



The University of the State of New York

The State Education Department

State Review Officer

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No. 20-187

**Application of the BOARD OF EDUCATION OF THE
FREEPORT UNION FREE SCHOOL DISTRICT for review of
a determination of a hearing officer relating to the provision of
educational services to a student with a disability**

Appearances:

Ingerman Smith, LLP, attorneys for petitioner, Christopher Venator, Esq., of counsel

Thivierge & Rothberg, PC, attorneys for respondents, Christina D. Thivierge, Esq., of counsel

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 granted the request of respondents (the parents) to be reimbursed for their son's tuition costs at the Vincent Smith School (Vincent Smith) for the 2019-20 school year. The appeal must be sustained to the extent indicated.

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's early history is significant for developmental delays; at age two he began receiving services through the Early Intervention Program (EIP) and at age three he entered an "interventional" preschool program (Parent Ex. B at p. 1; Dist. Ex. 5 at p. 2). The student received a diagnosis of autism spectrum disorder (ASD) at age five (Parent Ex. B at p. 1). Upon entering kindergarten, the student was placed in a district 15:1 special class (Parent Ex. B at p. 1). In second grade a 2:1 aide was added to the student's educational program (Parent Ex. B at p. 1; Dist. Ex. 5 at p. 2). Testing conducted in the third grade yielded below average scores for reading and

math and indicated that the student's cognitive ability was in the borderline range (Dist. Ex. 5 at p. 2).¹

For fourth grade the student was found eligible for special education and related services as a student with autism and he attended a district 15:1+2 special class where he received related services of speech-language therapy, occupational therapy (OT), physical therapy (PT), counseling, and parent training in the home (Parent Ex. B at p. 1). The student was also found eligible for 12-month services that included OT, PT and ABA services (Parent Ex. B at p. 1).

For fifth grade (2017-18 school year) the student continued to attend a district 15:1+2 special class and receive PT, OT, speech-language therapy and parent training services (Dist. Ex. 5 at p. 1). In addition, the student was provided with the support of a 1:1 teaching assistant (Parent Ex. D at p. 1; Dist. Ex. 5 at p. 1). In November 2017 the student began receiving behavior intervention services and in January 2018 a behavior intervention plan (BIP) was created to increase the student's on task behavior and compliance, to encourage better emotional regulation and positive peer interaction, and reduce self-stimulatory behaviors (Parent Ex. D at pp. 1, 2; Dist. Ex. 5 at p. 1).

In June 2018 a CSE convened to conduct an annual review and develop the student's IEP for the 2018-19 school year (sixth grade) (Dist. Ex. 1 at pp. 1-17; see Parent Ex. C). Finding that the student remained eligible for special education and related services as a student with autism the CSE recommended a 15:1+2 special class placement and related services of two 30-minute sessions per week of PT in a group of three, one 30-minute session per week of counseling in a group of three, two 30-minute sessions per week of speech-language therapy in a group of five, two 30-minute sessions per week of occupational therapy (OT) in a group of three, and individual parent training in the home (Dist. Ex. 1 at pp. 1, 13-14).² In addition, the CSE recommended that the student receive the support of a teaching assistant (Dist. Exs. 1 at pp. 10, 14; 2 at p. 1).³ The June 2018 IEP indicated that the student was eligible to receive the same related services during July and August (12-month services) (Dist. Ex. 1 at pp. 1, 15).

In October 2018 the district conducted an assistive technology evaluation for the stated purpose of determining whether assistive technology would enable the student to better access to

¹ The student had a history of seizures for which the parents consulted with a pediatric neurologist, however as of March 2017 the student had not had a seizure for close to a year (Parent Ex. B at p. 1).

² The IEP and IEP cover sheet indicated that the parent training recommendation was for five five-hour sessions per week, which seems to be an error (Dist. Ex. 1 at pp. 1, 14).

³ The student's IEP indicated that he would receive the support of a 1:1 teaching assistant five days a week for six hours per day but also indicated that the student would be provided a 2:1 teaching assistant during academic tasks only and that he did not require the teaching assistant to accompany him to lunch, recess, specials or therapy (Dist. Ex. 1 at p. 14). Several reports produced by the district during the 2018-19 school year indicated that the student had a full time 1:1 teaching assistant (Dist. Ex. 2 at p. 1; 8 at p. 1; 13 at p. 1); however one report indicated that the student had a 2:1 teaching assistant (Dist. Ex. 13 at p. 1). The school psychologist testified that student was recommended for a 1:1 teaching assistant (Tr. p. 47).

his curriculum (Dist. Ex. 4 at pp. 1, 7). Also, in October 2018 the district revised the student's FBA and BIP to reflect current behavioral strategies being utilized (Dist. Ex. 2 at pp. 1-12).

A CSE convened in December 2018 for a program review to discuss the results of the assistive technology evaluation (Dist. Exs. 3 at pp. 1-17; 7 at p. 1; see Dist. Ex. 4 at pp. 1-12). The student's IEP was modified to include the addition of an annual goal involving computer use, and supports and accommodations were modified to include a calculator, Read & Write for Google Chrome, use of a Chromebook, and use of a talking calculator for math (compare Dist. Ex. 1 at pp. 11-15, with Dist. Ex. 3 at pp. 11-15). The parent shared the results of a psychiatric evaluation with the CSE and at her request the student's IEP was modified to reflect diagnoses of ADHD and persistent mood disorder (Dist. Ex. 7 at p. 1). A February 2019 prior written notice indicated that parent training was discontinued as per parent written request (Dist. Ex. 7 at p. 1).

During the 2018-19 school year the student underwent numerous evaluations. In spring 2019 the district conducted a social history update, a psychological evaluation, a speech-language reevaluation, and an educational achievement reevaluation review (Dist. Exs. 6; 8; 9; 10; 13). In April 2019, the student's behavior consultant completed a summary of progress (Dist. Ex. 12).⁴ In May 2019 the parents obtained a neuropsychological evaluation of the student for the purpose of updated diagnostic and treatment planning (Parent Ex. E).

A CSE convened in May 31, 2019 to conduct the student's annual review and to develop his IEP for the 2019-20 school year (seventh grade) (Dist. Ex. 16). Finding that the student continued to be eligible for special education and related services as a student with autism, the CSE recommended placement in a 15:1 special class with related services of one 30-minute session per week of PT in a group of three, one 30-minute session per week of counseling in a group of three, two 30-minute sessions per week of speech-language therapy in a group of five, and two 30-minute sessions per week of OT in a group of three along with the support of a 1:1 teaching assistant (Dist. Ex. 16 at pp. 1, 15-16). At the CSE meeting the parents and their advocate expressed concern regarding the student's transition to the district's middle school and the advocate requested to visit the middle school and for the committee to consider other programs and placements (Dist. Ex. 17 at p. 2). The committee disagreed with the advocate and stated that the student had made meaningful progress (Dist. Ex. 17 at p. 2). The advocate indicated that the parents did not agree (Dist. Ex. 17 at p. 2).

Subsequently, the parents' advocate and the student's mother visited the recommended middle school program (Parent Ex. F at p. 1; Dist. Ex. 19 at p. 1). The CSE reconvened on June 24, 2019 in response to the parents' request due to their disagreement with the CSE's May 31, 2019 recommendation (Dist. Exs. 18 at pp. 1-19; 19 at p. 1). The parents requested behavior intervention services be provided in the home and the CSE added 20 hours a month of home behavior intervention services to the student's IEP (Dist. Exs. 18 at p. 17; 19 at p. 1). The advocate shared her observation of the middle school and stated that it was not an appropriate placement for the student (Dist. Ex. 19 at p. 1). After a discussion of the student's strengths, weaknesses and

⁴ The behavior consultant reported that the student had received diagnoses of autism spectrum disorder – without intellectual impairment, attention deficit hyperactivity disorder (ADHD), persistent mood disorder, and generalized anxiety disorder (Parent Ex. 12 at p. 1). She also reported that the student had dyslexia, dysgraphia, and dyscalculia (id.).

progress, the CSE continued to recommended that the student attend a 15:1 special class and receive speech-language therapy, OT, PT, counseling, behavior intervention services and the support of a 1:1 teaching assistant (Dist. Exs. 18 at pp. 1, 15-17; 19 at p. 1). The parents continued to disagree with the CSE's recommendation (Parent Ex. 19 at p. 1).

In a letter dated August 16, 2019 , the parents informed the district of their disagreement with the program and placement recommendation for the student for the 2019-20 school year, as well as their intention to send the student to Vincent Smith and seek reimbursement/direct funding for tuition costs (Parent Ex. F at pp. 1-3).

The hearing record shows that the parents executed an enrollment contract with Vincent Smith for 2019-20 school year on August 17, 2019 and that the student attended Vincent Smith for the 2019-20 school year (seventh grade) (Parent Ex. H at pp. 1-3; see Parent Exs. G; I; J; K at pp. 1-2; L at pp. 1-2; M at pp. 1-5; N at pp. 1-2; O at pp. 1-8).

A. Due Process Complaint Notice

On March 16, 2020 the parents filed a due process complaint notice, asserting that the district failed procedurally and substantively to offer their son a free appropriate public education (FAPE) for the 2019-20 school year (Parent Ex. A at pp. 1-2). Initially, the parents alleged that the district was aware that the student was being verbally bullied through slurs and name-calling by other students and teachers and was physically assaulted by another student (id. at p. 3). The parents contend that the district failed to act on the widespread bullying (by students and staff) that the student was experiencing, recommend appropriate interventions, take prompt action to end the bullying, or assure the student's safety (id. at pp. 3, 6, 7). Additionally, the parents argued that the district failed to implement and uphold their own Code of Conduct (id. at p. 3).

Next the parents alleged that the district failed to develop an appropriate IEP and recommend an appropriate placement for the student for the 2019-20 school year (Parent Ex. A at p. 4). The parents argued that the student had regressed in the 15:1+2 special class that he attended in the district and that the recommended 15:1 special class placement for the 2019-20 school year was less supportive, and too large for the student since he required a "smaller, more individualized, structured, supportive, and nurturing setting" (id. at pp. 1, 4, 6).

