The University of the State of New York

The State Education Department
State Review Officer
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No. 21-103

Application of a STUDENT WITH A DISABILITY, by his parent, for review of a determination of a hearing officer relating to the provision of educational services by the Board of Education of the Rush-Henrietta Central School District

Appearances:
Cara M. Briggs, Esq., attorney for petitioner

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

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from a decision of an impartial hearing officer (IHO) which determined that the educational program and services the respondent's (the district's) Committee on Special Education (CSE) had recommended for her son for the 2020-21 school year was appropriate. The appeal must be sustained in part.

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

Due to the nature of this appeal, a full recitation of the student's educational history is unnecessary. However, the student's educational history will be discussed briefly as it relates to the issues in this appeal.

The student has received various diagnoses over time, with more recent diagnoses including an autism spectrum disorder, an attention deficit hyperactivity disorder (ADHD) combined type, dyslexia, and dyscalculia (Dist. Exs. 3 at pp. 1, 25-27; 8 at pp. 1, 3; 9 at p. 1). The student received services through the Early Intervention Program (EIP) and the Committee on Preschool Special Education (CPSE) and remained in preschool for an extra year (Dist. Ex. 8 at p. 1). The student was declassified prior to entering kindergarten but was later found eligible for

special education services during first-grade as a student with autism (id.). Upon initial eligibility, the student was recommended for and received consultant teacher services in the public school up until the 2019-20 school year (id.). While attending school in the district, the student also received academic intervention services (AIS) in math, reading, and writing (Dist. Exs. 3 at pp. 6-13; 8 at p. 1).

The CSE convened to revise the student's IEP on June 13, 2019, in preparation for the 2019-20 school year (see Dist. Ex. 4). Based on its review of teacher reports and classroom functioning, parent information, and committee discussion, the CSE recommended that the student receive integrated co-teaching (ICT) services five times a week for 45 minutes each in English language arts (ELA), math, science and social studies (id. at p. 15). The CSE also recommended that the student be provided with two 20-minute sessions of small group speech-language therapy per week, access to a word processor, a speech-language consultation for five hours per year, an autism consultation for 10 hours per year, a 30-minute quarterly team meeting which would include the parents, and an occupational therapy (OT) consultation for four hours per year (id. at pp. 15-16).[1] The parents unilaterally placed the student at a State-approved nonpublic school, the Norman Howard School (Norman Howard), for the 2019-20 school year (Dist. Ex. 14 at p. 33).[2]

An individualized education services program (IESP) was created on October 28, 2019, for the student's enrollment at Norman Howard for the 2019-20 school year (see Dist. Ex. 7; see Tr. p. 85).[3] The IESP provided for one 45-minute session of small group speech-language therapy, as well as an autism consultation for 10 hours yearly and an OT consultation for four hours yearly (Dist. Ex. 7).

In December 2019, the district sought and obtained consent from the parents for a reevaluation of the student consisting of a psychological evaluation, social history, and a speech-language evaluation (Dist. Exs. 11 at p.1; 12). The CSE convened on January 21, 2020, to consider the results of the reevaluation (Dist. Exs. 16 at p. 1; 17). The evaluations reviewed by the CSE indicated that the student had average abilities but that his academic skills were delayed (Dist. Ex. 17 at p. 2). In addition, the student's receptive and expressive language skills were in the average range and he was showing improvement in his social skills class (id.). The student's teachers reported an increase in the student's pacing in the classroom and noted that it was difficult to get the student to engage in non-preferred activities (id.). The CSE recommended that the duration of the student's small group therapy sessions be increased from 20 to 45 minutes (compare Dist. Ex. 4 at p. 15, with Dist. Ex. 17 at p. 13).

[1] The 2019-20 school year was the subject of a different due process complaint notice which was resolved by an IHO (IHO 1) in a decision dated January 3, 2020 (Dist. Ex. 14 at p. 50). IHO1 found that the district's educational programming offered the student a FAPE because the proposed ICT services offered an appropriate placement within the least restrictive environment (Dist. Ex. 14 at p. 43). IHO 1 held that the ICT services and the 10 hours of autism consultation would address the student's central need to remain focused and noted evidence showing that the student would receive additional services of learning lab and AIS services (Dist. Ex. 14 at p. 44).

