied on information as to how the student functioned at HH4K at the start of the 2019-20 school year, such reliance is flawed in that that specific information was not available to the June 2019 CSE and even knowing of that information now it does not necessarily reflect how the student was functioning at the time of the June 2019 CSE as educational policy favors examining a student's interfering behavior in the context of the student's environment (see Application of a Student with a Disability, Appeal No. 20-025).

continuation of the same program student had made progress in for prior school year was appropriate and a more restrictive placement was not necessary]).

I have considered the party's remaining contentions and find it is unnecessary to address them in light of my determinations above.

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO decision, dated October 17, 2020, is modified to reverse that portion which found that the district did not offer the student a FAPE for the 2019-20 school year and awarded the parent direct funding for the placement of the student at HH4K for the 2019-20 school year.

Dated: **Albany, New York**
February 3, 2021

STEVEN KROLAK
STATE REVIEW OFFICER