



The University of the State of New York

The State Education Department

State Review Officer

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No. 21-076

Application of the BOARD OF EDUCATION OF THE RUSH-HENRIETTA CENTRAL SCHOOL DISTRICT for review of a determination of a hearing officer relating to the provision of educational services to a student suspected of having a disability

Appearances:

Ferrara Fiorenza, PC, attorneys for petitioner, by Susan T. Johns, Esq.

Cara M. Briggs, Esq., attorney for respondent

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 a decision of an impartial hearing officer (IHO) which determined that it failed to meet its child find obligation during the 2018-19 school year, found respondent's (the parent's) daughter eligible for special education and related services, and ordered the district to reimburse the parent for her daughter's tuition costs at the Norman Howard School (Norman Howard) for the 2019-20 school year. The parent cross-appeals from that portion of the IHO's decision which failed to address all of the issues raised in the due process complaint notice or to order compensatory education. The appeal must be sustained in part. The cross-appeal must be dismissed.

II. Overview—Administrative Procedures

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

school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[l]).

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

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

III. Facts and Procedural History

There is extensive evidence in the hearing regarding the student prior to the 2017-18 school year; however, due to the nature of this appeal, such evidence will only be discussed as it pertains to the issues on appeal.

The student has received diagnoses including anxiety disorder, autism spectrum disorder, attention deficit hyperactivity disorder (ADHD), obsessive compulsive disorder (OCD), and unspecified depressive disorder (Joint Exs. 5b at p. 11; 16a at pp. 1-2; 18b). As a young child the student received special education and related services through the Early Intervention Program and speech improvement services in kindergarten (Joint Ex. 16a at p. 2). The student received counseling services and, at times, occupational therapy (OT), together with various accommodations under section 504 of the Rehabilitation Act of 1973 (section 504), 29 U.S.C § 794(a), with a section 504 accommodation plan in place for each school year since first grade (2011-12 school year) (see Joint Exs. 3b; 3c; 3d; 3e; 3f; 3g; 3h; 3i; 3j; 3k).¹ CSEs convened in 2010, 2012, and 2013 in order to determine whether the student was eligible for special education and related services and she was found ineligible for each of those years (see Joint Exs. 4d; 4e; 4f).² The evidence in the hearing record demonstrates that the 2010 and 2012 CSE meetings were convened due to parent referrals (Joint Exs. 4e at p. 6; 4f at p. 4).³

In May 2017, the section 504 committee convened to conduct an annual review and develop a 504 accommodation plan for the 2017-18 school year (seventh grade) (Joint Ex. 3c at pp. 1). Finding that the student continued to be eligible under section 504, the May 2017 section 504 committee recommended that the student receive services that included one 30-minute session per month of individual counseling, one 30-minute session per year for a team meeting to review transition to new grade, and accommodations including supports for organizational skills, refocusing and redirection, special seating, reteaching, checks for understanding, OT embedded into the student's educational program and twice annual OT consultation, and testing accommodations of extended time and breaks (id. at pp. 2-3).

In May 2018, the section 504 team received reports from the student's chorus teacher, "Team 7-2 Teachers," and the "BITS" teacher (see Joint Ex. 14b at pp. 1, 3, 5). The team 7-2 teacher report indicated that during the past year the student advocated for herself when she had a need and that her attention at times was inconsistent (id. at p. 3). The team 7-2 teachers reported that the student did not seem to need or use accommodations of cool off time when upset and teacher availability outside of class time (id. at p. 4). The report also noted that consideration should be made to have the student sit with peers who were kind and positive role models and that in recent weeks the student had been very tired and had had a hard time staying awake in some classes (id.).

¹ In third grade (2013-14 school year) and at the beginning of the fourth grade (2014-15 school year), the student was in a reading intervention group that focused on decoding skills using the Wilson Reading program, but exited from that group in November 2014 as she no longer needed that level of intervention (Joint Ex. 5c at p. 2). Subsequently, the student was placed "in a comprehensive reading intervention group four days a week that ha[d] provided work on decoding and comprehension" (id.).

² Specifically, CSEs convened on December 2, 2010 (kindergarten), November 27, 2012 (second grade), and February 6, 2013 (second grade) (Joint Exs. 4d at p. 3; 4e at p. 3; 4f at p. 2).

³ The evidence in the hearing record does not include a referral related to the February 6, 2013 CSE (see Joint Ex. 4d).

In June 2018, the section 504 committee convened to conduct a reevaluation review of the student's section 504 plan for the 2018-19 school year (eighth grade) and found the student continued to be eligible to receive accommodations (Joint Ex. 3b at p. 1). The resultant plan indicated that the student became distracted, had difficulty maintaining focus in class which caused her to miss instructions and directions, presented with difficulties with executive functioning that impacted her organizational skills, and displayed heightened emotionality, and that she had difficulty navigating social relationships (id. at p. 2).⁴ The section 504 plan provided the student with one 30-minute session per month of individual counseling; one 30-minute session per year of an information on disability check-in with a school counselor within the first 10 weeks of the school year to discuss transition and progress to the new grade; accommodations including checks for understanding, repetition of directions, opportunities for review, assistance chunking long-term assignments, refocusing and redirection, special seating close to instruction and with specific peers, and special locker location and support; as well as testing accommodations of extended time and breaks (id. at pp. 2-3).

The student's fourth quarter report card for the 2017-18 school year revealed final grades between 73 (math) and 95 (Art7), with an end of year unweighted grade point average (GPA) of 88, numerous positive teacher comments, eight absences, and one tardy recorded for the year (Joint Ex. 12d at pp. 1-2). The report card indicated that the student's year-end class absences ranged from 2 to 12 (id. at p. 1).⁵ Also, New York State testing for that school year showed the student was performing at "Level 2" in English language arts (ELA) and math, which was described as not meeting the State standard (Joint Ex. 13d at pp. 1-5).

In a January 2019 letter to the parent, the assistant principal and district social worker shared their concern regarding the student's school attendance pattern, which included nine days of missed or incomplete instruction since the beginning of the year and encouraged the parent to contact the district to discuss a plan of action to improve the student's attendance (Joint Ex. 20a at p.1). The attendance records for the 2018-19 school year reveal that the student's attendance was poor and continued to drop significantly in spring 2019 (Joint Exs. 20b at pp. 1-2; 20c at pp. 1-8; 20d at pp. 1-8).

On March 12, 2019 the parent met with school staff to discuss the student's suicidal thoughts and discuss developing a safety plan (Tr. pp. 50, 215; Joint Ex. 23 at pp. 123, 125, 136-

⁴ The team also indicated that the student would become stressed from missing school and benefitted from having make-up work available to her in a timely manner (Joint Ex. 3b at p. 2).

⁵ The attendance report indicated that the student was absent about 11 times and tardy once during the 2017-18 school year (Joint Ex. 20e). However, the student's report card indicated the student was absent on eight school days that school year (Joint Ex. 12d at p. 2).

38).^{6, 7} In a March 19, 2019 letter, the parent requested that a psychological evaluation of the student be conducted (Joint Ex. 4c at p. 11). In a subsequent written communication to the district dated March 26, 2019, the parent requested a CSE meeting and the development of an IEP identifying the student as a student with an other health-impairment (id. at p. 10).⁸

On April 9, 2019 the parent provided consent for the district to conduct a classroom observation, social history, educational evaluation, psychological evaluation, and a social/emotional assessment (Joint Ex. 4c at p. 7). The parent also requested that the district administer the "Brief" and the "BASC," and conduct an OT evaluation "with sensory component," a "sensory regulation evaluation," and a physical therapy (PT) evaluation (id.). In May and June 2019, the district arranged for or had district staff conduct a PT evaluation, a classroom observation, a social history, an OT evaluation, and a psychological evaluation, and prepare teacher reports (see Joint Exs. 5b; 7b; 9; 14a; 15a; 16a).

On June 14, 2019, the parents sent a written request to the district seeking psychological and OT independent educational evaluations (IEE) as they disagreed with the district evaluations (Joint Ex. 4c at p. 3). Specifically, regarding the psychological evaluation, the parents "applauded" the evaluator's attempt to work with the student; however, they felt that the student's "struggles with anxiety during the testing interfered with obtaining an accurate measure of her abilities" (id.). The parents also indicated that they wished to move forward with the scheduled CSE meeting on June 19, 2019 (id.).

On June 19, 2019, the CSE convened to conduct an initial eligibility determination meeting (Joint Exs. 4a at pp. 1-2; 4a1 at pp. 1-29; 4c at pp. 1-2, 5-6). Following a discussion regarding the eligibility criteria for the other health-impairment disability category, the director of special education informed the parents that the CSE was "not recommending an IEP" at that time (Joint Ex. 4a1 at pp. 16-18, 27; see Joint Ex. 4a at p. 2). The parents notified the CSE that they would be enrolling the student at the Norman Howard School (Norman Howard) for the coming school year and would be seeking tuition reimbursement (Joint Ex. 4a1 at pp. 27-28).⁹

The 2018-19 (eighth grade) final report card revealed that the student had achieved final grades between 74 (earth science) and 98 (robotics) with an end of the year GPA of 85, and that

⁶ In a November 18, 2015 district suicide assessment report the classroom teacher stated that the student became upset in class when asked to "redo a paper," started scratching her arm with her fingernails and then with a pencil, and made the statement "I don't deserve to live" (Joint Ex. 17a at p. 2). Reportedly, the parent was contacted regarding the incident and informed that the scratch was not visible at that time and community resources were discussed (id.).

⁷ The evidence in the hearing record also indicates that subsequent to being informed about the student's suicidal thoughts that the district began developing a safety plan (Tr. pp. 102-05, 202, 215-21, 541-42, 557-558, 568-73; Joint Ex. 23 at pp. 117-131). However, no safety plan was entered into evidence during the impartial hearing.

⁸ The parent also emailed the district these requests on March 25, 2019 (Joint Ex. 23 at p. 116).

⁹ The Commissioner of Education has approved Norman Howard as a school with which districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

she passed her earth science Regents examination (Joint Ex. 12c at pp. 1, 2). The report card indicated that the student missed between 5 and 58 classes, with her having missed 58 ELA classes (id. at p. 1). Further, the student withdrew from chorus in the third quarter (id.). The report card indicated that the student had 15 absences and was tardy on 30 days during the year (id. at p. 2). The eighth grade New York State testing results showed the student performing at "Level 2" in ELA which was described as not meeting the State standard (Joint Ex. 13c at p. 3). A 2018-19 school transcript indicated a withdrawal date of June 30, 2019 (Joint Ex. 12b).

A July 1, 2019 letter from the student's physician stated that the student continued "to struggle with severe anxiety" and that the recommendations "for students her age include gradual exposure to school (i.e. going to school for only 1 period if tolerated and increasing as the patient is able)" as this practice was "considered to be preferable to forcing" a student to go just to be present or to home-school to avoid the stressful situation (Joint Ex. 18a at p. 1).

On July 1, 2019 the section 504 committee met to conduct an annual review and found the student continued to be eligible to receive accommodations under section 504 (Joint Exs. 3a at pp. 1-5; 3a1 at pp. 1-35). The section 504 committee recommended that the student continue to receive one 30-minute session per month of individual counseling and one 30-minute session per year of an information on disability check-in with school counselor within the first five weeks of school to discuss transition and progress to the new grade, and added five 60-minute sessions per year of counseling consultation to provide support to the student, parents and staff regarding social/emotional needs; four 60-minute sessions per year of OT consultation; and four 60-minute sessions per year of PT consultation (Joint Ex. 3a at pp. 2, 4-5). The other accommodations included on the July 2019 section 504 plan were checks for understanding, repetition of directions, opportunities for review, assistance with chunking long-term assignments, refocusing and redirection, special seating, and special locker location and support; and testing accommodations of extended time and breaks (id. at p. 4). The July 2019 section 504 committee added to the student's plan updated diagnoses to the identification of impairment section and accommodations including additional set of textbooks, copy of class notes, use of graphic organizers, access to breaks in counseling center, access to use of coping strategies, and access to alternate lunch location (id. at pp. 2-5).