With regard to the May 2019 CSE meeting and the recommended 15:1 special class placement, the parents alleged that the district indicated that "it made this decision because it did not have a smaller class size available in-[d]istrict" with similar peers (Parent Ex. A at p. 4). The parents contended that the district "did not consider placing [the student] in a smaller class in an out-of-[d]istrict placement, and thereby inappropriately based its decision on its own administrative convenience rather than [the student's] unique needs" (id. at p. 4). The parents alleged that the May 2019 IEP inaccurately indicated that the district considered an 8:1 special class as well as integrated co-teaching (ICT) services and argued that the district did not discuss these options or present them as possibilities at the May 2019 CSE meeting and refused to "send out packets" to other programs in accordance with requests of the parents (id. at p. 5).

Additionally, the parents argued that several of the proposed annual goals were copied from the previous school year, that the district predetermined the goals, that the annual goals were not

measurable, that the measurement criteria was neither individualized nor appropriate to monitor progress, that the IEP did not include annual goals to address agreed upon needs in shoe tying and paper cutting and failed to include sufficient academic goals, that the district admitted that it did not intend to use the CSE annual goals as the student's "main Goals" yet did not specify which goals would be used, and that the district failed to include all the goals discussed and agreed upon during the CSE meeting in the student's IEP (Parent Ex. A at pp. 5, 7).

With regard to the May 2019 CSE, the parents argued that the district failed to offer the student a sufficient and appropriate special education program with related services, supplementary aides, services, modifications and specialized reading instruction to address identified needs in anxiety, reading comprehension, written expression, math, and inferential comprehension skills (Parent Ex. A at pp. 6, 8). The parents alleged that the district failed to evaluate the student in all areas of suspected disability and relied on outdated evaluations and failed to fully and accurately report the student's present levels of performance (id. at p. 6). The parents contended that the district failed to offer any behavioral supports, failed to conduct a functional behavior assessment (FBA) and a behavioral intervention plan (BIP) for the 2019-20 school year, and failed to provide a copy of any BIP to the parents (id. at p. 7). The parents also argued that the management needs included in the proposed IEP were vague and insufficient, that the proposed placement could not implement any or all of the management needs, and that the district failed to provide the student with accommodations and supports he needed to succeed (id. at p. 7). Also, the parents alleged that the student failed to make meaningful progress and that the district failed to offer any goals, supports, or services related to transition; and failed to meaningfully consider the parent's requests and concerns (id. at pp. 7-8).

Turning to the June 2019 CSE meeting, the parents allege that the student's mother observed the district's middle school and saw students cursing, pushing, and bullying each other (Parent Ex. A at p. 8). The parents allege that the district inaccurately claimed that the student had not been bullied in the 2018-19 school year (id.). The parents alleged that the CSE did not discuss annual goals or options for other placements, and the district failed to provide the parents with a copy of the resultant IEP by the beginning of the school year (Parent Ex. A at pp. 8, 9). As relief, the parents sought tuition reimbursement for the cost of the program and services at Vincent Smith for the 2019-20 school year as well as transportation cost (id. at p. 9).

B. Impartial Hearing Officer Decision

The parties proceeded to an impartial hearing on May 21, 2020, which concluded on July 16, 2020 after six days of proceedings (see Tr. pp. 1-980). In a decision dated November 4, 2020, the IHO found that the district failed to offer the student a FAPE for the 2019-20 school year (IHO Decision at p. 23). The IHO reasoned that although the student's IEP called for 15 students, the student's classroom during sixth grade only had 12 student's present in the special class and that the district failed to show how the student would progress with 15 students and two fewer instructors when he had made "slow piecemeal progress" during the 2018-19 school year (id. at pp. 23-24). The IHO also noted that the "at the time of both the 2019 neuropsychological evaluation and the 2018 psychiatric evaluation, the [s]tudent's IEPs recommended a 15-student classroom while both evaluations recommend a smaller classroom for the [s]tudent" (id. at p. 24).

The IHO found that the district failed to prove that the 15:1 special class programming was appropriate and that placement in this setting without any evaluative material to support the move amounted to a "significant change in placement" (IHO decision at p. 24).

Additionally, the IHO found that the district failed to address the student's concerns about bullying and that its lack of documentary evidence that it investigated the bullying claims amounted to a failure to meet its burden of proof that it did so, which was in violation of New York Education Law (IHO Decision at pp 25-26). The IHO concluded that "[a]s a result of the [d]istrict's failure to adjust the [s]tudent's program in response to the bullying, he became increasingly dysregulated and self-injurious as the bullying incidents continued" and although ambiguous, it appears that the IHO also concluded that the conduct of the student's peers constituted bullying in fact because of the parent reports and the district's failure to turn over investigatory documentation (*id.* at pp. 26-27). The IHO concluded that the district ignored "bullying concerns, including perceived threats and cursing" (IHO Decision at p. 26). The IHO further found that based on admissions by the district that the student suffered from anxiety and "distress surrounding events he perceived as bullying, that the bullying was relevant and should have been considered in formulating [the student's] IEP for the 2019-20 school year" and, therefore, that one 30-minute session of group counseling per week was insufficient to address the evident social/emotional needs of the student for the 2019-20 school year under the circumstances (IHO Decision at p. 27). The IHO found that the student required individual (i.e. 1:1) counseling for the 2019-20 school year to address his anxiety about bullying and perceptions of conflict (in particular because the student was "reticent when it came to discussing his personal feelings and fears about incidents with other students") (IHO Decision at pp. 27-28). The IHO also concluded that the district failed to recommend parent counseling and training in accordance with State regulation, and stated that this together with the lack of 1:1 counseling for the student contributed to denying the student a FAPE (IHO Decision at pp. 27-29). Having found the district's program inappropriate on the above grounds, the IHO did not address the additional claims of substantive inadequacy with respect to the specialized reading instruction, the goals, the BIP, and the intensity of speech-language therapy (IHO Decision at p. 29). The IHO found that the district's failure to consider other options besides the 15:1 special class in its middle school amounted to predetermination which deprived the parents of meaningful participation in the IEP process and amounted to a deprivation of FAPE (IHO Decision at pp. 29, 36).

The IHO found that the parents' unilateral placement at Vincent Smith was appropriate and offered the student "educational instruction specifically designed to meet [his] unique needs" for the 2019-20 school year and that the equities favored the parents (IHO Decision at pp. 41-43, 45). The IHO ordered the district to directly pay Vincent Smith the cost of the student's tuition and program for the 2019-20 school year, which per contract amounted to \$56,300 (IHO Decision at p. 45).

IV. Appeal for State-Level Review

The district appeals from the IHO's determinations that the district denied the student a FAPE for the 2019-20 school year. First, the district claims that the best indication of the appropriateness of the 15:1 special class recommendation at the middle school for the 2019-20 school year was the fact that the student made meaningful progress in similar programs (15:1+2) during the 2017-18 and 2018-19 school years. The district contends that the IHO's analysis of the

size of the program by looking at the actual number of students in the prior year's classroom is flawed and cannot be sustained, noting that the IHO found that because there were actually only 12 students in the student's class with two classroom teaching assistants during the 2018-19 school year, the 15:1 special class recommendation amounted to a significant change in placement. The district also argues that the IHO ignored the fact that the student had a 1:1 teaching assistant who provided 1:1 instruction to the student throughout the school day and therefore the lack of classroom teaching assistants would have no impact on the student and the practical difference between the 15:1+2 program and the 15:1 program was not significant and did not justify the IHO's determination that the 15:1 program recommendation was inappropriate.

Next the district argues that the IHO erred when she held that the district failed to take appropriate measures to address the anxiety the student felt as a result of perceived bullying in the sixth grade and contends that the IHO's reliance on scant and insignificant incidents in this regard had no bearing on the appropriateness of the CSE's recommendations for the 2019-20 school year. Additionally, the district contends that the IHO erred when she held that the district failed to recommend appropriate counseling support and that her determination that the district failed to recommend parent training and counseling was misplaced.

The district further argues that the IHO erred in determining that the district failed to consider more restrictive program options and therefore pre-determined its program recommendation. Moreover, the district argues that having found that a 15:1 program was appropriate, a more restrictive program would have been inconsistent with the district's obligation to offer a program in the LRE. Lastly the district argues that the IHO erred when she held that the parents' unilateral placement at Vincent Smith was appropriate and that the equities favored the parents.

In an answer⁵, the parents argue that the IHO properly determined that the district failed to recommend an appropriate placement for the student for the 2019-20 school year, denied the student a FAPE by failing to investigate or address bullying issues in its program or IEP recommendations, effectively depriving the student of any meaningful educational benefit, and failed to recommend appropriate related services. The parents further argue that the district predetermined the student's program for the 2019-20 school year, failed to develop appropriate behavior interventions and supports, failed to conduct an adequate FBA or develop an appropriate BIP, and failed to develop appropriate annual goals. In addition, the parents argue that the student's placement at Vincent Smith was appropriate and that the equities favored the student and the parents.

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.

⁵ I note that the parents' answer was captioned with an incorrect IHRS docket number from several years ago rather than the number that was assigned to this case at the time the impartial hearing was commenced.

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]).⁶

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

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

VI. Discussion

A. Predetermination

The district argues that the IHO erred in finding that it failed to consider more restrictive program options and therefore predetermined its program recommendation. Moreover, the district argues that having found that a 15:1 program was appropriate, a more restrictive program would

⁶ 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).

have been inconsistent with the district's obligation to offer a program in the LRE. The parents argue that the district predetermined the student's program for the 2019-20 school year.

The hearing record shows that at the May 2019 CSE meeting the parent advocate requested that the CSE consider other program options, however, the CSE disagreed and indicated that the student had made meaningful progress (Dist. Ex. 17 at p. 2). The May 2019 prior written notice stated that there were no other options considered at the time of the CSE meeting (Dist. Ex. 17 at p. 2). The school psychologist testified that she did not feel the district had to consider other options because it had a program at the middle school in the LRE (Tr. pp. 74-75).