[2] The student was placed at Norman Howard by the parent for the 2019-20 school year.

[3] The October 2019 document is labeled an IEP but is identified both as an IESP and an IEP in the hearing record to be implemented at Norman Howard (Tr. pp. 5, 85, 162).

On May 19, 2020, the CSE convened to revise the student's IESP for the 2020-21 school year (see Dist. Ex. 22). Attendees at the May 2020 CSE included the CSE chairperson/district representative, the student's parents, the student, the parent's attorney, and staff from Norman Howard including a special education teacher, speech-language therapist, and school principal (Dist. Exs. 21 at pp. 1, 3; 22 at p. 1). The participants from Norman Howard and the parents opined that the student should be placed at Norman Howard for the 2020-21 school year; however, the district representative indicated that the district did not believe that Norman Howard was the least restrictive environment (Parent Ex. A at p. 13-17; Dist. Ex. 21 at p. 2). The May 2020 IESP recommended two 45-minute sessions of speech-language therapy per week and four hours of OT consultation yearly (Dist. Ex. 22 at pp. 11-12).

Because the district personnel did not believe the student would be placed in a nonpublic school if the school was selected by the district (versus a parentally selected school under an IESP), the district sent a CSE meeting notice dated June 10, 2020, that identified three district staff members who would attend the CSE meeting to develop an IEP (Dist. Ex. 23 at p. 2, see Tr. p. 228). The CSE reconvened on June 18, 2020, in order to create an IEP for the 2020-21 school year (see Dist. Ex. 25). The attendees at the June 2020 meeting included the CSE chairperson/district representative, two general education teachers, two special education teachers, a school psychologist, a speech-language therapist, a school counselor, and the parents (Dist. Ex. 23 at p. 6). The June 2020 CSE recommended that the student receive ICT services five times per week in four classes (ELA, math, science, and social studies) for 40 minutes each (Dist. Ex. 25 at p. 12). In the June 2020 IEP, the CSE also recommended six 30-minute sessions of speech-language therapy per month, three hours of autism consultation per year, five hours speech-language consultation per year, and four hours of OT consultation per year (id. at pp. 12-13). The IEP also identified management needs and accommodations for the student as clearly stated expectations for behavior and academics, predictable routines and warning of changes to schedule, extended time to complete writing tasks, cues and checklists for writing and editing, tasks chunked into smaller more manageable pieces, preferential seating so that the student was able to move freely, cues to focus during directions, longer directions broken down into smaller steps, frequent checks for understanding, gentle verbal and nonverbal cues to return attention task, gentle cues to move past when perseverating, praise and encouragement, use of sensory based materials as advocated for by student, opportunities to stand when working, and visual aids (id. at pp. 10-11).

A. Due Process Complaint Notice

By due process complaint dated August 7, 2020, the parent asserted that the district denied the student a free appropriate public education (FAPE) for the 2020-21 school year (Dist. Ex. 1 at p. 1). The parent alleged that the district failed to fully evaluate the student prior to the January 2020 CSE meeting, as the district failed to conduct an updated psychoeducational, social emotional, or OT evaluations (id. at p. 2). According to the parent, the district failed to obtain an updated physical examination and failed to consider two independent educational evaluation reports (IEEs) obtained by the parent, a December 2018 educational evaluation and a July 2019 OT evaluation and instead relied on outdated evaluative information (id.). Regarding the May 2020 CSE meeting, the parent argued that the district's chairperson asserted without explanation that the student's least restrictive environment was an in-district placement, after other members of the CSE explained that they disagreed with that assertion (id. at pp. 2-3).