On July 16, 2019, the parents obtained a private psychological assessment of the student (Joint Ex. 5a at pp. 1-11). The parent reported to the evaluator that the student struggled with the school day, experienced significant anxiety along with headaches and fatigue, had difficulty managing the stimulation of the lunchroom and band in addition to academic issues, exhibited incidents of school refusal and hiding in closets at school, attempted to manage an hour or two of school this spring, and that the student had not been in school since May (id. at p. 1). The evaluator observed that the student completed testing with a great deal of breaks, support and redirection; she exhibited high levels of frustration and low tolerance of stress; that overall, her coping skills were minimal and not up to the job of meeting current age-appropriate demands; and that her immaturity, insecurities, and emotionality contributed to her communication and social skill problems as well as her struggles to complete academic work (id. at p. 8). The evaluator estimated the student's "intellectual potential to be at least in the high average range," reported that academic testing revealed math as a weakness and that while reading and writing scores were in the average range, noted that they still were generally well below the student's intellectual potential (id.). The

evaluator stated that the autism spectrum most closely described the student's broad deficits and explained her failure to perform and function in spite of at least average academic skills and that over a decade of in school and out of school evaluations and services had not been sufficient to alter the student's steady decline in performance and to alter her growing emotional and behavioral problems (id. at pp. 8-9). The evaluator concluded that the student could only succeed with a radical change in placement and recommended a "successful" placement at Norman Howard which would help the student to acquire the needed skills for future educational and vocational demands (id. at p. 9).

The parent obtained a private OT assessment in August 2019 to gain greater insight into the student's sensory, motor and neuro developmental needs (Joint Ex. 7a at pp. 1-18). At the conclusion of the evaluation, the occupational therapist reported that standardized and clinical assessment measures left no doubt that the student had a variety of deficits and "atypicalities in sensory processing and motor coordination" (id. at p. 15). The occupational therapist concluded that the student would require a great deal of support to assist her with managing the demands of a school environment without the toxic effects of long-term stress (id.). In addition, the student would benefit from skilled and specific interventions to help her improve her basic sensory and motor abilities and required some relief from the stressful conditions that have eroded her coping skills and led to the mental health crisis she was experiencing (id.). The occupational therapist determined the student demonstrated clear and significant deficits in sensory modulation, proprioceptive processing, vestibular processing, tactile processing, auditory processing, multi-sensory processing, neurodevelopment, ocular-motor skills, strength, coordination, and executive functioning (id.). The occupational therapist's recommendations included a high degree of structure and predictability, limited exposure to competing auditory signals and an investigation into auditory and visual supports, optimal seating, an emotionally supportive environment, frequent breaks, awareness of potentially stressful events, explicit training on self-modulation techniques, support for organization and time management, and the avoidance of physical competition (id. at p. 16). In addition, the occupational therapist provided modifications, interventions and supports to address the student's working memory difficulties, difficulty "getting into set," difficulty inhibiting impulses, difficulty with response speed, and underlying neuro deficits (id. at pp. 16-17).

A. Due Process Complaint Notice

By due process complaint notice dated August 19, 2019, the parent asserted that the district "failed to evaluate the student in all areas of suspected disability (Child Find) and failed to provide the Student with a free appropriate public education" (FAPE) in the least restrictive environment under both the IDEA and section 504 for the 2017-18 and 2018-19 school years (Joint Ex. 1 at p. 1). The parent contended that the student's current 504 plan was not appropriate and was "not reasonably calculated to provide the Student with FAPE for the 2019-20 school year" (id.). Moreover, the district's refusal to classify the student continued to deprive her of a FAPE for the 2019-20 school year (id. at p. 2).

The parent argued that the student should have been classified as a student eligible for special education and related services because she has several diagnoses, including autism, anxiety, and attention deficit disorder (ADD), in addition to sensory processing dysfunction and

social skill deficits (Joint Ex. 1 at p. 2). According to the parent, these diagnoses and deficits adversely affected the student's educational performance (id.). Further, the parent contended that the student's "educational performance ha[d] not been commensurate with her expected level of achievement" (id.). The parent asserted that the student's anxiety and depression adversely affected her ability to attend school and that the district failed to offer compensatory services for the missed classes or take meaningful action to address the student's social/emotional and sensory needs (id.).

The parent contended that she "repeatedly expressed concerns" for the student to the district and provided evaluations dating back to 2012 (Joint Ex. 1 at p. 2). The parent asserted that the district failed to implement the recommendations of the private evaluations and failed to appropriately evaluate the student to "ascertain the factors that impact[ed] her functional performance so as to identify her educational needs," which deprived the student of appropriate supports under both section 504 and IDEA (id.). As a result, the parent argued that the district failed to comply with its child find obligations and failed to provide the student with a FAPE (id.). Moreover, the parent asserted that the district denied the parent her right to meaningfully participate in her child's education (id.).

Specific to the 2018-19 school year, the parent asserted that the evaluations conducted by the district were inadequate (Joint Ex. 1 at p. 2). Further, the parent alleged that, although the district agreed to fund IEEs due to the student's high level of anxiety and OT needs, it "placed a 'cap' on the reimbursement amount that [was] unreasonable and w[ould] result in a financial burden" (id. at p. 2-3). The parent also argued that the district's response to the parent's request for reimbursement for IEEs "was not in compliance with state and federal law and regulation" (id. at p. 2-3). Moreover, the parent alleged that the district's PT evaluation of the student "identified several areas of concern" but failed to make any recommendations for support or services to address the student's needs (id. at p. 3).

The parent raised several section 504 claims regarding the 2017-18 and 2018-19 school years and asserted that the district's 504 team failed "to adequately address the Student's unique educational needs and fails to provide her with FAPE" (Joint Ex. 1 at p. 3).

The parent further contended that the district deprived her of her right to participate in both the CSE and section 504 processes because the district failed to "give meaningful consideration to the Parent's request" for a non-public school placement (Joint Ex. 1 at p. 3). The parent alleged that the district failed to consider her input or the information contained in the IEE, which interfered in the parent's participation (id. at p. 4).

According to the parent, both the CSE and section 504 committee "placed an improper emphasis on the areas in which the Student was performing on grade level without recognizing that the Student's achievement was not expected based on her ability and without considering the other areas of educational performance that [were] adversely affected" (Joint Ex. 1 at p. 3). The parent contended that the district failed to consider the student's "inadequate social-emotional progress with both anxiety and peer relationships, her executive functioning needs, her physical needs, including sensory needs, and failed to appropriately consider the connection between the

Student's disability and her school avoidance and ability to access the general educational curriculum to the same extent as her nondisabled peers" (id. at pp. 3-4).

The parent requested findings that the district deprive the student of a FAPE under the IDEA and section 504 and that the parent's right to participate in the decision-making process was denied causing a deprivation of educational benefits (Joint Ex. 1 at p. 4). For relief, the parent sought an order requiring the CSE to reconvene to develop an IEP recommending Norman Howard for the student's placement, as well as an order requiring the district to reimburse the parent for the full cost of the psychoeducational and OT IEEs, and an order directing the district to provide the student with additional services for the failure to provide FAPE in "an amount, type and scope to be determined by the" IHO; and attorney's fees (id. at pp. 4-5).

B. Impartial Hearing Officer Decision

The parties proceeded to impartial hearing on December 12, 2019, which concluded on April 23, 2020 after five hearing dates (Tr. pp. 1-527). The IHO rendered a decision dated January 29, 2021 (IHO Decision on p. 26). Regarding child find, the IHO found that there was no evidence presented by the district "describing the Child Find Procedures used" by the district to identify students like this student "who are suspected of having a disability" (id. at p. 13). The IHO noted that no documents or testimony were presented as to the district's child find procedures or how child find is conducted by the district (id. at pp. 13-14). The IHO held that the student's increasing school avoidance and suicidal ideation in the spring of 2019 should have triggered child find procedures, if the district had them, and an evaluation (id. at p. 14). Therefore, the IHO concluded that the child procedures "had they existed would or should have resulted in a referral of [the student] to the CSE for an evaluation" (id.).

In addition, the IHO found that had child find procedures been in effect, the district would have conducted a functional behavioral assessment (FBA) to determine the basis for the student's school avoidance as an FBA is "designed to determine the cause of inappropriate behaviors negatively impacting a student's ability to learn and participate in school, which school avoidance clearly constitutes" (IHO Decision at p. 14). The IHO found that a failure to have child find procedures at the district requiring an FBA was a procedural violation of the IDEA, which contributed to the denial of FAPE (id. at pp. 14-15).

Moreover, the IHO determined that the district failed to "evaluate the student in all areas necessary to determine her eligibility for special education" (IHO Decision at p. 15). The IHO indicated that, at the time of the referral to the CSE, it was clear that the student had "substantial social/emotional needs that were preventing [the student] from participating in the educational setting in the classroom and in school" (id.). Therefore, the IHO found that the CSE was required to perform a psychiatric evaluation and an FBA to obtain additional information regarding the student's school avoidance (id.).

Regarding the student's eligibility, the IHO found that there was sufficient information before the CSE to find the student eligible for special education as a student with an other health-impairment or an emotional disturbance (IHO Decision at pp. 16, 18-19). The IHO noted that he believed other health-impairment "better describe[d]" the student's educational disability (id. at p. 16). Initially, the IHO determined that the CSE failed to follow the June 2019 district

psychological evaluation as the evaluation recommended an alternative placement from the general education setting, increased social/emotional support, individual academic assistance, instruction/guidance for executive functioning, reduced sensory and social distractions, greater feedback on social interactions, development of social coping skills, counseling, classroom accommodations, and testing accommodations (*id.* at pp. 16-17). The IHO held that "the alternative school placement recommendation in the District Psychological presumes a classification of a student with a disability" (*id.* at p. 17). Moreover, the IHO dismissed the district's contention that, because the student received passing grades, the CSE was unable to find her eligible for special education (*id.* at pp. 17-18). The IHO noted that the student did not "excel" per the case law provided by the district and that it was not until the student moved the Norman Howard that she "excelled" (*id.*). Based on the student's attendance issues during the 2019-20 school year, "in conjunction with grades not commensurate with her cognitive skills," the IHO found there was sufficient evidence to demonstrate an adverse educational impact for the purpose of finding the student eligible for special education under the IDEA (*id.* at p. 18).

Next, the IHO found that Norman Howard was an appropriate unilateral placement for the student as it was "ideally suited" for the student's needs (IHO Decision at pp. 21-22). The IHO held that the special education program at Norman Howard was "precisely the type of alternative placement recommended in the District and parent Psychological Evaluations" (*id.* at p. 22). Additionally, the IHO determined that the student made significant progress at Norman Howard during the 2019-20 school year and that the school met least restrictive environment restrictions (*id.* at p. 23). The IHO found that Norman Howard provided a therapeutic setting necessary for the student to make academic gains (*id.*).

The IHO determined that equitable considerations weighed in favor of granting the parent's requested relief, noting that the parent participated with the CSE and the district had not claimed the cost of Norman Howard was unreasonable (IHO Decision at pp. 24-25). The IHO did indicate that the 10-day notice letter was not in the hearing record but noted that the notice was but one equitable consideration (*id.* at p. 24).

Finally, the IHO held that the parent was entitled to a compensatory remedy for the district's failure to find the student eligible for special education during the 2018-19 and 2019-20 school years (IHO Decision at p. 25). Specifically, the IHO found that tuition at Norman Howard for the 2019-20 school year was "an alternative remedy to the denial of FAPE in this matter" (*id.*). The parent's request for tuition reimbursement for the 2019-20 school year at Norman Howard was granted (*id.* at p. 26). The IHO indicated that he considered all other requests and claims and found them to be without merit (*id.* at p. 25).

IV. Appeal for State-Level Review

The district appeals. The district argues that the IHO erred in finding a child find violation. The district contends that the student did not have increased absences until the spring of the 2018-19 school year and that the referral to the CSE was made on March 25, 2019, with the CSE meeting on June 19, 2019. The district asserts that the IHO erred in finding that there was no evidence in the hearing record of its child find process and in finding that any child find violation was material to provide a FAPE for the student. Even if there was no evidence in the record of the district's

child find procedures, the district argues that all of the "triggers" found by the IHO occurred after the CSE referral was made. Moreover, the district contends the IHO ignored evidence that demonstrated the district previously conducted a psychological assessment and many other evaluations of the student prior to the spring of 2019. Further, the district asserts that the CSE had met regarding the student three times prior to June 2019. The district argues that the IHO erred by finding a procedural violation that resulted in a denial of FAPE.

Next, the district contends that the IHO erred by finding it did not adequately evaluate the student in all areas of suspected disability. Specifically, the district asserts that the IHO erred by finding that an FBA and psychiatric evaluation were required and that failure to conduct these evaluations was a procedural violation. The district argues that there was no evidence to support a need for an FBA because the student's behaviors did not impede her learning. The district points to the student's grades to demonstrate that her learning was not impeded. As to the psychiatric evaluation, the district argues that it did not lack sufficient information regarding the student's educational needs. The district indicates that the student's increased behavioral needs only began in May 2019, after she went to Norman Howard for "shadowing" for three days.