In addition, the hearing record shows that as early as the student's fifth grade year, the parents were apprehensive regarding the student attending the district's middle school (Tr. p. 40). The March 2019 social history update indicated that the parents "had serious concerns about the possibility of [the student] going to [the district's middle school] next year" and that they did not feel that attending the district's middle school would be in the student's best interest (Dist. Ex. 6 at p. 2). According to the social history update, the student's father shared that the parents continued to believe that an out of district placement may be the best choice for the student, not BOCES, but a middle school in an alternative school district with a more inclusive self-contained classroom setting (Dist. Ex. 6 at p. 2).

The student's mother and the parents' advocate visited the middle school program in June 2019 (Tr. pp. 945-46; Parent Ex. F at p. 1; Dist. Ex. 19 at p. 1). The CSE reconvened in June 2019 at which time the advocate discussed her observation and stated that the middle school was not an appropriate placement for the student (Dist. Exs. 18 at p. 1; 19 at p. 1). This second meeting in June 2019 demonstrated that the district was willing to again listen to parents' concerns. The June 2019 prior written notice indicated that the CSE considered programs and/or services that were less restrictive and more restrictive, such as an 8:1 special class or an inclusion class but rejected those due to the student's current functioning levels and skills (Dist. Ex. 19 at p. 1). Accordingly, the prior written notice stated that it was determined that a 15:1 self-contained class would better meet the student's needs (Dist. Ex. 19 at p. 1).

To the extent that the district psychologist had an opinion during the CSE meeting that the student's needs could adequately be addressed in the 15:1 setting is not indicative of a refusal to consider the parents' input or the other experts that would constituted predetermination (see G.W. v. Rye City Sch. Dist., 2013 WL 1286154, at *21 [S.D.N.Y. Mar. 29, 2013], aff'd, 554 F. App'x 56 [2d Cir. 2014] [discussing the permissibility of using draft IEPs or having pre-formed opinions so long as that is combined with a willingness to hear parental objections and suggestions]). And once the June 2019 CSE determined that there was an appropriate class placement for the student for the student within the district, the district 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 least restrictive environment 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 least restrictive environment that could meet the [s]tudent's needs and did not need to inquire into more restrictive options").

B. 15:1 Special Class

The district argues that the IHO erred in holding that the district failed to offer the student a FAPE for the 2019-20 school year and contends that the student made meaningful progress in a similar program in elementary school, which was the best indication of the appropriateness of its recommendation. The parents argue that the IHO properly determined that the district failed to recommend an appropriate placement for the student for the 2019-20 school year.

As detailed above a CSE convened in May 2019 to conduct the student's annual review and to develop his IEP for the 2019-20 school year (Dist. Ex. 16 at pp. 1-19).

As part of its discussion, the CSE reviewed the student's IEP from the prior year, an April 2019 psychological reevaluation, an April 2019 speech-language reevaluation, an April 2019 educational reevaluation, an April 2019 behavior update and progress report, an April PT reevaluation, and an April 2019 OT reevaluation (Dist. Exs. 16 at p. 2; 17 at p. 1). In addition, the May 2019 CSE had available an April 2019 rationale for aide, April 2019 teacher report, an April OT annual progress report, a March 2019 social history update and October 2018 assistive technology evaluation (Dist. Ex. 16 at p. 2).

According to the March 2019 social history update, the parents reported that at home the student was often anxious, agitated, and angry; that he could act out; and that he did not have many friends in the community (Dist. Ex. 6 at p. 1). The parents shared that they had great concerns regarding the student's placement at the district middle school for the following year and felt that the student was struggling and could not "get a handle on" the work or on working independently (Dist. Ex. 6 at p. 2).

The April 2019 psychological reevaluation report indicated that the student's cognitive functioning was in the very low range (FSIQ 75) and noted that the student was inconsistent in his ability to focus on various tasks, demonstrated low frustration tolerance, and that the student's distractibility and anxious mannerisms appeared to interfere with his overall performance (Dist. Ex. 8 at pp. 3-4, 6). The evaluator reported that the student exhibited typical classroom behaviors and a good level of self-control at school yet tended to worry excessively in social situations and internalized his overall feelings (Dist. Ex. 8 at p. 6). Assessments of social emotional development found the student with clinically significant scores in the areas of anxiety and internal distress, and at-risk scores in the area of social skills (Dist. Ex. 8 at p. 6). The student's anxiety in school was a major concern (Dist. Ex. 8 at p. 6). While the student performed in the very low range of cognitive functioning, assessment of the student's academic achievement yielded average scores on some measures of math and reading (Dist. Exs. 9, 10). Results of the Kaufman Test of Educational Achievement-Third Edition (KTEA-3) administered in April of 2019 found the student performing in the average range in the areas of math computations, letter and word recognition, spelling, reading comprehension, and word recognition fluency (Dist. Exs. 9 at pp. 1-3; 10 at pp. 1-3). The student performed in the below average in the areas of math concepts and applications and written expression (Dist. Exs. 9 at pp. 1-3; 10 at pp. 1-3).

The April 2019 teacher report stated that with respect to academic functioning the student tried very hard but appeared stressed at times and that he needed to take breaks, be redirected and refocused, and could easily be distracted by external noises and would lose focus (Dist. Ex. 11 at p. 1). The teacher reported that the student was well-behaved in class and that reading and spelling were strengths for the student (Dist. Ex. 11 at pp. 1, 2). According to the teacher report the student was well liked by peers and adults, waved his hands and arms when stressed, engaged in self-talk to motivate himself to stay on task, and needed to exercise or follow the behavioral plan to allow him to release his energy or stress (Dist. Ex. 11 at pp. 2-3).

The April 2019 speech-language reevaluation report stated that the student's therapy sessions focused primarily on improving vocabulary, syntax, verbal expression, and auditory memory and comprehension, and noted that the student continued to make progress in speech and language services (Dist. Ex. 13 at p. 1). The student could express basic vocabulary in terms of categorization, associations, descriptions, synonyms, antonyms, and multiple-meaning words; could respond to "wh" questions based on passages he had heard; and could verbally express the main idea of short passages heard (Dist. Ex. 13 at p. 1). As measured by standardized testing, the student's overall spoken language score was below average while his total test score for listening comprehension was in the average range (Dist. Ex. 13 at pp. 2-3). Strengths were noted in the student's understanding and use of vocabulary and verbal expression (Dist. Ex. 13 at p. 4). The evaluator stated that the student benefitted from repetition, redirection, simplified language, scaffolding, and visual aids to improve his comprehension of auditory information (Dist. Ex. 13 at p. 4).

The April 2019 annual review report for behavior intervention services stated that the student demonstrated positive academic abilities and was capable of completing assigned classwork, however he required frequent prompting to begin, remain on, and complete academic tasks (Dist. Ex. 12 at p. 1). The student reportedly had difficulty focusing, benefitted from frequent breaks, and enjoyed participating in classroom discussions when he felt confident in the topic (Dist. Ex. 12 at p. 1). The report reflected that math was an area of anxiety for the student (Dist. Ex. 12 at p. 1). The April 2019 annual review report indicated that consistent with autism spectrum disorder, the student displayed motor and visual self-stimulatory behaviors characterized by hand flapping and rocking side to side and that these behaviors tended to interfere with his ability to attend to academic tasks (Dist. Ex. 12 at p. 1).

According to the prior written notice for the May 2019 CSE meeting, the student's physical therapist recommended decreasing the student's PT to once a week in a group of three and recommended custom-made orthotics (Dist. Ex. 17 at p. 2).⁷ The occupational therapist reported at the May 2019 CSE meeting that the student "did well," used his dominant hand through the evaluation, and that she recommended the continuation of OT services two times per week in a group of three (Dist. Ex. 17 at p. 1).

Finding that the student continued to be eligible for special education and related services as a student with autism, the May 2019 CSE recommended placement in a 15:1 special class with

⁷ The hearing record does not include the April 2019 PT reevaluation report or the April 2019 OT reevaluation report.

related services of one 30-minute session per week of PT in a group of three, one 30-minute session per week of counseling in a group of three, two 30-minute sessions per week of speech-language therapy in a group of five, and two 30-minute sessions per week of OT in a group of three, along with the support of a 1:1 teaching assistant (Dist. Ex. 16 at pp. 1-19). The May 2019 IEP included 17 annual goals in the areas of study skills, reading, writing, mathematics, speech-language skills, social/emotional/behavioral development and motor skills (Dist. Ex. 16 at pp. 13-15). The May 2019 IEP also included the support of a number of accommodations and devices including modified homework assignments, preferential seating, refocusing and redirection, checks for understanding, use of a talking calculator, use of Read & Write for Google Chrome and use of a Chromebook (Dist. Ex. 16 at pp. 16-17). In addition, the IEP provided the student with a BIP, behavior intervention services as needed throughout the day, an assistive technology consultation, and curb to curb transportation (Dist. Ex. 16 at pp. 13, 17, 19).

The CSE reconvened in June 2019 for the student's annual review as requested by the parents due to their disagreement with the CSE recommendation (Dist. Exs. 18 at pp. 1-19; 19 at p. 1). The parent advocate and the neuropsychologist, who conducted a May 2019 neuropsychological evaluation of the student, were in attendance (Dist. Exs. 18 at p. 1; 19 at p. 1). The parent advocate discussed her observation of the district's middle school and stated that it was not an appropriate placement for the student (Dist. Ex. 19 at p. 1). At the time of the CSE meeting, the neuropsychologist had interviewed and evaluated the student but had not completed her report (Tr. p. 657). She testified that during the meeting she provided a general review of the results of her evaluation in terms of the student's diagnosis, specifically that she was diagnosing him with an autism spectrum disorder level two, as opposed to an autism spectrum disorder level one (Tr. p. 657).⁸ In addition, she reported that she advised the CSE that the student required more support than he was receiving and recommended a smaller class size for the student (Tr. p. 657). Based on parent request, 20 hours per month of behavior intervention services in the home were added to the student's IEP (Dist. Exs. 18 at p. 17; 19 at p. 1).

The district claims that by all accounts the student made meaningful progress in similar programs (15:1+2 special classes) during the 2017-18 and 2018-19 school years and which provided support for their recommendation of a 15:1 special class for the student for the 2019-20 school year.