The district argues that the IHO erred by finding that the student was eligible for special education as a student with an other health-impairment or emotional disturbance. The district contends that the IHO erred by finding the student did not "excel" within the district. The district alleges that the IHO also erred by relying on the student's grades as evidence that the student's diagnosed disorders adversely affected her educational performance and he "erred as a matter of law in comparing grade to cognitive ability to determine that the Student's disorders adversely affected her educational performance." Regarding the classification of emotional disturbance, the district contends that there was no evidence that the student presented with either inappropriate types of behavior or feelings under normal circumstances or a general pervasive mood of unhappiness or depression or that such characteristics existed over an extended period of time to a marked degree.

The district asserts that the IHO erred in finding that Norman Howard was an appropriate unilateral placement for the student as he erred in finding that small classes and a warm environment constitute specialized instruction. Also, the district alleges that the IHO erred by determining that the student's grades rendered the Norman Howard appropriate. Finally, the district argues that the IHO erred by finding the Norman Howard provided a therapeutic environment as there was no evidence to support such a finding.

Regarding relief, the district contends that the IHO erred by granting tuition reimbursement as a form of compensatory relief. The district argues that "any order of compensatory relief for the 2018-19 school year [wa]s neither supported by the IHO's findings nor by the evidence in the" hearing record. Lastly, the district asserts that any order of compensatory services for the 2019-20 school year was also not supported by the IHO's findings or the hearing record. The district contends that the IHO offered no basis to find that the student should have been found eligible as a student with a disability for the 2018-19 or 2019-20 school years.

The parent answers the district's appeal and interposes a cross-appeal. The parent argues that the district incorrectly asserted that the student's absence and school avoidance did not begin

until the spring of 2019, arguing that both began in the 2017-18 school year and escalated during the 2018-19 school year. The parent notes the January 2019 letter from the district citing the student's absences as having a significant negative impact on the student's academic progress. Further, the parent asserts that any argument that the student's school avoidance only occurred after the student spent time at Norman Howard is without merit because the student's distress occurred prior to that point and Norman Howard was only looked into after the student's psychiatrist recommended a new environment for the student.

Regarding child find, the parent asserts that the IHO properly found that the district violated its child find obligation and denied the student a FAPE, noting that the IHO correctly found that the record was devoid of evidence regarding the district's child find procedures. Further, the parent argues that the evaluation cited to by the district to demonstrate there was no violation of child find, demonstrated the student's long-standing need for special education as the district has been on notice since elementary school of the student deficits and needs. The parent contends that the district's failure to classify the student "caused a chronic, ongoing denial of FAPE." Moreover, the parent asserts that the IHO correctly determined that the district should have conducted an FBA and psychiatric evaluation in order to investigate the function of the student's avoidant behaviors. The parent argues that the IHO properly found that the student should have been classified as a student with either an other health-impairment or emotional disturbance as the CSE had evidence of an adverse educational impact. Finally, the parent contends that the district's arguments against Norman Howard are without merit as the school was an appropriate placement for the student and the IHO properly awarded tuition reimbursement as a compensatory remedy.

The parent cross-appeals several findings made by the IHO. The parent contends that the IHO erred by not finding a child find violation for the 2017-18 school year. The parent argues that the student was denied a FAPE for the 2017-18 school year as the district had been aware of the student's needs since elementary school. Moreover, the parent asserts that the IHO should have also found that the student met the criteria for the disability categories of learning disability or autism. Specifically, the parent asserts that the student has received an autism diagnosis and that the hearing record demonstrates that she has not met State-approved grade level standards in reading and math and has exhibited "a pattern of strengths and weaknesses in performance or achievement relative to age, State-approved grade-level standards or intellectual development."

The parent also contends that the IHO failed to address her claims that her right to meaningfully participate in the decision-making process was denied by the district. The parent argues that the district's failure to properly evaluate the student "significantly impeded [her] ability to participate in" the student's education. The parent contends that the district's special education director derailed CSE discussion that supported classification and unilaterally made a decision without seeking committee consensus, which again significantly impeded the parent's right to meaningful participation in the CSE and with the student's education.

The parent asserts that the IHO erred by not ordering the CSE to reconvene and recommend Norman Howard as the student's placement as the award of tuition reimbursement "failed to provide meaningful relief for [the student] based on [the IHO's] own findings of fact that [the student] needed an IEP and that Norman Howard is the least restrictive environment to meet [the student's] needs." The parent asserts that the IHO also erred by not ordering compensatory

education services of OT, PT, and educational instruction. The parent contends that the hearing record demonstrates that the denial of FAPE for the 2018-19 and 2019-20 school warranted compensatory OT and PT services. Also, the parent argues that the district's failure to address the student's school related anxiety and its failure to provide instruction for missed instruction time warrants compensatory educational instruction.

Next, the parent contends that the IHO failed to adhere to timeline requirements as he improperly granted extensions, failed to document the reasons for such extension, failed to provide a record close date, and failed to render a timely decision, all of which combined to cause a deprivation of FAPE. The parent notes that the IHO unilaterally cancelled two hearing date scheduled for February 2020 due to a personal conflict. Also, the parent indicates that closing briefs were submitted to the IHO on June 5, 2020, yet the IHO's decision was not dated until January 29, 2021. Further, the parent asserts that she did not consent of any extensions after December 13, 2019 and based on information and belief there were no extensions that met the regulatory requirements. The parent contends that by the time the IHO decision was rendered the 2019-20 school year had ended and the 2020-21 school year was half over, which prejudiced the student as she still has no IEP, and the parent has been bearing the financial burden of the student's education. The parent requests tuition reimbursement for the 2020-21 school year "to compensate for the protraction of the denial of FAPE caused by the District's failures and the denial of FAPE as a result of the delay caused by the IHO's failure to comply with" hearing timelines.

V. Applicable Standards

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

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP" (Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). The Supreme Court has indicated that "[t]he IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement" (Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. ___, 137 S. Ct. 988, 999 [2017]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural

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

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

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

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. Timeliness of IHO Decision

The parent asserts that the IHO failed to render the decision in a timely manner as the IHO improperly granted extensions, failed to document the reasons for the extensions, and failed to provide a record close date, and that these failures caused a deprivation of FAPE.¹⁰

When a parent files a due process complaint notice, the impartial hearing or prehearing conference must commence within 14 days of the IHO receiving the parties' written waiver of the resolution meeting, or the parties' written notice that mediation or a resolution meeting failed to result in agreement, or the expiration of the 30-day resolution period; unless the parties agree in writing to continue mediation at the end of the resolution period (8 NYCRR 200.5[j][3][iii][b][1]-[4]). An IHO is required to render a decision not later than 45 days after the expiration of the resolution period (34 CFR 300.510[b], [c]; 300.515[a]; 8 NYCRR 200.5[j][5]), unless an extension has been granted at the request of either party (34 CFR 300.515[c]; 8 NYCRR 200.5[j][5][i]). Extensions may be granted consistent within regulatory constraints, the IHO must ensure that the hearing record includes documentation setting forth the reason for each extension, and each extension "shall be for no more than 30 days" (8 NYCRR 200.5[j][5][i]).¹¹ Absent a compelling reason or a specific showing of substantial hardship, "a request for an extension shall not be granted because of school vacations, a lack of availability resulting from the parties' and/or representatives' scheduling conflicts, avoidable witness scheduling conflicts or other similar reasons" (8 NYCRR

¹⁰ With her answer and cross-appeal, the parent offers two email exchanges between the parties and the IHO and requests that they be considered. For purposes of this decision, the January 2020 email exchange will be referred to as exhibit "A" to the answer and cross-appeal, and the April 2020 email exchange will be referred to as exhibit "B" to the answer and cross-appeal.

¹¹ However, State regulation does allow for extensions beyond 30 days but for no more than 60 days during the time that "schools are closed pursuant to an Executive order issued by the Governor pursuant to a State of emergency for the COVID-19 crisis" (8 NYCRR 200.5[j][5][i]).

200.5[j][5][iii]). Moreover, an IHO "shall not rely on the agreement of the parties as a basis for granting an extension" (*id.*). If an IHO has granted an extension to the regulatory timelines, State regulation requires that the IHO issue a decision within 14 days of the date the IHO closes the hearing record (8 NYCRR 200.5[j][5]). Pursuant to State regulation, an IHO shall determine when the record is closed and notify the parties of the date the record is closed (8 NYCRR 200.5[j][5][v]).

The parent's due process complaint notice was dated August 19, 2019 (*see* Joint Ex. 1). The parties participated in five hearing dates on December 12, 2019, December 13, 2019, February 27, 2020, February 28, 2020, and April 23, 2020 (*see* Tr. pp. 1-476). During the impartial hearing, the IHO indicated that he would grant extensions to the timeline at the parties' request so that the parties' witnesses could appear (*see* Tr. pp. 121-22, 269, 474-75). In addition, at the end of the April 23, 2020 hearing date, the parties agreed in an off-the-record discussion that closing briefs would be submitted to the IHO on June 5, 2020, to give the parties time to review the transcript prior to submission of the briefs (Tr. pp. 477, 591). The district agreed with the IHO that it would request a case extension to enable the IHO to review all of the record and the parent's attorney did not object (Tr. p. 591).^{12, 13} The IHO decision was dated January 29, 2021 and did not indicate the record close date (*see generally* IHO Decision). In a footnote in the final decision, the IHO indicated that "[c]ase extensions were issued pursuant to Commissioner's Regulations . . . for purposes of witness availability, to obtain transcripts, for submissions, and for review of the record for a decision" (IHO Decision at p. 2 n.1).

Beyond the footnote in the IHO's decision, the hearing record does not include documentation of the IHO's written responses to the parties' extension requests stating the reasons relied upon for granting the extensions (*see* 8 NYCRR 200.5[j][5][iv]). The parent indicates that the IHO "unilaterally" cancelled hearings set for February 11, 2020 and February 12, 2020 (Answer & Cross-Appeal at p. 8; *see* Answer & Cross-Appeal Ex. A). While State regulations provide that an IHO "shall not solicit extension requests or grant extensions on his or her own behalf or unilaterally issue extensions for any reason," the regulations do not prohibit an IHO rescheduling a hearing date within the timelines, so long as the hearing is conducted at a time and place reasonably convenient to the parent (8 NYCRR 200.5[j][3][x]; [5][i]). Here, absent individual orders of extension, it is unclear if the rescheduled hearing dates were within the appropriate timeline at the time they were scheduled. According to parent's additional evidence, when the IHO re-scheduled the hearing dates, it does not appear that the parent's attorney objected to the rescheduled dates (*see* Answer & Cross-Appeal Ex. A). Ultimately, however, even if the extensions granted through June 2020 were appropriate, the hearing record is devoid of any

¹² The district requested a 60-day extension of the compliance date on April 27, 2020, which the IHO granted on April 29, 2020 (Parent Answer & Cross-Appeal Ex. B). There is no indication from those emails that the parent's attorney objected to the district's request.

¹³ The parent's post-hearing brief was dated June 4, 2020 (IHO Ex. II at p. 28). The district's post-hearing brief was not dated; however, the IHO decision indicated that both briefs were dated June 24, 2020 (IHO Ex. I; IHO Decision at p. 30).

information regarding why the IHO failed to issue the decision for more than seven months following the parties' submission of their post-hearing briefs.¹⁴

Based on the foregoing, the hearing record supports a finding that the IHO's decision was not rendered within the applicable timelines. Nevertheless, courts have found that as long as the student's substantive right to a FAPE is not compromised because of the late decision, an untimely administrative decision, by itself, does not deny the student a FAPE (Jusino v. New York City Dep't of Educ., 2016 WL 9649880, at *6 [E.D.N.Y. Aug. 8, 2016] ["Case law's emphasis on substantial vindication of substantive rights and ensuring a fair opportunity to participate is equally present in resolving disputes arising out of the decision deadline date. With respect to the 45-day deadline, 'relief is warranted only if . . . [a] forty-five-day rule violation affected [the student's] right to a free appropriate public education'" [alterations in the original], quoting J.D. v. Pawlet Sch. Dist., 224 F.3d 60, 69 [2d Cir. 2000]; see A.M. v. N.Y.C. Dep't of Educ., 840 F. Supp. 2d 660, 689 n.15 [E.D.N.Y. 2012] [same], aff'd, 513 Fed. App'x 95 [2d Cir. Mar. 12, 2013]). According to the courts, the substance of an administrative decision is not flawed just because it is issued late (J.C. v. New York City Dep't of Educ., 2015 WL 1499389, at *14 n.12 [S.D.N.Y. Mar. 31, 2015] [noting that "[t]he untimeliness of the SRO's decision does not suggest a flaw in its logic and reasoning"], aff'd, 643 Fed. App'x 31 [2d Cir. Mar. 16, 2016]; M.L. v. New York City Dep't of Educ., 2014 WL 1301957, at *13 [S.D.N.Y. Mar. 31, 2014] ["Although the Court agrees with Plaintiffs that the State Review Office's routine delays in issuing decisions is problematic, it has found no authority in IDEA cases that allows it to declare the SRO's decision a nullity"]).

Based on the foregoing authority, the IHO's failure to comply with the timelines does not warrant overturning the IHO's findings and, further, review of the hearing record does not support the parent's request for relief related to the delay. The parent alleges that the parent has been bearing the financial burden for the student's education for a second school year due to the IHO's unreasonable delay and requests tuition reimbursement for the 2020-21 school year to remedy the delay (Answer with Cross-Appeal at pp. 8-9). However, the parent is able to challenge, in a separate proceeding, the CSE's failure to refer the student and create an IEP for the 2020-21 school year, and there is insufficient evidence in the hearing record concerning either the CSE process or the student's placement for 2020-21 to allow for consideration of the impact of the IHO's noncompliance on that particular school year. Based on the foregoing, the hearing record does not support a finding that this is an instance where the delay in the IHO decision compromised the student's substantive right to a FAPE and no further relief is warranted related to the timing of the IHO's decision. Nevertheless, the IHO is reminded that a student may be prejudiced by delays in decision issuance and that he must comply with the applicable State regulations for granting extensions and rendering a decision in a timely manner.

¹⁴ While an IHO determines when the record is closed, guidance from the State Education Department's Office of Special Education explains that "[a] record is closed when all post-hearing submissions are received by the IHO" and that "[o]nce a record is closed, there may be no further extensions to the hearing timelines. . . . [and] the decision must be rendered and mailed no later than 14 days from the date the IHO closes the record" ("Requirements Related to Special Education Impartial Hearings," at p. 5, Office of Special Educ. [Sept. 2017], available at <http://www.p12.nysed.gov/specialed/publications/2017-memos/documents/requirements-impartial-hearings-september-2017.pdf>; see 8 NYCRR 200.5[j][5][iii]).

B. Child Find

The district contends that the IHO erred in finding a violation of child find. The district argues that the IHO erred in ruling that there was no evidence in the record of the district's child find process. The district alleges that, even if the IHO correctly determined that specific written "Child Find procedures" did not exist, the events that the IHO found would trigger its child find obligations occurred, for the most part, after the parent referral to the CSE was made. The parent argues that IHO correctly found that the district violated its child find obligations for the 2018-19 and 2019-20 school year; however, the parent contends that the IHO should have also found the district violated its obligations for the 2017-18 school year.

The purpose of the "child find" provisions of the IDEA are to identify, locate, and evaluate students who are suspected of being a student with a disability and thereby may be in need of special education and related services, but for whom no determination of eligibility as a student with a disability has been made (see Handberry v. Thompson, 446 F.3d 335, 347-48 [2d Cir. 2006]; E.T. v. Bd. of Educ. of Pine Bush Cent. Sch. Dist., 2012 WL 5936537, at *11 [S.D.N.Y. Nov. 26, 2012]; A.P. v. Woodstock Bd. of Educ., 572 F. Supp. 2d 221, 225 [D. Conn. 2008], aff'd, 370 Fed. App'x 202 [2d Cir. Mar. 23, 2010]; see also 20 U.S.C. § 1412[a][3][A]; 34 CFR 300.111; 8 NYCRR 200.2[a][1], [7]). The IDEA places an affirmative duty on State and local educational agencies to identify, locate, and evaluate all children with disabilities residing in the State "to ensure that they receive needed special education services" (20 U.S.C. § 1412[a][3]; 34 CFR 300.111[a][1][i]; Forest Grove, 557 U.S. at 245; K.B. v. Katonah Lewisboro Union Free Sch. Dist., 2019 WL 5553292, at *7 [S.D.N.Y. Oct. 28, 2019]; E.T., 2012 WL 5936537, at *11; see 20 U.S.C. § 1412[a][10][A][ii]; see also 8 NYCRR 200.2[a][1], [7]; New Paltz Cent. Sch. Dist. v. St. Pierre, 307 F. Supp. 2d 394, 400 n.13 [N.D.N.Y. 2004]). The "child find" requirements apply to "children who are suspected of being a child with a disability . . . and in need of special education, even though they are advancing from grade to grade" (34 CFR 300.111[c][1]; see 8 NYCRR 200.2[a][1], [7]; D.K. v. Abington Sch. Dist., 696 F.3d 233, 249 [3d Cir. 2012]; J.S. v. Scarsdale Union Free Sch. Dist., 826 F. Supp. 2d 635, 660 [S.D.N.Y. Nov. 18, 2011]). To satisfy the requirements, a board of education must have procedures in place that will enable it to identify, locate, and evaluate such children (34 CFR 300.111[a][1]; 8 NYCRR 200.2[a][1], [7]).

Because the child find obligation is an affirmative one, the IDEA does not require parents to request that the district evaluate their child (see Reid v. District of Columbia, 401 F.3d 516, 518 [D.C. Cir. 2005] [noting that "[s]chool districts may not ignore disabled students' needs, nor may they await parental demands before providing special instruction"]; see also Application of the Bd. of Educ., Appeal No. 11-153; Application of a Student Suspected of Having a Disability, Appeal Nos. 11-092 & 11-094). A district's child find duty is triggered when there is "reason to suspect a disability and reason to suspect that special education services may be needed to address that disability" (J.S., 826 F. Supp. 2d at 660; New Paltz Cent. Sch. Dist., 307 F. Supp. 2d at 400 n.13, quoting Dep't of Educ., State of Hawaii v. Cari Rae S., 158 F. Supp. 2d 1190, 1194 [D. Haw. 2001]). To support a finding that a child find violation has occurred, school officials must have "overlooked clear signs of disability" and been "negligent in failing to order testing," or have "no rational justification for deciding not to evaluate" the student (Mr. P v. W. Hartford Bd. of Educ., 885 F.3d 735, 750 [2d Cir. 2018], quoting Bd. of Educ. of Fayette County, Ky. v. L.M., 478 F.3d 307, 313 [6th Cir. 2007]; see A.P., 572 F. Supp. 2d at 225). States are encouraged to develop

"effective teaching strategies and positive behavioral interventions to prevent over-identification and to assist students without an automatic default to special education" (Los Angeles Unified Sch. Dist. v. D.L., 548 F. Supp. 2d 815, 819 [C.D. Cal. 2008], citing 20 U.S.C. § 1400[c][5]). Additionally, a school district must initiate a referral and promptly request parental consent to evaluate a student to determine if the student needs special education services and programs if a student has not made adequate progress after an appropriate period of time when provided instruction in a school district's response to intervention program (8 NYCRR 200.4[a]), see also 8 NYCRR 100.2[ii]).

Related to child find is the referral process. Upon written request by a student's parent, a district must initiate an individual evaluation of a student (see Educ. Law § 4401-a[1], [3]; 8 NYCRR 200.4[a][1][i]; [a][2][ii]-[iv]; [b]; see also 20 U.S.C. § 1414[a][1][B]; 34 CFR 300.301[b]).

Here, the IHO's main rationale to support his decision that the district failed to meet its child find obligations was that the district failed to submit evidence of its child find procedures (IHO Decision at pp. 13-14). Although evidence of the district's child find procedures would have been relevant to issues before the IHO, the district's failure to present evidence of them in the hearing record is not fatal due to the nature of the parent's allegations. The parent did not allege that the district did not have child find policies and procedures in place; rather, she asserted that the district had sufficient reason to suspect that the student had a disability requiring special education to warrant a referral of the student to the CSE for an initial evaluation (see Joint Ex. 1). In reviewing whether the district satisfied its child find obligations, the child find inquiry "must focus on what the [d]istrict knew and when" (K.B., 2019 WL 5553292, at *8, quoting J.S., 826 F. Supp. 2d at 652).

In this case, the district has been aware of the student as a student with needs since her kindergarten year when the CSE first evaluated the student (see Joint Ex. 4f). The student continued to receive services through 504 accommodation plans since first grade and also received building level services such as academic intervention services (AIS) during elementary school (Joint Exs. 3b-3k; 5c).

To support her argument that a child find violation occurred during the 2017-18 school year, the parent points to the student's long-standing needs. The parent does not point to any specific instances that would have triggered a referral by the district. In addition to the supports set forth in the 504 plan for the 2017-18 school year, the student received AIS for math and ELA (see Tr. pp. 146-47; Joint Ex. 3c at pp. 2-3). The parent reported that, during seventh grade, she and the student's father provided the student with a lot of support at home with assignments (see Tr. pp. 161-62). In addition, the evidence indicates that the student began to avoid riding the bus after an incident with a peer (Joint Ex. 23 at pp. 159-75). Teachers reported that the student had improved in her ability to advocate for herself but exhibited inconsistent attention and did not use all of the accommodations available to her (Joint Ex. 14b at pp. 3-4). Toward the end of the school year, the student had appeared more tired in class (id. at p. 4). By the end of the 2017-18 school year, the student earned grades between 73 and 95 with a final GPA of 88 (Joint Ex. 12d). The student had been absent a total of eight days during the 2017-18 school year with one day tardy (Joint Ex. 12d at p. 2).

Turing the 2018-19 school year, the student continued to have a section 504 plan in place and received some AIS support (see Joint Exs. 3b; 23 at p. 156; but see Tr. p. 147 [indicating that the student did not receive AIS during eighth grade]). The evidence in the hearing record demonstrates that the student began to exhibit school avoidance and other issues during the school year. In November 2018, the parent reported to the district that the student was struggling and was showing signs of depression and that her medications were being adjusted (Joint Ex. 23 at p. 153). In January 2019, the first indication of school avoidance was documented in a letter from the district noting the student's increased absences (see Joint Ex. 20a). At the time of the January 2019 letter, the student had nine absences, was tardy six times, and left school early three times (Joint Exs. 20a; 20b at p. 1).¹⁵ From the January 16, 2019 letter to March 26, 2019, when the parent made the formal referral to the CSE, the student only had two absences, although she had four late arrivals and one early dismissal (Joint Exs. 5c at p. 10; 20b at p. 1).

While the student's attendance was inconsistent, the district acknowledged that on or around March 12, 2019, the student's parents notified them that the student had expressed thoughts of suicide (Tr. pp. 50; Joint Ex. 23 at p. 123). Based on this discussion, the district and parent indicated that safety plan was going to be developed (Tr. pp. 102-04, 202, 215-21, 541-42, 557-558, 568-73; Joint Ex. 23 at pp. 117-131). The parent requested a psychological evaluation of the student on March 19, 2019, very soon after the March 12, 2019 meeting when the district became aware of the student's suicidal thoughts (Joint Ex. 4c at p. 11). On March 26, 2019, the parent specifically requested a CSE meeting be held to review the student's eligibility for special education (Joint Ex. 4c at p. 10). And the parent provided her consent for evaluations on April 9, 2019 (Joint Ex. 4c at p. 7).

In this instance, the parent referral came close in time to the district's notice of the student's heightened emotional state, such that there was no child find violation, nor would there be a remedy for any potential child find violation over a two-week span, as the district acted promptly once it received the parent referral by evaluating the student between April and June 2019 (see Joint Exs. 5b; 7b; 9; 14a; 15a; 16a) and holding a CSE meeting on June 19, 2019 (see Joint Exs. 4a at pp. 1-2; 4a1 at pp. 1-29; 4c at pp. 1-2, 5-6).