A review of the evidence shows that the student's June 2018 IEP stated that during the 2017-18 school year the student had shown slow but steady progress in the area of math computation, had improved his ability to multiply and divide, and benefitted from 1:1 or small group instruction in math (Dist. Ex. 1 at p. 8). The June 2018 IEP also showed that the student had made slow but steady progress in his fluency and comprehension, and according to a June benchmark assessment was reading on a Fountas and Pinnell level M (instructional) (Dist. Ex. 1 at p. 8).⁹ The June 2018 IEP indicated that the student lacked confidence in mathematics and could be shy but had shown improvement in both areas (Dist. Ex. 1 at p. 9). With respect to physical

⁸ The student was diagnosed as having an autism spectrum disorder – level one in 2017 (Parent Ex. B at p. 7).

⁹ According to the reading level correlation chart in the hearing record, Fountas and Pinnell level M is equivalent to a second-grade reading level (Parent Ex. P).

development, the June 2018 IEP stated that the student had made excellent progress in OT during the school year and was now completely independent in school related self-care tasks including shoelace tying, backpack management, clothing management, lunch time routine and bathroom routine (Dist. Ex. 1 at p. 9). Also, the student reportedly had made progress with his fine motor skills and utilized a mature tripod grasp for writing tasks and could draw shapes, color within lines, draw figures, illustrate a story, and form letters and numbers correctly with good spacing, line adherence, letter size and margin alignment (Dist. Ex. 1 at p. 9). The June 2018 IEP noted that the student's handwriting was "now legible" and that he could read back his own handwriting (Dist. Ex. 1 at p. 10). In addition, it was noted that the student had made progress with his attending skills and had made progress in initiating a task, sustaining concentration on a task, and finishing a given task independently (Dist. Ex. 1 at p. 10).

According to the February 2019 prior written notice, the parents acknowledged that the student was making some progress during the 2018-19 school year (Dist. Ex. 7 at p. 1). At a CSE meeting in or around that time, the district behavior specialist reviewed the student's progress, as well as his anxiety regarding math assignments and tests (Dist. Ex. 7 at p. 1). In response, the student's mother expressed that she was "very pleased" with the student's progress and stated that his behaviors had also improved at home (Dist. Ex. 7 at p. 1). Although as part of the March 2019 social history the parents reported that the student was really struggling and could not get a handle on the work or on working independently, they also indicated that the student had improved during the 2018-19 school year (Dist. Ex. 6 at p. 2).

With respect to progress an April 2019 teacher report, completed by the student's special education teacher, indicated that the student had made slow yet steady academic progress and had increased his ability to be self-reliant (Dist. Ex. 11 at p. 2). Additional reports from the student's special education teacher, included as part of the April 2019 psychological evaluation, noted that the student appeared stressed at times and that he was easily distracted; however, the teacher also reported that the student was very well behaved, appeared to put forth good effort toward learning, and had shown improvement in his work habits (Dist. Ex. 8 at p. 2; see Dist. Ex. 12 at pp. 1-3).

The April 2019 speech-language reevaluation report noted that the student continued to make progress in speech and language services and had become more aware of when he required assistance or repetition and was asking for it appropriately (Dist. Ex. 13 at p. 1). The student had also shown improvement in his ability to follow multi-step directives, utilized learned strategies, was an active participant, and was eager to please his teachers (Dist. Ex. 13 at p. 1). The April 2019 report also noted that while the student had shown improvement in his ability to respond to higher level thinking questions, he continued to have a difficult time responding without assistance or choices (Dist. Ex. 13 at p. 1). In summary, the evaluator stated that the evaluative data and informal measures provided evidence that while the student had made progress in speech and language therapy, he currently demonstrated below average receptive language skills; she recommended strategies to address the student's areas of need (Dist. Ex. 13 at p. 1).

According to the April 2019 annual review report for behavior intervention services, the student had shown progress in his flexibility, tolerance of change, ability to stay on task, social interactions, and academic functioning (Dist. Ex. 12 at p. 2). The report indicated that ABC data showed a decrease in the student's targeted behaviors (Dist. Ex. 12 at p. 3; see Dist. Ex. 2 at pp. 2-3). According to the report, a graph summarizing the student's on-task behavior showed a

gradually increasing trend with low variability (Dist. Ex. 12 at p. 5). The behavior consultant noted that the student had shown steady progress in his attention and independence and stated that based on his progress behavior intervention services were considered effective (Dist. Ex. 12 at p. 5).

Next, the student's June 2019 IEP progress report showed that the student had achieved seven of his annual goals, was progressing satisfactorily toward eight of his annual goals, and was progressing gradually toward the remaining seven annual goals (Dist. Ex. 14 at pp. 1-5). The student's year end (June 2019) report card shows the student earned passing final averages, was meeting grade level standards in ELA (75), science (83), and social studies (75), and was working toward meeting grade level standards in math (73) (Dist. Ex. 15). The May 2019 IEP's present levels of performance stated that the student had shown slow yet steady improvement of his basic computation skills (Dist. Ex. 16 at p. 10).

The parents argue that contrary to the district's contentions that the student progressed in prior years, the neuropsychologist testified that the student's decreased psychometric testing scores reflected "a significant decline" in his overall cognitive functioning and also that his reading level had "regressed" (Tr. p. 610). The neuropsychologist stated that cognitive testing which she conducted indicated declines and that based on the behavior she saw in the student, how engaged the student was, and the effort he put forth she believed that the results reflected a decline in functioning (Tr. pp. 609-10).

Further, the parents point to the testimony of the neuropsychologist who indicated that a comparison of cognitive testing results conducted in spring 2017 with those conducted by the district in spring 2019 show trends for a decline in the student's performance (Tr. p. 606-07). A review of these assessments reflects that in spring 2019 the student attained a lower full scale IQ score as well as lower verbal comprehension, visual spatial, fluid reasoning, and working memory indices scores on intelligence testing; however the student attained a higher score on the processing speed index (compare Parent Ex. B at p. 9, with Dist. Ex. 8 at pp. 2-3). The neuropsychologist provided two possible reasons for this general decrease by explaining that it may have been caused by the student having a hard time engaging in testing the second time or that sometimes it showed that the student was "not making gains the way that we would expect him to make gains" or that he was experiencing a decline in terms of his functioning from one evaluation to the next (Tr. p. 607).

A review of the April 2019 district psychoeducational evaluation report shows that the school psychologist noted on multiple occasions that the student at times appeared easily distracted, anxious, and frustrated, and had trouble focusing (Dist. Ex. 8 at pp. 3-4). In sum, the school psychologist stated that the student was inconsistent in his ability to focus on various tasks, demonstrated low frustration tolerance, and that his distractibility and anxious mannerisms appeared to interfere with his overall performance (Dist. Ex. 8 at p. 6). The school psychologist testified that she believed the student's performance was an underestimate of his ability and further believed the student would have performed better if he did not feel as anxious or frustrated (Tr. pp. 62-63). However, the neuropsychologist reported that the scores the student attained on a test of nonverbal intellectual functioning that she had administered were comparable to the scores the student attained on district testing, and opined that they represented an actual decline in functioning as opposed to situational discomfort (Tr. pp. 607-11).

With respect to reading, the student's special education teacher testified that the student made progress during the 2018-19 school year, moving from a reading lexile of 300 or 307 to a lexile of 379 (Tr. p. 156).¹⁰ He characterized the student's growth as meaningful (Tr. p. 156). On a standardized measure of achievement testing, administered by the special education teacher, the student attained scores in the average range on letter and word identification, reading comprehension, and word recognition fluency subtests. (Dist. Exs. 10; 11). This represented an improvement in the student's performance as compared to his performance on the same test in 2016 and 2017 (compare Dist. Ex. 18 at p. 4, with Dist. Ex. 18 at pp. 6, 9). However, the student's June 2018 IEP indicated that the student's instructional reading level was a Fountas and Pinnell level M (equivalent to a second-grade level), which was the same level reported by the student's special education teacher in April 2019 (Dist. Ex. 1 at p. 6; Parent Ex. P; Tr. pp. 96-97, 179-80).

As detailed above, the hearing record persuades me that the student made progress during the 2017-18 and 2018-19 school years, but that the progress was slow. Indeed, it appeared that the parents recognized the student's slower progress, as they reported that the student was having difficulties with learning skills that his younger siblings were actually learning and that his younger brother was surpassing him academically and in self-care skills and that the student expressed frustration with that and probably contributed to his anxiety (Tr. p. 645; Parent Ex. E at p. 3). While I do not agree with the parents' arguments that the student was already regressing in the 15:1+2 setting in the district's elementary school or the assertion that a significantly smaller classroom setting in a nonpublic school (i.e. an approved school as small as Vincent Smith) was a necessity, I nevertheless am not convinced that the district met its burden to establish that it offered the student a FAPE. I share the IHO's concern that as of June 2019, it was appropriate to decrease the level of adult support for the student in the special class setting to a 15:1, especially in conjunction with the student's increasing anxiety, delayed reading skills, as well as the deficiency in counseling support as further described below.

C. Bullying/Anxiety

Turning to the IHO's findings that the district failed to address the student's perception of bullying incidents and that the district violated Dignity for All Students Act (DASA) by failing to turn over to the parents documents that memorialized the DASA investigation, the district argues that the IHO erred in finding that it failed to take appropriate measures to address the anxiety the student felt as a result of perceived bullying. The district further contends that the IHO's reliance on scant and insignificant incidents—one incident from the 2017-18 school year when the student attended fifth grade and one comment by another student during sixth grade—had no bearing on the appropriateness of the CSE's recommendations for the 2019-20 school year. The district contends that the two incidents were unfounded and that there was no evidence of significant bullying against the student and that staff who worked with the student throughout the 2018-19 school year testified that he was not bullied. The district also asserts that a miscommunication between the student and his sixth-grade teacher that resulted in his homework being thrown out was not an instance of bullying.

¹⁰ The student's special education teacher reported that the student was instructed in reading using the Read 180 program (Tr. p. 149). Although he referenced a lexile performance growth chart, the chart was not included in the hearing record (Tr. p. 155-56).