Based on the foregoing, for both the 2017-18 school year and 2018-19 school years prior to the March 2019 referral, there is no evidence that the district overlooked clear signs of disability, was "negligent in failing to order testing, or had no rational justification for deciding not to evaluate the student (Mr. P., 885 F.3d at 750). Rather, the district rationally determined that it could continue to address the student's needs with building level supports and the 504 plans. Suffice it to say that, while the parent would have preferred the CSE to have found the student eligible for special education, child find is a distinct question from eligibility, and "[t]he IDEA does not call for instantaneous classification of a student upon suspicion of a disability" . . . rather, "[o]nce a school has 'reason to suspect a disability,' the school must conduct an evaluation of the child within a reasonable time" (W.A. v. Hendrick Hudson Cent. Sch. Dist., 2016 WL 6915271, at *24 [S.D.N.Y. Nov. 23, 2016], quoting Murphy v. Town of Wallingford, 2011 WL 1106234, at *3 [D. Conn.

¹⁵ From September 2018 to January 16, 2019, the attendance record indicated that of the student nine absences, seven were marked as the student being "sick" and two as "personal." (Joint Ex. 20b at p. 1).

Mar. 23, 2011]). The district did so in this case. Accordingly, the IHO's determination that the district committed a child find violation during the 2018-19 school year is reversed.

C. CSE Process

1. Parent Participation

The parent argues that her right to meaningful participation in her child's education was denied. Specifically, she asserts that the district's failure to evaluate the student impeded her right to participate and that the district's special education coordinator derailed discussion regarding classification and unilaterally decided on the issue of classification without consensus of the committee.

The IDEA sets forth procedural safeguards that include providing parents an opportunity "to participate in meetings with respect to the identification, evaluation, and educational placement of the child" (20 U.S.C. § 1415[b][1]). Federal and State regulations governing parental participation require that school districts take steps to ensure that parents are present at their child's IEP meetings or are afforded the opportunity to participate (34 CFR 300.322; 8 NYCRR 200.5[d]). Although school districts must provide an opportunity for parents to participate in the development of their child's IEP, mere parental disagreement with a school district's proposed IEP and placement recommendation does not amount to a denial of meaningful participation (see T.F. v. New York City Dep't of Educ., 2015 WL 5610769, at *5 [S.D.N.Y. Sept. 23, 2015]; A.P. v. New York City Dep't of Educ., 2015 WL 4597545, at *8, *10 [S.D.N.Y. July 30, 2015]; E.F. v. New York City Dep't of Educ., 2013 WL 4495676, at *17 [E.D.N.Y. Aug. 19, 2013] [stating that "as long as the parents are listened to," the right to participate in the development of the IEP is not impeded, "even if the [district] ultimately decides not to follow the parents' suggestions"]; P.K. v. Bedford Cent. Sch. Dist., 569 F. Supp. 2d 371, 383 [S.D.N.Y. 2008] [noting that a "professional disagreement is not an IDEA violation"]; Sch. for Language & Commc'n Dev. v. New York State Dep't of Educ., 2006 WL 2792754, at *7 [E.D.N.Y. Sept. 26, 2006] [finding that "[m]eaningful participation does not require deferral to parent choice"]).

Here, there is no information in the hearing record to support a finding that the parent was denied the right to meaningfully participate in educational planning for the student. The transcripts for the June 2019 CSE show that the parent was able to express her opinions and concerns and the committee listened to her at the meeting (see Joint Ex. 4a1). The June 2019 CSE did not follow the parent's suggestions; however, this does not mean that the parent's right to participate was denied or hindered as discussed above, the district does not have to defer to the parent's choice in order for the meaningful participation to occur. Further, the parent's argument that the lack of evaluative information prevented her from participating in her child education is without merit. The parent was able to obtain multiple IEEs and, although as discussed below the district's evaluative information was insufficient, it did not prevent the parent from expressing her opinions and concerns and advocating for her child.

2. Sufficiency of Evaluative Information

The IHO found that the district failed to ensure that the student was evaluated in all areas of disability (IHO Decision at p. 15). Specifically, the IHO held that the CSE was required to

complete a psychiatric evaluation and an FBA "to obtain additional information regarding [the student's] classroom and school avoidance" (*id.*). The district contends the IHO erred in determining that an FBA and psychiatric evaluation were required as there was no evidence that the student's behaviors impeded her learning or the learning of others and that the student's learning was not impeded as evidenced by her grades.

Regulations require that a district must conduct an evaluation of a student where the educational or related services needs of a student warrant a reevaluation or if the student's parent or teacher requests a reevaluation (34 CFR 300.303[a][2]; 8 NYCRR 200.4[b][4]); however, a district need not conduct a reevaluation more frequently than once per year unless the parent and the district otherwise agree and at least once every three years unless the district and the parent agree in writing that such a reevaluation is unnecessary (8 NYCRR 200.4[b][4]; see 34 CFR 300.303[b][1]-[2]). A CSE may direct that additional evaluations or assessments be conducted in order to appropriately assess the student in all areas related to the suspected disabilities (8 NYCRR 200.4[b][3]). Any evaluation of a student with a disability must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parent, that may assist in determining, among other things, the content of the student's IEP (20 U.S.C. § 1414[b][2][A]; 34 CFR 300.304[b][1][ii]; see S.F., 2011 WL 5419847 at *12 [S.D.N.Y. Nov. 9, 2011]; see Letter to Clarke, 48 IDELR 77 [OSEP 2007]). In particular, a district must rely on technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors (20 U.S.C. § 1414[b][2][C]; 34 CFR 300.304[b][3]; 8 NYCRR 200.4[b][6][x]). A district must ensure that a student is appropriately assessed in all areas related to the suspected disability, including, where appropriate, social and emotional status (20 U.S.C. § 1414[b][3][B]; 34 CFR 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]). An evaluation of a student must be sufficiently comprehensive to identify all of the student's special education and related services needs, whether or not commonly linked to the disability category in which the student has been classified (34 CFR 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]; see Application of the Dep't of Educ., Appeal No. 07-018).

The evidence in the hearing record reflects the student's extensive evaluative history and the district's responses to the parent's requests and concerns (see, e.g. Joint Exs. 3a1; 5a-i; 6a-i; 7a-m; 8a-b; 9; 10a-b; 11a-b; 23).

At the time of the June 2019 CSE meeting the CSE had either conducted or otherwise had available the following evaluative information from the 2018-19 school year: a May 2019 PT evaluation report, a May 2019 classroom observation, a May 2019 social history, May 2019 teacher reports, a May 2019 OT evaluation report, a June 2019 psychological evaluation report, the student's final 2018-19 report card, and results of 2018-19 "NWEA MAP testing" (Tr. pp. 17-20, 26, 75, 77; Joint Exs. 5b; 7b; 9; 12c; 13b; 14a; 15a; 16a).

A May 2019 PT evaluation was requested by the parent as part of a comprehensive evaluation to determine whether the student was eligible for additional school-based support (Joint Ex. 9 at pp. 1-5). In sum, the physical therapist stated that the student presented as mostly cooperative with functional ambulation and most foundational gross motor skills (*id.* at p. 5). According to the physical therapist, the student's gross motor ability was below average for her

age in coordination, balance, strength, and endurance and she exhibited clinically observable and measurable joint hypermobility and decreased core strength, which potentially contributed to fatigue, anxiety, and feelings of isolation due to struggling to participate at the level of peers (*id.*). The physical therapist recommended that the student learn joint stability techniques and increase core and extremity strength in order to improve her postural alignment and control, and to positively affect her overall coordination, movement fluidity and endurance (*id.* at p. 5).

According to a May 2019 classroom observation, the student was alert and happy throughout the observed lesson, shared her thoughts, was able to maintain focus as needed and take notes without prompting, and talked freely with peers and refocused without prompts (Joint Ex. 15a at pp. 1-2).

The May 2019 social history report reflected the student's past diagnoses including ADHD, oppositional defiant disorder, OCD, Asperger's, sensory processing delay, speech-language delay, tic disorder, generalized anxiety disorder, learning disability, auditory processing delay, autism spectrum disorder, unspecified coordination delay, sleep disturbance, fine motor delay, and non-verbal language disability (Joint Ex. 16a at pp. 1-5; *see* Joint Ex. 18b). At the time of the social history, the student was under the care of a psychiatrist for medication management, as well as a specialist in self-regulation training and behavior management techniques for behavior support (Joint Ex. 16a at p. 2; *see* Joint Ex. 18b). The May 2019 report stated that within the last few months the student's anxiety had been quite high in school and at times she ran and hid in a bathroom or in a small space and had also reported wanting to kill herself (Joint Ex. 16a at p. 3). The May 2019 report noted that at that time, the student had been modifying her schedule to eliminate stressful encore classes, a.m. and p.m. homeroom, study hall, and lunch (*id.*). According to the report, the parent stated that the student could tolerate two consecutive core classes and was working up to being able to tolerate more but reported that three or more consecutive classes caused headaches (*id.*). The parent reported that her biggest concern was that the student was not thriving, that she was constantly struggling, and that her health was suffering (*id.*).

In May 2019, the student's math, German, physical education, applied art, earth science, social studies, and applied music teachers completed teacher reports (*see* Joint Ex. 14a at pp. 1-14). The teachers reported concerns including that when tired the student struggled to keep up with the lesson and it affected her attention and focus, that she could be easily distracted, that she needed to be seated near the front of the room, that she struggled with directions and often needed them repeated, that her absences at times affected her work completion as she seemed overwhelmed by backed up assignments, at times anxiety from an event from earlier in the day would "get in her way", and that in some classes she would often not participate in partner work and did not socialize with peers in the class (*see id.*). The physical education teacher reported that on a few occasions the student had been overwhelmed or embarrassed and ran out of class to the bathroom and that on multiple occasions it had been difficult to get her to come out (*id.* at p. 6).

A May 2019 504 teacher report prepared for the section 504 team stated that the student was very slow in processing new information, required repetition to learn new information, could become overwhelmed at times, struggled with meaningful interpretation in her writing, had a difficult time socially, felt that everyone saw her "not doing well" which made her anxious, and

that she lacked self-confidence (Joint Ex. 14a at pp. 15-16). Staff who prepared the May 2019 report opined that the accommodations then-currently in place were appropriate (id. at p. 16).

The May 2019 OT evaluation report reflected that on tests of motor proficiency the student's scores were within the average to below average range indicating that the student was demonstrating functional skill deficits in some areas of fine motor and visual motor skills (Joint Ex. 7b at p. 4). The student demonstrated difficulty with tasks relying heavily on motor planning and bilateral coordination skills and displayed slow and uncoordinated movements during those tasks (id.). The occupational therapist noted that difficulty in those areas could impact an individual's academic abilities in the areas of reading, writing, and mathematics (id.). Administration of a sensory profile to the parent yielded scores in the "definite difference" range, and reflected that in the school environment, the student had difficulty with loud noisy environments and with managing the actions of her peers which made participating in typical school day tasks, such as eating with peers in the cafeteria, difficult (id.). In addition, the student demonstrated poor registration of sensory input which may have contributed to her being able to hold certain body positions such as sitting upright in a chair and that difficulty in that area may create challenges for attending to tasks and lessons throughout the school day (id.).

A June 2019 psychological evaluation report prepared by a Board of Cooperative Educational Services (BOCES) school psychologist stated that the student was referred for a comprehensive evaluation of her current skills and abilities by her parents due to on-going academic, sensory, and emotional issues at school (Joint Ex. 5b at pp. 1-14). The evaluator noted that the student had a section 504 plan in place to provide program modifications, test accommodations and monthly counseling and that the student had been receiving educational supports since she was approximately one year old to address language, behavior, social emotional skills, sensory and "occupational therapy issues" (id. at p. 11). The evaluator identified the student's diagnoses to include autism spectrum disorder, ADHD, OCD, depressive disorder, and generalized anxiety disorder (id.). Cognitive assessment results found the student functioning in the average range for overall intelligence with skills ranging from very low to high average (id. at p. 12). The student performed better with concrete as opposed to abstract material and her performance appeared to be influenced by sustained attention, concentration, and emotional issues (id.). Academically the student's skills ranged from low average to average, which according to the evaluator made the independent completion of grade-level work difficult (id.). The evaluator reported that the student displayed moderate delays in grapho-motor integration skills and average component skills of visual perception and motor coordination (id.).

According to the June 2019 psychological evaluation report, rating scales completed by the parent indicated that the student had difficulty with attention, internalized behaviors, adaptive skills, and executive functioning while teacher rating scales suggested that the student exhibited typical externalized behaviors and in some cases had issues with withdrawal, atypicality, social development, and executive functioning (Joint Ex. 5b at p. 12). The evaluator indicated the student appeared to be anxious and depressed, viewing herself as inadequate and noted that this was partly due to the student not meeting her high expectations and having limited social success (id.). In addition, the evaluator noted that her coping skills were limited and that many of her issues appeared to be influenced by executive functioning deficits (id.). The evaluator concluded that based on her observations, the student's history, test data, and reports from the parents and teachers

that the student appeared to be "neuro-diverse" and that qualitatively she exhibited traits that were similar to those identified with autism spectrum disorder, anxiety and mood disorders and deficits in executive functioning skills, which were seen in the student's "difficulty producing independently even when the skills [were] present" and in self-regulation (id.). The evaluator stated that all of those facets interacted to limit the student's ability to develop adequate coping skills to maintain herself without fatigue and shutting down (id.).

Further, the evaluator stated that because it appeared the student was "caught in a cycle where school success and her current functioning [were] incompatible and that it seem[ed] unlikely that the current environment [would] be able to break that cycle," the CSE should consider options to provide an alternative environment (Joint Ex. 5b at p. 12). The evaluator recommended that the student would benefit from an environment that offered increased social/emotional support, opportunity for individualized instruction in academics, opportunity for instruction and guidance in developing executive functioning skills, reduced social and sensory distractions, more immediate feedback on her interactions and influence on others, and opportunity for instruction and guidance in developing social coping skills (id.). In addition, the evaluator recommended for the student group and individual counseling (which may help the student in understanding herself and her interactions with others), ongoing contact with her family and community-based providers, typing-skills instruction, and a number of program modifications and supports and testing accommodations (id. at pp. 12-13).

The student's fourth quarter report card for the 2018-19 school year shows that she achieved the following final grades: 74 (earth science), 86 (German 8), 98 (robotics), 91 (applied art), 79 (ELA), 90 (applied music), 77 (math 8), 85 (physical education), 85 (social studies), for a final GPA of 85 (Joint Ex. 12c at pp. 1-2). The report card also reflected that the student had achieved a 77 on the earth science Regents examination, and a 75 on the "Check Point A German" assessment (id. at p. 1). Results of the 2018-19 NWEA MAP testing, which the coordinator of special education described as an internationally used, "normed" program that measures students' achievement levels in reading and math, indicated that the student's math skills were "growing above average" when compared to her peers, and that she was "achieving at or above her peers in the same grade level as she's at the seventy-second percentile" (Tr. pp. 17-21; Joint Ex. 13b at pp. 2-3). In reading, the coordinator of special education testified that the NWEA MAP testing results showed that the student's growth was also above average for students her age, and her achievement was in the 66th percentile, which he described as being "at or above grade level" (Tr. pp. 24-25; Joint Ex. 13b at pp. 4-5).

Turning next to the evidence available to the June 2019 CSE regarding the student's attendance and school avoidance, the student's seventh grade (2017-18) attendance reports indicated the student's year end absences ranged from 2 to 12 in each of her classes, with a total of 8 days absent and 1 day tardy (Joint Exs. 12d at pp. 1-2; 20e).

In a January 2019 letter to the parents the district shared its concern regarding the student's school attendance pattern, which included nine days of missed or incomplete instruction since the beginning of the year and encouraged the parents to contact the district to discuss a plan of action to improve the student's attendance (Joint Ex. 20a at p.1). Attendance records reveal that the student's attendance was poor during the 2018-19 school year as compared to the previous school

year and dropped significantly in spring 2019 (Joint Exs. 12c at pp. 1-2; 12d at pp. 1-2; 20b at pp. 1-2; 20c at pp. 1-8; 20d at pp. 1-8). The student's final report card for the 2018-19 school year indicated that she had missed 58 ELA classes, 29 earth science classes, 29 social studies classes, 27 German classes, 27 math classes, 19 applied music classes, 17 applied art classes, 10 physical education classes, and 14 robotics classes; she was absent for a total of 15 days and was tardy on 30 days (Joint Ex. 12c at pp. 1-2).

The evidence in the hearing record shows that in spring 2019 the parents began keeping the student home, or signing the student out from school—breaking the school day in to "agreeable parts" for the student whereby she could successfully stay in school without becoming overwhelmed by her anxiety symptoms—which the parties came to refer to as "chunking" (see Tr. pp. 51-53, 95-97, 188-91, 364, 416-17, 448-49, 541; Joint Ex. 19 at p. 5).

The coordinator of special education testified that he was aware that in spring 2019 the student "had missed a great deal of school" and the parents were attempting to get the student to attend school for at least part of the day (Tr. pp. 14, 51). He testified that although he did not know the "exact reasons every day," his understanding as to why the parents were taking the student out of school was because the student would say she was "having a tough time" (Tr. pp. 52-53). The district junior high principal testified that the student was missing school because the parents were choosing to come and pick the student up or were keeping her home, actions which they communicated to the principal (Tr. pp. 87, 94-96). According to the principal, the reasons the parent gave for the student's absences were that the student was not having a good day, and at times the parent would mention the student's anxiety and her concerns about being in school, including becoming upset due to the noise in the cafeteria or being concerned about an assignment that was due (Tr. pp. 96-97). The principal acknowledged that on a few occasions the student was feeling anxious about going to gym class, so the principal developed an "alternate plan" so that the student did not have to go to gym on those days (Tr. pp. 100-01). She also testified that there were a few "situations" in which the student would avoid class and go to the bathroom without permission and staff would have to locate her; on one occasion, the principal helped get the student out of the bathroom (Tr. pp. 102, 105). Moreover, the principal testified that every day the parent would bring something to the school's attention about the student, the parents in this matter were very open with the attendance concerns and the student not going to school, and from her perspective it appeared that the parents were making genuine efforts to get the student back into school (Tr. pp. 106, 101, 111).

The principal testified that the process to identify students who have excessive missed school days, tardiness, or missed classes is to conduct a quarterly review of the student's attendance with the team consisting of herself, at times the assistant principal, and the social worker (Tr. pp. 105-06). The team reviews the students' attendance and determines the number of absences, the percentage of absenteeism, and then determines the next steps, which many times includes contact with the students' homes (Tr. p. 106; see Joint Ex. 20a). The principal testified that near the end of the 2018-19 school year the student was choosing to call and go home, that the school was "not intervening," and the principal did not have any information about what was prompting the student to call and ask to be taken home (Tr. p. 111). She indicated that the student was either coming in late or leaving early throughout the school year more regularly than would be advisable, and that the only information she was provided was that it was due to the student's anxiety, and frustration

with certain classes, peers and noises (Tr. pp. 112-14). The school counselor testified that the student suggested that she wanted to get out of classes when frustrating events happened, or that she was tired and wanted to go home to rest, but the counselor could not say "definitively, the reasoning that [the student] wanted to leave a class" (Tr. pp. 582-83; see Tr. pp. 534-36).

As detailed above, a review of the available evaluation, teacher reports and testimony points to school avoidance and chronic absences as a primary area of need for the student during the latter portion of the 2018-19 school year. However, the hearing record does not contain evidence of the district determining the nature or cause of the student's admittedly excessive absences beyond concluding that she was having a bad day, was concerned about being in school, and had anxiety. Nor does the evaluative information available to the district identify the contextual factors that contributed to her absenteeism or the consequences that served to maintain it. Therefore, the hearing record offers no reason to disturb the IHO's finding that the district failed to ensure that the student was evaluated in all areas necessary to determine her eligibility for special education and that the CSE was required to conduct additional assessments, including obtaining a psychiatric evaluation and conducting an FBA, to obtain additional information regarding the student's classroom and school avoidance.

D. Eligibility – Other Health-Impairment

The IHO found that the student was eligible for special education and related services as a student with either an other health-impairment or an emotional disturbance; specifically, that the student's attendance problems in conjunction with her grades, which the IHO concluded were not commensurate with her cognitive abilities, demonstrated "adverse educational impact for the purpose of classification under the IDEA" (IHO Decision at pp. 16-18). On appeal the district contends that the IHO erred in making this determination as the student's grades did not support a finding of an adverse educational impact. While the parent asserts that the IHO correctly found that the student was eligible under other health-impairment and emotional disturbance disability categories, she argues on appeal that the IHO also should have analyzed whether the student was eligible under the classifications of autism and learning disability.

Initially, for the reasons stated below, the evidence in the hearing record supports a finding that the student meets the eligibility criteria for special education and related services as a student with an other health-impairment. As such, it is not necessary to determine whether the student is eligible under another category. If the parent believes a different eligibility category better describes the student's needs, she may request that the CSE consider it when it next convenes.

The IDEA defines a "child with a disability" as a child with specific physical, mental, or emotional conditions, including an other health-impairment, "who, by reason thereof, needs special education and related services" (20 U.S.C. § 1401[3][A]; Educ. Law § 4401[1]). Under State and federal regulation, other health-impairment is defined as "having limited strength, vitality, or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment, that . . . [i]s due to chronic or acute health problems such as . . . attention deficit hyperactivity disorder [ADHD]" (34 CFR 300.8[c][9]; 8 NYCRR 200.1[zz][10]). Here, the district does not contest that the student's diagnosis of ADHD may satisfy this part of the standard.

The other health-impairment category also requires an examination of whether the student's condition or deficits adversely affected her educational performance (see 34 CFR 300.8[c][9][ii]; 8 NYCRR 200.1[zz][10]). Whether a student's condition adversely affects his or her educational performance such that the student needs special education within the meaning of the IDEA, is an issue that has been left for each state to resolve (J.D., 224 F.3d at 66). Although some states elect to establish further, more explicit definitions for these terms, often through regulation or special education policy (see, e.g., Mr. I. v. Maine Sch. Admin. Dist. No. 55, 480 F.3d 1, 11 [1st Cir. 2007]; J.D., 224 F.3d at 66-67; Johnson v. Metro Davidson County Sch. Sys., 108 F. Supp. 2d 906, 918 [M.D. Tenn. 2000]), others do not and instead resolve the issue on a "case-by-case" basis (R.B. v. Napa Valley Unified Sch. Dist., 496 F.3d 932, 944 [9th Cir. 2007]; see, e.g., Yankton Sch. Dist. v. Schramm, 93 F.3d 1369, 1375-76 [8th Cir. 1996]; Greenland Sch. Dist. v. Amy N., 2003 WL 1343023, at *8 [D.N.H. Mar. 19, 2003]). Cases addressing this issue in New York appear to have followed the latter approach (Corchado v. Bd. of Educ. Rochester City Sch. Dist., 86 F. Supp. 2d 168, 176 [W.D.N.Y. 2000] [holding that each child is different and the effect of each child's particular impairment on his or her educational performance is different]; see Maus v. Wappingers Cent. Sch. Dist., 688 F. Supp. 2d 282, 294, 297-98 [S.D.N.Y. 2010] [emphasizing that educational performance is focused on academic performance rather than social development or integration]; see also C.B. v. Dep't of Educ. of City of New York, 322 Fed. App'x 20, 21-22 [2d Cir. Apr. 7, 2009]; Muller v. E. Islip Union Free Sch. Dist., 145 F.3d 95, 103-04 [2d Cir. 1998]; W.G. v. New York City Dep't of Educ., 801 F. Supp. 2d 142, 170-75 [S.D.N.Y. 2011] [finding insufficient evidence that the student's "academic problems—which manifested chiefly as truancy, defiance and refusal to learn—were the product of depression or any similar emotional condition"]; A.J. v. Bd. of Educ., E. Islip Union Free Sch. Dist., 679 F. Supp. 2d 299, 308-11 [E.D.N.Y. 2010] [noting the difficulty of interpreting the phrase "educational performance" and indicating that it must be "assessed by reference to academic performance which appears to be the principal, if not only, guiding factor"]; Eschenasy v. New York City Dep't of Educ., 604 F. Supp. 2d 639, 649-50 [S.D.N.Y. 2009]; N.C. v. Bedford Cent. Sch. Dist., 473 F. Supp. 2d 532, 543 [S.D.N.Y. 2007], aff'd, 300 Fed. App'x 11 [2d Cir. Nov. 12, 2008]; New Paltz Cent. Sch. Dist., 307 F. Supp. 2d at 399).