In contrast, the parents argue that the bullying incidents occurred, the district failed to address the bullying in violation of DASA and IHO properly determined that the district failed to recommend an appropriate placement for the student for the 2019-20 school year, and failed to address bullying issues in its programming or IEP.

The hearing record includes a number of allegations with respect to incidents described by the parents as bullying that stretch over the course of fifth and sixth grade, prior to unilaterally placing the student for seventh grade. Specifically, the evidence shows that a June 2018 psychiatric evaluation that was before the CSE in 2019 had been requested by the district, which indicated, among other things, that the psychiatrist had met with the student and the parents one or more of whom relayed that during the 2017-18 school year the student had faced greater challenges in school due to his being targeted by other children in a negative way (Dist. Exs. 5 at p. 1; 18 at p. 1). In the "History of Presenting Problem" section of her report, the evaluating psychiatrist reported that the student had been called names and did not understand why (Dist. Ex. 5 at p. 1). She described the student as "a very gentle boy who want[ed] to get along with others" (Dist. Ex. 5 at p. 1). The psychiatrist reported that the student did not know what to do when others teased him and, further, that the student would return home from school visibly upset and have emotional breakdowns (Dist. Ex. 5 at p. 1). Based on her interview of the student, the psychiatrist indicated that the student disliked his current school and was happier in his previous elementary school, where the other children were nicer to him (Dist. Ex. 5 at p. 2). The student indicated that he had begun to feel that he could not trust any of the students at the new school because they would turn against him (Dist. Ex. 5 at p. 2). The student also stated that he was often very nervous and anxious and worried and that he wanted people to like him and did not understand when they did not (Dist. Ex. 5 at p. 2). According to the psychiatric evaluation report, the parents were concerned that the student was being exposed to "very negative content" from other students (Dist. Ex. 5 at p. 1).

In addition, the May 2019 neuropsychological evaluation report reflected statements by the student's father that the student had been having difficulties with peer relationships at school and that he had been bullied by other students during the past academic year (2017-18) (Parent Ex. E at p. 3). A prior written notice dated June 24, 2019 showed that during the June 2019 CSE meeting the parent advocate indicated that the student was "bullied" and "tortured" in the fifth grade (2017-18 school year) (Dist. Ex. 19 at p. 1). However, the notice indicated that the school principal responded to the advocate that "the case was investigated and was unfounded" (Dist. Ex. 19 at p. 1).

Months after the June 2019 CSE concluded, the parents asserted in their August 2019 10-day notice of unilateral placement sent to the district that the student had failed to make progress in the 15:1+2 special class in the district's elementary school and, as a result of "unaddressed bullying which they reported to the district on multiple occasions," the student had "significant anxiety about attending school" (Parent Ex. F at p. 1). The parents also stated in the 10-day notice that other students had hurled obscenities at the student, called him names, and threatened the student and physically attacked him at school and on the bus (Parent Ex. F at p. 1).

At the time of the impartial hearing, the parent advocate testified that during a May 2019 classroom observation she noticed other student laughing at the student when he was engaging in self-stimulatory or sensory behaviors (Tr. pp. 773, 775, 777, 823-24). The student's special

education teacher described the situation differently in that he reported that the student had created a funny comic and the other students were laughing with the student regarding the comic and not at him (Tr. pp. 964-65). The teacher stated that during the 2018-19 school year he did not see any of the students in the classroom laughing or mimicking the student and that he would never condone that in the room (Tr. p. 965).

The parent advocate testified her knowledge regarding the student being bullied came from the student, her observation of the student, videos of the student tantrumming and explanations provide by the parents (Tr. p. 834). She acknowledged that she observed the student one time in his educational placement in the district and the videos she saw were of the student at home and not in school (Tr. p. 835). However, the advocate reported that the student tried to explain to her that he was being bullied at school but did not want to be a "snitch" (Tr. p. 834). The school psychologist acknowledged that there was a phrase in her building, "snitches get stitches," and that the student was scared to be called a snitch (Tr. p. 109).

The school psychologist, who provided counseling services to the student, testified that although the student came to her with concerns about other students during the 2018-19 school year, he did not come to her with concerns about being bullied by other students in the building (Tr. pp. 103, 105). The school psychologist acknowledged that the parents contacted her regarding an incident where the student was "punched in the stomach" but her view of events was that that it was investigated, brought to the administration's attention, and was deemed "unfounded" (Tr. pp. 104-07). In contrast, the student's father testified that when he spoke on the telephone, he relayed that the incident involved two other boys, that the student had also been called a rapist, that the school psychologist acknowledged that the student was victim of punching and name calling, and the school psychologist disclosed to the student's father that "I'm not surprised....Those two boys will lose their playground privileges" (Tr. pp. 873-74, 930). The student's father testified that he was satisfied with the outcome of that penalty (Tr. p. 930). The school psychologist testified as to a different outcome of the discussion, stating that "I spoke to the parents on the phone and we discussed it, but it went to the administration level. I had nothing to do with the investigation" and that the allegation was ultimately unfounded (Tr. p. 105).¹¹ As noted above, the IHO appeared to make a general, tacit finding that bullying occurred insofar as the "[d]istrict failed to recommend appropriate interventions and/or take action that ended the harassment, bullying and hostile environment that was prompting the [s]tudent to act out at home" in violation of DASA regulations (IHO Decision at p. 26), but the IHO did not resolve the conflicting testimony or otherwise find that the student was a victim of specific incidents that constituted bullying.

¹¹ During the impartial hearing there was discussion of alleged incidents on a bus, involving a bus aide or a student using bad language, the student being attacked on the bus, and the student being threatened with a needle by another student, but the student's father also testified that an assistant principal had the bus aide removed from the bus and that the student liked the new aide a lot (Tr. pp. 108, 784, 871, 875). The school psychologist indicated that the use of bad language on the bus was addressed by the administration and was not bullying (Tr. p. 108). According to the student's father, he spoke with the school psychologist who stated that "[w]e got to the bottom of it. The boy will be off the bus for a long, long time." (Tr. p. 876). According to the student's father the assistant principal to whom he spoke ceased being an assistant principal, but he was not sure when that occurred prior to the June 2019 CSE meeting (Tr. pp. 874).

Although the district asserts that reports of bullying were investigated and unfounded and that school staff witnessed no bullying or harassment of the student, and the parents' insist that bullying occurred, there is at least some common ground on the fact that the student experienced at least some anxiety. The school psychologist confirmed that the student's parents had talked to her about the student being called names and being fearful of coming to school (Tr. pp. 105-06). With respect to allegations of the student being bullied, the school psychologist explained that if there was an argument or if "kids were not being nice to each other" on the playground or in the classroom, the student would get very upset about it even though he was not a part of it; the student would worry a lot about other people and was a rule follower (Tr. p. 58; see Tr. pp. 107-108). The school psychologist reported that the student was friendly and well liked and that he was not being harassed mentally or emotionally at school (Tr. p. 108). She noted that the student was "pretty much" always with a teaching assistant or participating in an activity that was supervised by an adult (Tr. p. 108). With respect to whether the student was empathizing with other students who had been bullied, rather than having been bullied himself, the neuropsychologist who evaluated the student opined that the student had difficulty reading social cues and that it was a higher cognitive process to pick up on somebody else's emotions and misattribute them to yourself, and therefore unlikely that the student was doing that (Tr. p. 621-22).

The student's father testified regarding a number of incidents which upset the student during his fifth-grade year including when a bus aide was "cursing at the kids," a toy he brought to school from home was taken from him on the playground, he was called names, and was punched in the stomach (Tr. pp. 871-75).

The student's 1:1 teaching assistant, who worked with the student throughout the day during the 2017-18 and 2018-19 school years, testified that she did not see anyone bullying the student (Tr. pp. 307-08, 310). The student's special education teacher for the 2018-19 school year also testified that he did not observe any instances of the student being bullied (Tr. p. 152).

The parents additionally point to an incident in which they believed the student was bullied by a teacher. The parents reported an incident, recorded in the May 2019 neuropsychological evaluation, in which the student came home from school upset because his teacher tore up his math paper for not showing his work (Parent Ex. E at p. 3). The student's special education teacher testified during direct and cross examination that several students in the class had used a calculator to obtain the answer to a math problem instead of performing the exercise of showing the work and using a calculator for self-check (Tr. pp 151-52, 190-191). The teacher explained that he did crumble up the student's paper and throw it in the garbage can, but that he threw it like a basketball and that this happened with a number of other students too because they did not show their work (Tr. pp. 151, 189-90). The teacher explained that he was discarding the material that was not done correctly and provided the students new material, had the student "come up" to complete the work together, and that they "got through the lesson" (Tr. pp. 151-52). The teacher indicated that the student did not express being upset about the incident (Tr. p. 151). The parent testified that the student was frustrated by poor math performance and that it was his understanding that the student could use a calculator to do homework and that the student was excited about the prospect of completing homework, and while it was suggested that the incident was a misinterpretation by the student, it was crushing to the student and for him it was a disaster (Tr. pp. 889-91). The parent acknowledged that the teacher apologized and indicated that in hindsight he should not have done

it (Tr. pp. 925-26). The student's father related a second incident in which the student was frustrated because the teacher had him throw out his own homework (Tr. p. 893).

Faced with conflicting evidence with regard to whether the incidents occurred as alleged or whether they constituted bullying, the IHO did not make specific factual findings and did not address the testimonial evidence that no district personnel witnessed bullying of the student and that the incidents reported by the parents did not constitute bullying. She did not find that the district witnesses were untruthful about their personal observations of the student during the school day or that his aide was with him for virtually the entire school day. Notwithstanding these points, the IHO proceeded to go beyond the IDEA and concluded that the district violated obligations under DASA, specifically the school employee reporting requirements to the to a school superintendent, principal, or designee as well as the school district's annual reporting requirements to the Commissioner of Education. This was error as neither DASA nor its implementing State regulations confer jurisdiction to administrative hearing officer appointed under IDEA to determine that a public school district or its personnel have violated DASA.¹² The IHO identified no authority in the IDEA, DASA, or any corresponding statutes or regulations stating that a district's failure to comply with DASA would be a determining factor in whether a student had received a FAPE (see Motta v. Eldred Cent. Sch. Dist., 141 A.D.3d 819, 820 [3d Dep't 2016] [holding that the Dignity for All Students Act does not create a private right of action]; Benacquista v. Spratt, 2016 WL 6803156, at *8-*9 [N.D.N.Y. Nov. 17, 2016]; C.T. v. Valley Stream Union Free Sch. Dist., 2016 WL 4368191, *13 [E.D.N.Y. Aug. 16, 2016]). DASA imposes specific obligations on school districts with regard to the prevention and investigation of harassment and bullying (Educ. Law §§ 10-18). The law defines bullying as "the creation of a hostile environment by conduct or by threats, intimidation or abuse" that, among other things, interferes with a student's educational performance, mental, emotional, or physical well-being, causes a student to fear for his or her physical safety, or causes physical or emotional harm (Educ. Law § 11[7]). As the Court of Appeals has explained, DASA relies upon "the creation and implementation of school board policies to reduce bullying in schools through the appropriate training of personnel, mandatory instruction for students on civility and tolerance, and reporting requirements (see Education Law § 13). The Act did not criminalize bullying behaviors; instead, it incorporated educational penalties such as suspension from school" (People v. Marquan M., 24 N.Y.3d 1, 4 [2014]). The parents in this case cited to the district's DASA policy in the district's code of conduct in their due process complaint notice, but that did not confer jurisdiction over the school district's investigatory and disciplinary procedures upon the IHO (Parent Ex. A at p. 3). The investigation of an alleged bullying incident under DASA is not like a criminal trial that is subject to public scrutiny, and while it have been appropriate for the principal to inform the parents of the outcome of an investigation in this case, that does not mean that the IHO in this special education due process hearing can find that the principal or superintendent have violated DASA for failing to turn over investigation reports involving other children to the parents of the alleged victim. These matters must be left to the procedures in the school district's State-mandated DASA policies, the exhaustion of any district-level appeal processes, and any subsequent appeal to the Commissioner of Education pursuant to Section 310 of the Education Law who has routinely resolved disputes

¹² Instead, DASA specifically indicates that it does not "preclude or limit any right or cause of action provided under any local, state or federal ordinance, law or regulation including but not limited to any remedies or rights available under the [IDEA]" (Educ. Law § 17 [2]).

alleging violations of DASA, which in some cases implicate the rights of multiple students (Appeal of Students with Disabilities, 59 Ed Dept Rep, Decision No. 17,805 [addressing allegations that students with disabilities were excluded from a club]; Appeal of R.I., 59 Ed Dept Rep, Decision No. 17,758 [addressing a DASA dispute over the separation of a victim and an offender and the need to join necessary parties]; Appeal of a Student with a Disability, 59 Ed Dept Rep, Decision No. 17,845 [adjudicating a school district's compliance with its DASA procedures]; Appeal of YQ, 59 Ed Dept Rep, 17,842 [noting that not all altercations or disagreements between students rise to the level of bullying or harassment under DASA]; Appeal of M.F., 59 Ed Dept Rep, Decision No. 17,704; Appeal of A.G., 58 Ed Dept Rep, Decision No. 17,618; Appeal of R.E., 56 Ed Dept Rep, Decision No. 17,003 [finding that there is no explicit provision in DASA which requires an appeal at the local level or exhaustion; however, there is also nothing in DASA which prevents a school district from promulgating a policy that requires exhaustion]). The IHO's vague determinations that the district violated DASA must be reversed because they were not findings regarding the identification, evaluation, educational placement of a student with a disability, or the provision of a FAPE to the student; rather, with respect to their DASA allegations, the parents were likely required to follow the district's DASA policy, including any local exhaustion requirements and/or in an appeal pursuant to Section 310 of the Education Law.¹³

The IHO's findings with respect to the student's anxiety are a different matter. While the hearing record reveals varying opinions as to whether the student was being bullied in school, the hearing record consistently shows that the effect of whatever the student experienced, bullying or not, resulted in the student having anxiety at school in relation to other students. The IHO concluded that one 30-minute session of group counseling was insufficient to address this need (IHO Decision at pp. 27-28). Evaluative information from the 2018-19 school year, considered by the May 2019 and June 2019 CSEs, identified the student's anxiety as an area of need (Parent Ex. D at p. 1-2; Dist. Exs. 2 at pp. 1-2, 6 at p. 1; 8 at pp. 4, 6; 11 at p. 1; 12 at p. 1; see Dist. Exs 16 at pp. 2-3; 17 at pp. 1-2; 18 at pp. 2-3; 19 at pp. 1-2).

The May 2019 neuropsychological evaluation included parent reports that the student had been struggling in school, maintained his composure in school although he was very anxious, had become more overwhelmed and anxious than in the past, and that he had very severe anxiety and became very anxious when he had to do math; the parents also noted that the student became anxious regularly about what they were preparing for dinner because he worried excessively that he was not going to like it (Parent Ex. E at p. 1). Additionally, the parents indicated that the student's younger brother was beginning to surpass him academically and in self-care and that the student expressed frustration with this and it contributed to his anxiety (Tr. p. 645; Parent Ex. E at p. 3).

Therefore, the relevant question here, is whether the district appropriately addressed the student's anxiety, and the IHO concluded that the lack of individual counseling on the student's IEP rendered it insufficient. The hearing record supports that determination in this case. The

¹³ The student's father testified that he spoke to the school psychologist and an assistant principal and relied on their assertions that the other student's were the culprits and that they disclosed to him how the district intended to discipline the other students, but there is no evidence that these individuals were Dignity Act coordinators or the principal or superintendent's designee to conduct investigations, and the school psychologist testified that she referred the matters "to the administration."

evidence shows that the June 2019 CSE recommended for the student a 15:1 special class placement and related services including one 30-minute session per week of counseling in a group of three (Dist. Ex. 18 at pp. 1, 15-16). The school psychologist indicated that the student's anxiety and social skills needs were addressed in counseling (Dist. Ex. 17 at pp. 1-2), but during the impartial hearing she also testified that the student would address his anxiety in the group if she asked him to, but that he preferred not to (Tr. pp. 102). The school psychologist also admitted that the student preferred to come to her individually if his anxiety was related to triggers involving other students (particularly those known to other students in the counseling group) or matters in the home (Tr. pp. 102-03). In response, to the IHO's findings, the district asserts that the evidence shows that the student had access at all times to the psychologist informally in the elementary school, and the same support would have been provided to the student in the middle school, but that is impermissible retrospective evidence, evidence presented at a hearing that materially alters an IEP, which cannot be not be relied upon and/or used to rehabilitate an inadequate IEP (see R.E., 694 F.3d at 188). The IEP itself also contradicts the district's argument—the student's June 2018 IEP for the preceding school year indicated in the management needs that "[t]he student utilizes services of the psychologist/social worker more than the frequency listed on his IEP" (Dist. Ex. 1 a p. 10), but this provision was explicitly removed from the June 2019 IEP (District 18 at p. 12). While the lack of individual counseling standing alone, might not have convinced me that the student was unlikely to make educational progress under the Andrew F. standard, in conjunction with the fade back in adult support in the special class described above, the two factors contribute to my conclusion that the district failed to establish that the June 2019 IEP contained sufficient supports for the student and therefore denied the student a FAPE.

D. Parent Counseling and Training

The district contends that the IHO's determination that the district failed to recommend parent training and counseling was misplaced. The district added that the parents wrote a letter declining the services. The parents argue that the IHO properly found that the district's failure to recommend parent training denied the student a FAPE.

State regulations require that an IEP indicate the extent to which parent counseling and training will be provided to parents, when appropriate (8 NYCRR 200.4[d][2][v][b][5]). State regulations further provide for the provision of parent counseling and training for the purpose of enabling parents of students with autism to perform appropriate follow-up intervention activities at home (8 NYCRR 200.13[d]). Parent counseling and training is defined as "assisting parents in understanding the special needs of their child; providing parents with information about child development; and helping parents to acquire the necessary skills that will allow them to support the implementation of their child's [IEP]" (8 NYCRR 200.1[kk]; see 34 CFR 300.34[c][8]).

Although the district did not recommend parent counseling and training as part of the student's 2019-20 IEP, the hearing record shows that the parents had received parent counseling and training from the district in the past. The March 2017 neuropsychological evaluation report indicates that, at the time the evaluation was conducted, the parents were receiving parent training for one hour per week at home (Parent Ex. B at p. 1). In addition, the June 2018 psychiatric evaluation stated that the student's program included parent training (Dist. Ex. 5 at p. 1). The student's June 20, 2018 IEP includes a recommendation for parent counseling and training in the home; however this recommendation was discontinued on the student's December 2018 IEP

(compare Dist. Ex. 1 at pp. 1, 13-14 with Dist Ex. 3 at p. 1, 13-14). The February 2019 prior written notice indicated that parent counseling and training was discontinued in accordance with a written request from the parents because they were not happy with the service provider (Dist. Ex. 7 at p. 1). According to the May 2019 prior written notice, parent training was recommended at the May 2019 CSE meeting, but the parents declined the service (Dist. Ex. 17 at p. 2). Although the May and June 2019 IEPs did not include a recommendation for parent counseling and training, the June 2019 IEP included, at the parents' request, 20 hours per month of behavior intervention services in the home (Dist. Exs. 16 at pp. 15-17; 18 at pp. 15-17; 19 at p. 1).

Ultimately, however, even assuming that the IHO's decision may be read to describe a procedural violation relating to parent counseling and training, the Second Circuit has consistently held that the failure to include parent counseling and training on an IEP does not usually constitute a denial of a FAPE (see L.O. v. New York City Dep't of Educ., 822 F.3d 95, 122-23 [2d Cir. 2016]; M.W. v. New York City Dep't of Educ., 725 F.3d 131, 141-42 [2d Cir. 2013]; R.E., 694 F.3d at 191; see also A.M. v. New York City Dep't of Educ., 845 F.3d 523, 538 [2d Cir. 2017]; J.C. v. New York City Dep't of Educ., 643 Fed. App'x 31, 32 [2d Cir. Mar. 16, 2016]; R.B. v. New York City Dep't of Educ., 603 Fed. App'x 36, 39 [2d Cir. Mar. 19, 2015]; but see C.F. v. New York City Dep't of Educ., 746 F.3d 68, 80-82 [2d Cir. 2014]). The Second Circuit explained that, "[t]hrough the failure to include parent counseling in the IEP may, in some cases (particularly when aggregated with other violations), result in a denial of a FAPE, in the ordinary case that failure, standing alone, is not sufficient to warrant reimbursement" (R.E., 694 F.3d at 191; see F.L. v. New York City Dep't of Educ., 553 Fed. App'x 2, 7 [2d Cir. Jan. 8, 2014]; K.L. v. New York City Dep't of Educ., 2013 WL 3814669 [2d Cir. Jul. 24, 2013]).