Discerning an adverse impact on educational performance in the case of a student that exhibits strong academic skills is not as apparent as it might be for a student who is failing or being retained in a course or grade. Given the student's academic successes in the present case, were the student's grades to be viewed as the litmus of "educational performance" a finding of adverse impact would be less likely. On the other hand, viewing the student's educational performance slightly more broadly to take into account academic considerations beyond grades (such as considerations related to the student's attendance, homework, and organization)—but not so broadly as to encompass social/emotional needs that have not necessarily translated to academics—is consistent with the approach taken by New York courts (see, e.g., M.N. v. Katonah-Lewisboro Sch. Dist., 2016 WL 4939559, at *11-*13 [S.D.N.Y. Sept. 14, 2016]; M.M. v. New York City Dep't of Educ., 26 F. Supp. 3d 249, 255-57 [S.D.N.Y. 2014]; cf. W.A., 2016 WL 6915271, at *23 [in the child find context, distinguishing a narrow view of "academic success" (e.g., grades alone) from a broader view that included "feedback from teachers and standardized test scores as well"]). This interpretation of "educational performance" is in line with federal guidance from the Office of Special Education Programs (OSEP), discussing the eligibility of students with high cognition and providing an example of a student that sounds quite analogous to

the student in the present case; to wit, "a child with high cognition and ADHD could be considered to have an 'other health impairment,' and could need special education and related services to address the lack of organizational skills, homework completion and classroom behavior, if appropriate" (Letter to Anonymous, 55 IDELR 172 [OSEP 2010]).

Here, the evidence in the hearing record shows that, generally, the district coordinator of special education—who was the chairperson of the June 2019 CSE meeting—and the director of special education's position at the CSE meeting was that the student was not eligible for IDEA services because the "most pertinent information considered," student's grades and "MAP scores," did not show evidence that the student's disabilities had an adverse effect on her educational performance (see Tr. pp. 17-30; Joint Ex. 4a1 at pp. 16-18, 25, 27). Moreover, the coordinator of special education testified that in light of the student's grades and MAP achievement results, even if she had been found eligible for special education, he would not know what type of goals to create for her (Tr. pp. 30-31).

However, the evidence in the hearing record including the transcript of the June 2019 CSE meeting shows that the student's struggle with anxiety, gross motor skills, and sensory processing contributed to her school avoidance and poor attendance, which the coordinator of special education acknowledged could be a factor that adversely affects a student's educational performance (Tr. p. 34; see Joint Ex. 4a1 at pp. 6-17; 5b at p. 12; 7b at p. 4; 9 at p. 5; see e.g. Joint Ex. 23 at pp. 121-22, 130, 133, 135-36, 138-40, 147).

The student's counselor, who also attended the June 2019 CSE meeting, testified that she was aware of the student's headaches and feelings of not being comfortable in school, which affected her attendance (Tr. pp. 533, 566-67; see Joint Ex. 4a1 at pp. 6-7). She stated that from January until March there were some "inconsistencies" and from March until the end of the school year the student's "attendance was not very good" (Tr. p. 567). According to the counselor, there was nothing on the student's section 504 plan that directly addressed attendance (Tr. p. 587).

According to the parent, the pattern of the student's attendance problem "evolved" around physical education and ELA classes, where the student "just couldn't get herself into [those] subject class[es]," and "then lunch became an issue" (Tr. p. 186). The parent testified that the student's stress and anxiety were causing her headaches, "she started physically getting ill," and that it was a "battle" about going to school on the days when she had physical education or ELA class (Tr. p. 187). Additionally, the parent stated that because of the headaches and anxiety she started to "chunk" the student's day in order to have her attend as much of the day as the student could tolerate (Tr. pp. 188-92). During spring 2019 the student stopped attending ELA class and had withdrawn from chorus (Tr. pp. 155, 192; Joint Ex. 12c at p. 1). Further, the parent testified that the student's suicidal thoughts were related to the school environment that was "upsetting her greatly" due to the anxiety she felt while there (Tr. pp. 184-86).

As discussed above, the student's final report card for the 2018-19 school year indicated that she had missed 58 ELA classes, 29 earth science classes, 29 social studies classes, 27 German classes, 27 math classes, 19 applied music classes, 17 applied art classes, 10 physical education classes and 14 robotics classes; she was absent for a total of 15 days and was tardy on 30 days (Joint Ex. 12c at pp. 1-2). Here, the district improperly relied solely on the student's grades and

MAP results when determining whether the student was eligible for special education services. Simply finding that the student was passing her classes was not a sufficient rationale to determine the student's educational performance was not adversely affected when the evidence in the hearing record shows that her anxiety was preventing her from attending school (M.M., 26 F. Supp. 3d. at 256 [finding that "[f]ew things could be more indicative of an emotional problem that 'adversely affected' a student's education than one that prevented her from attending school."]).

In addition to meeting criteria for a specific disability category, in order to be deemed eligible for special education, a student must by reason of such disability, "need special education and related services" (34 CFR 300.8[a][1]; 8 NYCRR 200.1[zz]). State regulation defines "special education" as "specially designed individualized or group instruction or special services or programs" (8 NYCRR 200.1[ww]; see 20 U.S.C. § 1401[29]; Educ. Law § 4401[2]; 34 CFR 300.39[a][1]). "Specially-designed instruction," in turn, means "adapting, as appropriate, to the needs of an eligible student . . . , the content, methodology, or delivery of instruction to address the unique needs that result from the student's disability; and to ensure access of the student to the general curriculum, so that he or she can meet the educational standards that apply to all students" (8 NYCRR 200.1[vv]). In New York, the Education Law describes special education as including "special services or programs," which, in turn, includes, among other things, "[s]pecial classes, transitional support services, resource rooms, direct and indirect consultant teacher services, transition services . . . , assistive technology devices as defined under federal law, travel training, home instruction, and special [education] itinerant teachers [services]" (Educ. Law § 4401[1], [2][a]). In New York the definition of "special services or programs" (and therefore special education) also encompasses related services, such as counseling services, OT, physical therapy, and speech-language therapy, as well as "other appropriate developmental, corrective or other support services" (Educ. Law § 4401[2][k]).

The broad definition of special education within New York's Education Law includes related services such as psychological counseling (Educ. Law § 4401[2][k]).¹⁶ The June 2019 psychological evaluation report described several supports from which the student might benefit that meet the definition of special education, including individualized instruction, guidance in executive functioning, and counseling services (Joint Ex. 5b at pp. 12-13). The section 504 committee that convened shortly after the June 2019 CSE meeting concluded that the student would benefit from counseling services, as well as counseling, OT, and PT consultation services, in addition to accommodations and modifications (Joint Ex. 3a at pp. 2, 4-5). In conclusion, under the circumstances of this case, given the array of supports and services that, according to the section 504 plans developed by the district, the student required, the weight of the evidence supports a finding that, at the time of the June 2019 CSE meeting, the student should have been found eligible for special education programs and services as a student with an other health-impairment under the IDEA (see 20 U.S.C. § 1401 [3][A]; Educ. Law § 4401[1], [2][k]; 34 CFR 300.8 [a][1], [c][9]; 8 NYCRR 200.1[zz][10]; see also Muller, 145 F.3d at 105 [finding that the district's section 504 plan "was not an adequate substitute" for devising an IEP for the student pursuant to the IDEA]).

¹⁶ This would not mean that every student who needs counseling services would qualify as a student eligible for special education since, first, the student would have to fall within one of the disability categories.

Based on the foregoing, there is insufficient basis in the hearing record to disturb the IHO's determination that the June 2019 CSE should have found the student eligible for special education. As the student is now deemed eligible, when the CSE next convenes, it should either develop an IEP for the student based on the student's needs, or if the student's needs dictate that the student no longer requires special education, the CSE will be required to follow requirements for declassifying the student (see Educ. Law § 3602[1][i][2]; [5-a][d][1]; 8 NYCRR 200.1[ooo]; 200.4[c][3]; [d][1][iii]). In no event, however, is the CSE required to only consider Norman Howard as a placement for the student as the parent has requested.

E. Unilateral Placement – Norman Howard

The IHO found that Norman Howard was an appropriate unilateral placement (IHO Decision at pp. 21-22). The district argues that the IHO erred in finding that Norman Howard was an appropriate placement based on its provision of small classes and a warm supportive environment to the student because such general programmatic elements did not constitute specialized instruction, and there was also no evidence in the hearing record, contrary to the IHO's finding, that Norman Howard provided a "therapeutic" setting. In addition, the district contends that the IHO erred in determining that the grades given to the student at Norman Howard rendered the program "appropriate." The parent rebuts the district's arguments and asserts that Norman Howard was an appropriate placement for the student.

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).

As the student's identified needs have been detailed above, a discussion of such will not be repeated here.

1. Specially Designed Instruction

The director of education and co-head of school (director of education) at Norman Howard stated that Norman Howard was a New York State approved nonpublic school for approximately 110 students with disabilities in grades 5 through 12 (Tr. pp. 483, 487, 491). The director of education stated that the school was approved to work with students with learning disabilities, other health-impairments, speech-language impairments, and autism (Tr. p. 498). According to the Norman Howard brochure, students were supported in a small, structured learning environment within 12:1:1 class settings with full access to the general education curriculum, where classroom teachers collaborated with counseling staff to implement social skills, pragmatic language, and weekly explicit instruction in self-awareness, social awareness, self-management, responsible decision making, and relationship skill building along with opportunities to apply skills during class time, field trips, and social activities (see Tr. p. 487; Joint Ex. 21 at p. 3). Norman Howard specialized in language-based learning approaches, executive functioning support, school-based anxiety and strategies for students with autism spectrum disorders (Joint Ex. 21 at p. 2). In addition, the program created individualized conditions for learning comprised of the general education curriculum, reading and math intervention, speech-language services, social/emotional learning, counseling, enrichment, and experiential opportunities (id.). According to the brochure, at Norman Howard students learn strategies for managing their special needs and graduate alongside their peers (id. at p. 1).

With respect to academics, the director of education explained that students who were not taking a language other than English and who really struggled with basic reading skills would be in a 45-minute daily reading class with a focus on decoding, fluency, or comprehension (Tr. p.

488). According to the director of education, reading classes tended to be one-to-one, decoding classes would not have more than three students in a class, and comprehension classes may have two to four students in a class (Tr. pp. 501-02). The director of education noted that the student had strong comprehension skills but a weakness in the area of decoding and so she was in a "comprehensive class" that worked on inferential skills, reading, word study where they used word analysis strategies, vocabulary, and the morphology of words, root words, and prefixes and suffixes (Tr. pp. 519-20). With regard to writing, the director of education testified that students through eleventh grade had a daily, 45-minute writing class in addition to their English classes (Tr. p. 487).

The director of education explained that the school took a developmental approach to math so that if a student was in the sixth grade but was working at a fifth-grade math level, then that student would be in a fifth-grade math class (Tr. p. 488). According to the director of education students had grade-appropriate science and social studies classes and participated in physical education, health, and art electives (*id.*). The October 2019 Norman Howard report card indicated that the student attended classes in algebra I, ELA 9, global history and geography I, living environment, photography, physical education 9, reading, and writing 9 (Joint Ex. 12a at pp. 1-2).

The director of education stated that their teachers worked hard to establish consistent routines and that classroom teaching included what to learn and how to learn it with explicit instruction in teaching students how to estimate how long their homework might take, how successful they were, how to get ready for tests, and how to keep themselves, their materials, and their time organized (Tr. p. 497). The director of education stated that many of their students had difficulty with executive functioning and opined that students at Norman Howard formed really strong relationships with their teachers due to the size of the whole school and the size of the classes (Tr. pp. 497-98). He added that students finally felt that they had their own school, that they were fully part of the school and had the opportunity to do extra-curricular activities, noting that Norman Howard was a very small, warm, and supportive environment (Tr. p. 498). To address executive functioning needs, Norman Howard used a written agenda that had the homework routine built in, which included estimating how long it was going to take, how long to study for a test, what strategies to use, and then a reflection on it the next day (Tr. p. 503). Additionally, high school students had the option of staying with a paper agenda, or they could use their phone or Google Classroom along with a student management system where all assignments were posted (Tr. p. 504). The director of education stated that many of the students had active working memory challenges and that the Cloze (fill-in the blank) notes they provide to all students helped those who had difficulty looking up to the board and looking down and writing, and allowed the students to focus on what the teacher was saying and showing, and not try to keep up with notetaking (*id.*). The director of education opined that the environment was important for the student as she needed a smaller, quieter, consistent environment as she at times had "sensory overload" (Tr. p. 522). In addition, the director of education stated that the student had cognitive efficiency, processing speed, and executive functioning needs and that it was important that the student have an opportunity during the day to get organized and figure out what was coming ahead (Tr. pp. 522-23).

The director of education indicated that the pacing at Norman Howard was likely slower than a general education setting, and that lunch was not a traditional lunch as teachers ate alongside

the students, and they had two locations for eating, which she described it as "pretty quiet" as compared to a large cafeteria (Tr. pp. 505-06). With respect to bullying, the director of education stated that Norman Howard was small and so it was "hard for things to fall between the cracks" and that, if there was an issue, they found out about it (Tr. pp. 507-08). Additionally, she stated that counselors would go from class to class to talk explicitly about what bullying was and the difference between being an "upstander" and a "bystander," and that if there were difficulties then they would work through it with mediation and parents would be involved (Tr. p. 508).

The director of education explained that the school had one physical education class for students who were "very athletic" and really wanted an athletic class and another one for students who traditionally had struggled in physical education class either because of coordination difficulties or because "they didn't like it" (Tr. p. 519). Recognizing that previously physical education was an area of difficulty for the student, the director of education stated the student was placed in "not the extremely athletic" class of nine or ten students where there was not "heavy competitiveness" and that the student had been engaged, followed instructions, and met the behavioral expectations (*id.*).

The director of education explained that Norman Howard had an advisory system where every student had a faculty advisor (Tr. p. 489). Reportedly students started the day with their advisor in a 15-minute homeroom period, next the advisor taught the student at some point during the school day, and then at the end of the day the student returned to their advisor for a 30-minute homeroom period to work on homework, get organizational support, or to go to another teacher for content support (*id.*). The director of education shared that the school had a variety of afterschool extracurricular activities including theater, ski club, yearbook club, Dungeons and Dragons club, science club, art club, and a student-run sub shop (*id.*).

Regarding related services, the director of education stated that Norman Howard had two clinical social workers and two speech-language pathologists whose work was "very much" integrated into the program and that they all participated in weekly grade level meetings, were looked to for their expertise in the areas of language and social/emotional development, and provided services individually and in small groups in the classroom and the therapy room (Tr. pp. 493-94, 502-03). The director of education stated that the student was identified by the ninth-grade team and the speech-language pathologist for a "social thinking group" because of her needs in pragmatic language skills and perspective taking (Tr. p. 521). The education specialist stated that Norman Howard did not have "in-staff PT or OT," so he explained that those services would have had to be provided through the district in order for the student to access those at Norman Howard (Tr. pp. 281, 370).

In addition, the parent provided testimony detailing ways in which Norman Howard addressed the student's needs. The parent testified that the student reported that the environment at Norman Howard was "manageable" and that it was a smaller building, easier to navigate, and that that classes were smaller, all of which made the program "more helpful" for her (Tr. pp. 225, 456). In addition, regarding ELA—an area where the student had had "real trouble" because of the behaviors in the room—the parent reported that the student had three students in her reading class (Tr. p. 456). The parent reported that the teachers at Norman Howard understood the student's "sort of anxiety" and difficulties with attention and had a system in place for note-taking

which involved providing the student with pre-typed notes with missing words the student would have to fill in to "make sure [she was] paying attention" (Tr. p. 457).¹⁷ The parent explained that in this way the student would not have to write down every word and thus her slow handwriting would not be an encumbrance (*id.*). With respect to helping the student cope with her anxiety the parent testified that Norman Howard provided all the students with some very simple visual aids (e.g. picture schedule, flowchart) and that there was a visual aid for self-advocacy which stated "when you're struggling, this is what you do" (Tr. pp. 458-59). To help with organization they had agenda books which were well organized and very customizable (*id.*). The parent testified that Norman Howard had a "policy" used throughout the program with respect to self-advocacy that they worked on with the student; the first step included speaking up and advocating for yourself, then if the desired result was not achieved, you requested support from a teacher to move on with the process (Tr. p. 226; *see* Tr. pp. 521-22).

Contrary to the district's arguments, I find that Norman Howard provided the student with specialized instruction which addressed her unique individual educational needs and did not merely create a generalized warm and supportive environment lacking in special education interventions and supports. In assessing the appropriateness of a unilateral placement for tuition reimbursement purposes, a tension may sometimes exist between the legal requirement that the parent demonstrate that the private school provides specialized instruction tailored to the student's unique individual needs and the reality that a private school may appear to be a "good fit" for a student with a disability largely based upon the school's general philosophy and mission, preferred pedagogical methodology, and overarching programmatic framework – elements which are available to all attending students – even where more detailed evidence related to the student's individualized program may be lacking. Indeed, some courts have noted that evidence of the general educational milieu of a unilateral placement can be relevant for purposes of awarding tuition reimbursement, and in some cases may constitute special education, while recognizing that such considerations nonetheless do not abrogate the requirement that the appropriateness of a unilateral placement continues to rest on a finding of specialized instruction which addresses a student's unique needs (*see* W.A. v. Hendrick Hudson Cent. School Dist., 927 F.3d 126, 148-49 [2d Cir. 2019] [indicating that "a resource that benefits an entire student population can constitute special education in certain circumstances" but cautioning that features such as small class size might be the sort of feature that might be preferred by parents of any child, disabled or not], *cert denied*, 140 S. Ct. 934 [2020]; T.K. v. New York City Dep't of Educ., 810 F.3d 869, 878 [2d Cir. 2017]); *see also* Bd. of Educ. of Wappingers Cent. School Dist. v D.M., 831 Fed. App'x 29, 31 [2d Cir. 2020] [acknowledging an SRO's statement that the standard for an appropriate unilateral placement had become less demanding but reiterating that the appropriate analysis is the "totality of the circumstances" standard]).

Assessments of appropriateness employing, in part, a "general educational milieu" analysis allow for the consideration of programmatic elements that may nonetheless sufficiently address a student's needs, particularly where the school in question has been designed with a specific student population in mind – i.e. students diagnosed with autism, or those students who present with complex interfering behaviors or learning disabilities or reading needs, just to name a few

¹⁷ The parent noted that this was not "a special thing just for [the student]," but done for everyone (Tr. p. 457).

possibilities. At the same time, one potential danger of applying a more liberal standard in examining the appropriateness of unilateral placements is that an educational environment which might be deemed desirable for any student – such as small class size, individualized attention to the unique learning profile of each student, and collaboration between teachers to address a student's individual needs - may improperly become conflated with specially designed instruction which addresses the unique needs of a student who has been classified and found eligible for special education and related services (see Gagliardo, 489 F.3d at 115 [noting that reimbursement for a unilateral placement should be denied if "the chief benefits of the chosen school are the kind of educational and environmental advantages and amenities that might be preferred by parents of any child, disabled or not"]).

In this instance, the hearing record contains evidence concerning the general programmatic structure, learning environment, instructional framework, and methods Norman Howard employed; however, aspects of the instruction, supports, and services provided to the student at Norman Howard were integral to the school's program and therefore available to all students in attendance. Overall, however, when evaluating the totality of the circumstances, there is sufficient evidence in the hearing record concerning individualization of the school's programmatic elements to address the student's unique needs such that reliance primarily on the school's environment and general educational assets to determine the appropriateness of Norman Howard as a unilateral placement is not necessary. Specifically, Norman Howard provided the student with a social thinking group to assist her with pragmatic language needs and perspective taking. The school also identified her individual needs in the areas of cognitive efficiency, processing speed, executive functioning and reaction to sensory stimulation and provided her with a small, calm, consistent environment and daily organizational supports and interventions for her academics, classroom functioning, and homework. The student also received modifications and supports in reading and athletics to address the specific difficulties she experienced in those areas. Moreover, the student received her individualized instruction, supports, and modifications in a school approved to work with students with learning disabilities, other health-impairments, speech-language impairments, and autism, staffed by teachers who collaborated with counseling staff to implement social skills, pragmatic language, and weekly explicit instruction in self-awareness, social awareness, self-management, responsible decision making, and relationship skill building along with opportunities to apply skills during class time, field trips, and social activities (see generally Bd. of Educ. of Wappingers Cent. Sch. Dist., 831 Fed. App'x at 31 [affirming an award of tuition reimbursement where the unilateral placement provided a small environment designed for autistic children without behavioral issues, "along with real-world socialization opportunities," and addressed the student's need for frequent 1:1 instruction, noting that the student performed better on subsidized tests, improved in reading and math, and generally received "educational benefit" from the placement]). While more detail from staff who worked with the student concerning the student's day-to-day functioning or the instruction provided would have been optimal, the record identifies significantly more detail concerning how Norman Howard met the student's unique needs than its "warm and supportive environment" as focused on by the IHO and, despite the IHO's seemingly more colloquial use of the term "therapeutic" to describe the school, there was no evidence in the record that the student needed specific "therapeutic" interventions in order to render the unilateral placement appropriate, particularly since the district failed to sufficiently assess the underlying reasons for the student's school anxiety and related attendance issues. As a result, I find no basis

in the hearing record to disturb the IHO's determination that Norman Howard was an appropriate unilateral placement for the student.

2. Progress

While a student's progress is not dispositive of the appropriateness of a unilateral placement, a finding of some progress is, nevertheless, a relevant factor to be considered (Gagliardo, 489 F.3d at 115, citing Berger, 348 F.3d at 522 and Rafferty, 315 F.3d at 26-27; Lexington County Sch. Dist. One v. Frazier, 2011 WL 4435690, at *11 [D.S.C. Sept. 22, 2011] [holding that "evidence of actual progress is also a relevant factor to a determination of whether a parental placement was reasonably calculated to confer some educational benefit"]).

In this case, the October 2019 Norman Howard report card shows the student received grades of an 88 in algebra, 98 in ELA, 91 in global history and geography, 96 in living environment, 100 in photography, 100 in physical education, 91 in reading, and 98 in writing (Joint Ex. 12a at pp. 1-2). Teacher comments from the October 2019 report card include that the student is a model student, is consistently engaged in class and completes all of her work on time, participates well in group discussions, has submitted all homework, has excelled on all assigned work, is a regular participant in whole class and small group activities, self-advocates appropriately, demonstrates an understanding in the subject matter, and comes prepared to class (id.). The parent testified that looking at the student's second quarter report card she had received grades in the 90s in all her classes and an 88 in living environments (Tr. p. 460).

Accordingly, while the progress is not determinative, the grades that the student achieved at Norman Howard contribute to the totality of circumstances that support a finding that Norman Howard reasonably served the student's individual needs.

F. Relief

The district has not appealed the IHO's determination that equitable considerations weighed in favor of an award of tuition reimbursement (see IHO Decision at pp. 24-25). Therefore, the IHO's determinations regarding equitable considerations are final and binding on the parties and will not be reviewed (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; 279.8[c][4]). For the reasons set forth herein, the IHO's order requiring the district to fund the student's attendance at Norman Howard will not be disturbed.¹⁸

With respect to the parent's request for compensatory education, as the evidence in the hearing record does not support a finding that the district committed a child find violation for the 2017-18 and 2018-19 school years, no relief is warranted for those school years. As for the 2019-20 school year, since the parent chose to unilaterally place the student, she may not seek compensatory education for the same time frame (see D.F. v. Collingswood Borough Bd. of Educ., 694 F.3d 488, 498 [3rd Cir. 2012] [holding that "[b]ecause compensatory education is at issue only

¹⁸ To the extent the IHO characterized the award of tuition as compensatory education in the alternative (see IHO Decision at pp. 19-20), I find it unnecessary to address the district's appeal of this finding, since, as set forth herein, I find that the parent is entitled to an award of tuition reimbursement for the student's attendance at Norman Howard during the 2019-20 school year.

when tuition reimbursement is not, it is implicated only where parents could not afford to 'front' the costs of a child's education"; P.P. v. West Chester Area Sch. Dist., 585 F.3d 727, 739 [3rd Cir. 2009] [holding that "compensatory education is not an available remedy when a student has been unilaterally enrolled in private school"]; Application of a Student with a Disability, Appeal No. 20-151; but see I.T. v. Dep't of Educ., State of Hawaii, 2013 WL 6665459, at *7-*8 [D. Haw. Dec. 17, 2013] [finding that the student was entitled to compensatory education for services the student received at the nonpublic school]).

VII. Conclusion

The evidence in the hearing record does not support the IHO's determination that the district violated its child find obligations. However, the evidence does support the IHO's findings that the district failed to offer the student a FAPE for the 2019-20 school year, and that Norman Howard was an appropriate unilateral placement for the student for the 2019-20 school year. Accordingly, the IHO's award requiring the district to reimburse the parent for the costs of the student's attendance at Norman Howard for the 2019-20 school year will not be disturbed.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

THE CROSS-APPEAL IS DISMISSED.

IT IS ORDERED that the IHO's decision, dated January 29, 2021, is modified by reversing that portion which found that the district violated its child find obligation.

Dated: Albany, New York
April 9, 2021

CAROL H. HAUGE
STATE REVIEW OFFICER