Here, the hearing record does not support a finding that the district committed a procedural violation pertaining to parent counseling and training or that any failure to communicate to the parents what parent counseling and training would entail would otherwise contribute to a finding of a denial of a FAPE. Although parent counseling and training was not recommended as part of the student's 2019-20 IEP, the IEP did include 20 hours per month of home-based behavior intervention services aimed at assisting the parents with the student's behavior at home, which served the same purpose as parent counseling and training. Contrary to the findings of the IHO, the failure to reflect parent counseling and training, in those precise terms, on the student's June 2019 IEP did not result in or contribute to a denial of a FAPE in this instance.

E. Annual Goals

Finally, the parents assert several claims in the answer based on allegations in the due process complaint notice concerning the appropriateness of the annual goals included in 2019-20 IEP. Specifically, the parents contend that the annual goals failed to address all of the student's needs such as his "reading deciding [sic] deficits," that several goals were not measurable, that some reading goals were actively detrimental to the student as a student with dyslexia, and that several IEP goals were copied from the prior year's IEP.

As an initial matter, I note that any claims based upon annual goals are not dispositive in this matter. While the IHO did not make any findings on the parents' claims related to the goals contained in the 2019-20 IEP and parties, as the parents did here, are encouraged to assert on appeal any "failures to rule" by the IHO (8 NYCRR 279.8 (c)(2)), the parents in this instance will

receive relief as a result of my finding herein that the district failed to provide the student with a FAPE due to its recommendation of an inappropriate program and placement. Moreover, even where deficiencies are identified in the annual goals contained in an IEP, inadequate goals in and of themselves are unlikely to rise to the level of a denial of FAPE. Indeed, courts have held that an IEP need not identify annual goals as the vehicle for addressing each and every need in order to conclude that the IEP offered the student a FAPE (see J.B. v. New York City Dep't of Educ., 242 F. Supp. 3d 186, 199 [E.D.N.Y. 2017]). In addition, courts generally have been reluctant to find a denial of a FAPE on the basis of an IEP failing to sufficiently specify how a student's progress toward his or her annual goals will be measured when the goals address the student's areas of need (D.A.B. v. New York City Dep't of Educ., 973 F. Supp. 2d 344, 359-61 [S.D.N.Y. 2013]; A.D. v. New York City Dep't of Educ., 2013 WL 1155570, at *10-*11 [S.D.N.Y. Mar. 19, 2013]; J.L. v. City Sch. Dist. of New York, 2013 WL 625064, at *13 [S.D.N.Y. Feb. 20, 2013]; P.K. v. New York City Dep't of Educ. (Region 4), 819 F. Supp. 2d 90, 109 [S.D.N.Y. 2011], aff'd, 526 Fed. App'x 135 [2d Cir. May 21, 2013]). Relatedly, the carryover of annual goals from a student's IEP in the prior school year to the next school year's IEP has been found to be appropriate "[w]here a student's needs and objectives remain substantially the same; '[i]t is especially sensible that [an IEP] would reflect continuity with [a student's] needs and objectives as of [previous years,]'" (P.C. v. Rye City Sch. Dist., 232 F. Supp. 3d 394, 413-15 [S.D.N.Y. 2017], quoting L.B. v. New York City Dep't of Educ., 2016 WL 5404654, at *11 [S.D.N.Y. Sept. 27, 2016]; see M.B. v. City Sch. Dist. of New Rochelle, 2018 WL 1609266, at *15 [S.D.N.Y. Mar. 29, 2018] [finding that, despite "some carry-over" between goals for the years at issue, "each of the disputed IEPs contained a number of new goals and objectives that appropriately reflected [the student's] progress and updated evaluative information"]). Accordingly, given the wide latitude districts are generally afforded by the courts in fashioning annual goals, the parents' claims related to annual goals in this matter similarly do not, standing alone, support a finding of a denial of FAPE. However, in the interest of thoroughness, and in an abundance of caution, I will briefly address the gravamen of the parents' goals claims below.

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

The 2019-20 IEP included 17 annual goals (Dist. Ex. 18 at pp. 13-15). Specifically, the student's IEP included a study skills annual goal involving maintaining attention to task; two reading annual goals involving using context clues in answering comprehension questions and identifying the author's purpose when reading content area material; two writing annual goals addressing the restatement of a question before answering questions and self-assessing written work by labeling parts of speech; two math annual goals involving calculating money amounts (dollars and cents) and multiplying 2 digit numbers; and two speech-language annual goals involving practicing compensatory strategies to clarify information from a listening or reading passage to answer higher level thinking questions and verbally interpreting the meaning of several

sentences utilizing various strategies (Dist. Ex. 18 at pp. 13-14). The student's 2019-20 IEP also included four social/emotional/behavioral annual goals involving self-identifying personal qualities and how they impact interactions with others, identifying behavior triggers and how they impact behaviors of self and others, identifying and appropriately using coping skills in response to negative emotions at school, and identifying response options with favorable outcomes to simulated social situations (being teased, insulted, bumped) (Dist. Ex. 18 at pp. 14-15). In addition, the student's 2019-20 IEP included four motor skills annual goals addressing balance during school activities, stretching and flexibility activities to assist in maintaining functional movement, near point copying skills, and visual memory and recall of information across academic settings (Dist. Ex. 18 at p. 15). All of the annual goals included evaluative criteria (e.g.; "3 out of 5 trials," 85%), evaluation procedures (e.g.; writing samples, recorded observations, observation checklists), and a schedule to measure progress (e.g.; quarterly) (Dist. Ex. 18 at pp. 13-15).

While the 2019-20 IEP does include a number of annual goals carried over from the previous year's IEP (e.g.; identifying personal qualities and impact on interactions, identifying triggers, identifying responses to social situations with favorable outcomes, joint mobility and functional movement), the majority of the annual goals included were new (compare Dist. Ex. 3 at pp. 11-13, with Dist. Ex. 18 at pp. 13-15). Additionally, the 2019-20 IEP's present levels of performance identified continued needs in the area of developing appropriate social skills, interpreting social cues, decreasing anxiety, and improving lower body flexibility (Dist. Ex. 18 at pp. 11-12).

Accordingly, I find that while the annual goals contained in the 2019-20 IEP were not free from deficiencies and may not have addressed every aspect of the student's needs, under the prevailing law, the goals at issue were largely appropriate and any inadequacies related thereto were not sufficient to constitute a denial of FAPE.

F. Special Factors - FBA/BIP

While the parents assert that the IHO made no findings regarding the adequacy of the FBA and BIP developed for the student by the district, their claim on appeal—that the district failed to conduct an adequate FBA or develop an appropriate BIP because the district hired an unlicensed consultant to conduct the FBA and develop the BIP—is different than the claim raised before the IHO. I note that in contrast to attacking the adequacy of the district's FBA and BIP, the due process complaint notice alleged that the district "failed to conduct" an FBA and "did not develop a BIP (Parent Ex. A at p. 7). As the record reveals that the district had conducted an FBA and developed a BIP, I find the parents' contentions in the due process complaint were without merit and their revised claims will not be reviewed for the first time on appeal (see Parent Ex. D at p. 1; Dist. Exs. 2 at pp. 1-12; 5 at p. 1).

G. Unilateral Placement

Having found that the district failed to provide the student a FAPE for the 2019-20 school year, the next issue is whether the parents' unilateral placement at Vincent Smith was appropriate. The district argues that the IHO erred in finding that Vincent Smith was appropriate because it was not the least restrictive environment for the student, some of his teachers at the school were not

certified in New York State and the student did not receive physical therapy as a related service while attending the private placement.

A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak, 142 F.3d at 129). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (Carter, 510 U.S. at 13-14). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ. of the City Sch. Dist. of Yonkers, 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement'" (Gagliardo, 489 F.3d at 112, quoting Frank G. v. Bd. of Educ. of Hyde Park, 459 F.3d 356, 364 [2d Cir. 2006]; see Rowley, 458 U.S. at 207). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). When determining whether a unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether the placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see Gagliardo, 489 F.3d at 115; Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] ["evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]). A private placement is appropriate if it provides instruction specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; Educ. Law § 4401[1]; 34 CFR 300.39[a][1]; 8 NYCRR 200.1[ww]; Hardison v. Bd. of Educ. of the Oneonta City Sch. Dist., 773 F.3d 372, 386 [2d Cir. 2014]; C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 836 [2d Cir. 2014]; Gagliardo, 489 F.3d at 114-15; Frank G., 459 F.3d at 365).

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

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

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

The dean of students testified that Vincent Smith was an independent school that taught students with dyslexia, dysgraphia, dyscalculia or an unidentified learning disability (Tr. p. 381;

see Parent Ex. K at p. 1). The dean noted that a few of the students were on the autism spectrum but that the students were all verbal and were all able to learn; the school did not accept students with severe emotional or behavioral problems (Tr. p. 381). According to the dean, Vincent Smith had a total student population of approximately 54 students with a lower school (grades one through six) and an upper school (grades seven through twelve) and all classes were small with the largest class for the 2019-20 school year being six students (Tr. pp. 380, 381-82). The dean explained that every student in the upper school received instruction in science, social studies, math, English, gym, art, music, and social skills and that the school used a lot of multisensory teaching and "mostly" used proven research-based programs (Tr. p. 382; see Parent Ex. G).

1. Specially Designed Instruction

The student began attending Vincent Smith in September 2019 and the dean reported that the student's perceived deficits at the time were that he was "very low" in writing, reading, and math and needed a lot of one-to-one work and additional programs (Tr. p. 387). The dean noted that during the 2019-20 school year the student was in a class of two students for academic subjects and that all of his teachers were New York State certified in special education and/or their content area (Tr. pp. 392; Parent Ex. K at p. 1).

The Vincent Smith 2019-20 second trimester report card stated that the student's ELA class focused on finding examples of characterization and conflicts and involved keeping a plot diagram and a vocabulary chart (Parent Ex. O at p. 2). Reportedly, the student had made good progress in ELA (reading fluency, paying attention) with the modified curriculum allowing him to practice using strategies he had learned (Parent Ex. O at p. 2). With respect to math instruction, the report card stated that the class explored concepts associated with fractions using visual models, improper fractions and mixed numerals and analyzing their relationship, and fraction operations and that the student benefitted from the multisensory classroom (Parent Ex. O at pp. 4-5). Regarding the content areas of social studies and science it was reported that the student performed better on hands-on assignments and less well on those that required a recall of facts, benefitted from the smaller class size, learned best through repetition, continued to use visuals to help in his learning, and that his critical thinking skills were being strengthened through in class labs where the students work on discussion questions with guidance (Parent Ex. O at pp. 5-6).

According to an April 2020 statement from the dean, the student participated in an evidence-based social skills program "Overcoming Obstacles," which taught essential skills necessary to improve social and emotional development, classroom behavior, readiness to learn, and academic performance (Parent Ex. K at p. 1). The program was led by a school psychologist (id.). The dean also reported that the student participated in individual reading instruction with a certified Wilson practitioner three times per week that targeted his decoding and comprehension skills (Parent Ex. K at p. 1). The student's report card indicated that this multisensory reading instruction was designed to improve the student's decoding, spelling, fluency and vocabulary and detailed the specific skills the student was working on such as learning short vowel sounds and digraphs (Parent Ex. O at p. 3). Also, the dean indicated that the student was provided with the opportunity to participate in daily 1:1 tutorials in core subjects after school, which he did on an "as needed" basis (Parent Ex. K at p. 2). When not participating in a tutorial session, the student attended self-elected clubs that taught specific skills needed to achieve a smooth transition from adolescence to adulthood, and additional science labs (Parent Ex. K at p. 2). The dean noted that

the student benefitted from modifications and accommodations that were built into the school's curriculum including checks for understanding, preferential seating, continuous assurances, extended time, wait time for processing, copies of class notes, repeated listening sections, and scaffolding (Parent Ex. K at p. 2).

In addition to the above, the student received counseling, speech-language therapy, and individual OT at Vincent Smith (Parent Ex. K at p. 1).

The student's counselor at Vincent Smith testified that when she first met a student she conducted an assessment by reflecting on their previous evaluations and IEPs, and gathered her own psychosocial information during her first sessions with the student (Tr. pp. 495-96). With regard to the student, the counselor testified that based on her assessment she determined that he had difficulties in the areas of anxiety, coping strategies, problem solving, confidence, and self-esteem (Tr. pp. 495-96). To address the student's needs the counselor stated that she provided the student both individual counseling and a social skills class in a group of two (Tr. p. 494, Parent Ex. L at p. 1). The counselor testified that with individual counseling she had the opportunity to discuss "personal matters" and to work with the student on coping strategies, meditation, and mindfulness (Tr. p. 496; see Parent Ex. L at p. 1). She further explained that through the use of social scenarios, videos, and games they were able to practice coping strategy skills, reframe the student's thinking, and consider and practice different perspectives (Tr. p. 497). The counselor also stated that the student identified math as one of his triggers for anxiety and that they talked about and identified things that were within the student's control and those that were not (Tr. pp. 497-98; see Parent Ex. L at p. 1). The counselor reported that the student made progress during the year on goals involving coping skills, problem solving and assertiveness (Tr. pp. 498-502). In the group, the counselor addressed socialization, friendship skills, communication skills, problem solving, assertiveness, bully prevention, coping strategies, meditation and mindfulness (Tr. pp. 503-04; Parent Ex. L at pp. 1-2).

The Vincent Smith speech-language pathologist indicated that the student was in a group with two other students (see Tr. p. 553). She noted the student's needs in word retrieval, sentence complexity, and vocabulary and identified goals for the student in the areas of expressive language, auditory listening (filtering and understanding), writing and pragmatics (Tr. pp. 554-55, 557; Parent Ex. O at pp. 3-4). The speech-language pathologist stated that she worked with the student on synonyms, very specific word retrieval strategies (e.g.; asking oneself what is it used for, what does it look like, what is its function), writing on familiar topics as motivation, developing more involved written work, and active listening skills (Tr. pp. 555, 557, 562).

According to the 2019-20 OT progress report the Vincent Smith occupational therapist worked with the student on attending skills, self-regulation, gross motor skills, bilateral integration, improving laterality, sensory integration and integrating primitive reflexes, ocular motor skills, visual perception skills (visual spatial, figure ground and visual memory), visual motor integration and coordination, activities of daily living, and graphomotor and fine motor skills (Parent Ex. N at p. 1). The therapist indicated that the student had made progress in the areas of skipping with reciprocal arm swing, jumping rope using both feet simultaneously, graphomotor skills, and untying and double knotting his laces (Parent Ex. N at pp. 1-2).

As detailed above, the hearing record supports the determination that Vincent Smith identified the student's areas of need and provided specially designed instruction to meet the student's unique needs. While the district asserts that Vincent Smith is not in the student's LRE, it is well settled that although the restrictiveness of a parental placement may be considered as a factor in determining whether parents are entitled to an award of tuition reimbursement (M.S., 231 F.3d at 105; Walczak, 142 F.3d at 122; see Rafferty v. Cranston Pub. Sch. Comm., 315 F.3d 21, 26-27 [1st Cir. 2002]), parents are not as strictly held to the standard of placement in the LRE as are school districts (C.L., 744 F.3d at 830, 836-37 [noting "while the restrictiveness of a private placement is a factor, by no means is it dispositive" and furthermore, "[i]nflexibly requiring that the parents secure a private school that is nonrestrictive, or at least as nonrestrictive as the FAPE-denying public school, would undermine the right of unilateral withdrawal the Supreme Court recognized in Burlington"]; see Carter, 510 U.S. at 14-15; M.S., 231 F.3d at 105 [stating that parents "may not be subject to the same mainstreaming requirements as a school board"]) and "the totality of the circumstances" must be considered in determining the appropriateness of the unilateral placement (Frank G., 459 F.3d at 364). Moreover, the district's objections to the student's placement are not based primarily on the student's access to nondisabled peers but rather the small size of the student's class at Vincent Smith. While class size may be an issue of concern with respect to a student who has social-emotional issues related to social skills and appropriate interactions with peers, as does this student, the one-to-one counseling and group counseling provided at Vincent Smith have been specially designed to meet the student's unique social-emotional needs and are sufficient to support a finding that Vincent Smith was an appropriate unilateral placement for the student.

In addition, the district's arguments based on some of Vincent Smith's teachers allegedly lacking New York State certification as well as the absence of physical therapy services at the school are unavailing. It is well settled that a unilateral placement need not employ certified special education teachers in order to be deemed appropriate (Carter, 510 U.S. at 13-14). Moreover, parents need not show that their unilateral placement provides every service necessary to maximize the student's potential, but rather, must demonstrate that the placement provides education instruction specially designed to meet the unique needs of a student (M.H., 685 F.3d at 252; Gagliardo, 489 F.3d at 112; Frank G., 459 F.3d at 365; Stevens, 2010 WL 1005165, at *9). Accordingly, because the hearing record supports a finding that the student's program, while not perfect, provided the student with individualized academic instruction, counseling and social skills support, occupational therapy and speech-language therapy which addressed his unique educational needs, I will not disturb the IHO's determination that Vincent Smith was an appropriate unilateral placement for the student (T.K. v. New York City Dep't of Educ., 810 F.3d 869, 877-78 [2d Cir. 2016] [citations omitted] ["The test for the private placement 'is that it is appropriate, and not that it is perfect'"]).

H. Equitable Considerations

The parents argue that, despite the IHO's finding to the contrary, equitable considerations do not weigh in favor of the parents with respect to tuition reimbursement because they had expressed their intention not to send the student to the district middle school as early as his fourth grade year. The district contends that the parents had a closed mind when it came to the student considering attending the district's middle school program and none of the parents' other three children have ever attended the district's middle school or high school.

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"]).

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

The IHO found that the parents cooperated at all times with the district and did not hinder the CSE or IEP development process (IHO Decision at p. 45) Specifically, the IHO determined that the parents participated in the CSE meetings, raised concerns at the meetings, and stated their willingness to consider any placement options (id.). The IHO noted that the parents informed the district by letter dated August 16, 2019 of their concerns with the district's recommended program for the 2019-20 school year and provided proper notice that absent appropriate recommendations from the district for the student they would place the student in a private school and seek reimbursement from the district (id.). The hearing record supports the IHO's findings that the parents fully cooperated with the district at all times during the CSE process. Moreover, even if the parents had no intention of placing the student in the district's recommended program, it is well-settled that it would not be a basis to deny their request for tuition reimbursement (see C.L.

744 F.3d at 840 [holding that the parents' "pursuit of a private placement was not a basis for denying their [request for] tuition reimbursement, even assuming . . . that the parents never intended to keep [the student] in public school"). Accordingly, I will not disturb the IHO's finding that equitable considerations weighed in favor of the parents' request for tuition reimbursement.

VII. Conclusion

In summary, some aspects of the district's appeal are meritorious, but it is not sufficient to disturb the IHO's ultimate conclusion to grant the parents tuition reimbursement claim for the 2019-20 school year I have considered the parties' remaining contentions and find it is not necessary to address them in light of my determinations herein.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO decision dated November 4, 2020 is modified by reversing those portions that found that the district violated the Dignity for All Students Act and determined that the district predetermined the student's programming for the 2019-20 school year.

Dated: **Albany, New York**
 January 13, 2021

JUSTYN P. BATES
STATE REVIEW OFFICER