With respect to the June 2020 CSE meeting, the parent contended that the meeting notice indicated that there would be only three attendees from the district at the CSE meeting but that upon the parents' arrival at the meeting an additional five district employees were in attendance (Dist. Ex. 1 at p. 3). The parent asserted that she was given no advance warning of the change of district personnel at the CSE meeting and was not given an option to reschedule the meeting (id.). The parent argued that none of the student's teachers or related services providers (from Norman Howard) were invited to participate in the June 2020 CSE meeting and that only one of the CSE participants had had any contact with the student (id.). The parent contended that the exclusion of CSE participants who knew the student's present levels of performance and needs was "unconscionable" because the CSE lacked complete information regarding the student to develop an appropriate IEP (id. at p. 4). The parent again asserted that the CSE relied on the same outdated information as the January 2020 CSE (id. at p. 3). Moreover, the parents contended that the whole purpose of the June 2020 CSE meeting was for the district to develop an "in-district" IEP for the student and it failed to consider any other program option (id.). Also, the discussion at the June 2020 meeting revealed that the district would be unable to fit all of the student's classes and services into his schedule and that the final recommendations of the June 2020 CSE would have denied the student a FAPE (id. at p. 4).[4]

The parent alleged that she did not receive either the May 2020 IESP or the June 2020 IEP until July 25, 2020, and that both contained inaccuracies (Dist. Ex. 1 at p. 5). The parent noted that the June 2020 IEP only indicated that three CSE members attended the meeting, omitting the parents and the five additional members who attended the meeting, and the May 2020 IESP contained the incorrect date and list of participants (id.).

Further, the parent argued that the district's proposed re-opening plan for the 2020-21 school year would have created "additional disruptions and challenges" that would have served to "compound the already deficient proposed program" (Dist. Ex. 1 at pp. 5-6). Moreover, the parent asserted that the district would have been unlikely to fully deliver the IEP program and services (id. at p. 5). She opined, however, that the re-opening plan at Norman Howard would have assured consistency of instruction and services to meet the student's needs (id.).

The parent contended that the IEP developed for the 2020-21 school year was not reasonably calculated to enable the student to make meaningful progress and "would deprive the Student of the same access to his education as that of his nondisabled peers and would deprive the Student of a" FAPE (Dist. Ex. 1 at p. 6). The parent noted that the student was finally able to make meaningful progress during the 2019-20 school year at Norman Howard and that since attending the school the student had demonstrated a significant decrease in anxiety along with improvement in his social language, social/emotional functioning, independence, and ability to attend during instruction (id. at p. 2).

The parent provided a list of bulleted claims regarding the IEP created for the 2020-21 school year (Dist. Ex. 1 at pp. 6-7). The parent asserted that the "CSE failed to develop an IEP to meet the Student's unique academic, speech-language, physical and social/emotional needs to

[4] The parent also asserted that she did not receive the IESP created in May 2020 before the June 2020 meeting and was therefore not provided a copy of the student's present levels of performance (Dist. Ex. 1 at p. 4).

enable him to make meaningful progress in his educational program;" the IEP did not adequately describe the student and his needs; the CSE failed to appropriately consider parent concerns and failed to adequately include parent concerns in the IEP; the IEP failed to include necessary specialized programming and services to meet the student's reading, spelling, writing, math and executive functioning needs; the IEP failed to provide appropriate OT services to meet the student's sensory, fine motor, visual perception and writing needs; the IEP failed to provide appropriate programming and services to meet the student's social communication needs; the IEP failed to provide appropriate programming and services to meet the student's social emotional needs; and that the IEP did not include parent counseling and training as an IEP service (id.). Further, the parent listed several alleged procedural violations: that the CSE delayed the fall 2019 meeting resulting in a delay in the development of an IESP and delay in the commencement of IEP-mandated speech-language services; neither the OT consult services not the autism consultation services were delivered per the IEP; the parent was not provided with the present levels of performance information that other CSE members were using to make their decisions; the parent's ability to participate in her child's education was significantly impeded because the outcome of the CSE meeting was predetermined or determined solely by the CSE chairperson, rather than the committee; the parent's ability to participate in her child's education was significantly impeded by the defective CSE meeting notice and the inclusion of the five additional CSE participants; the CSE excluded the student's special education teachers and/or special education providers from participating in the CSE; the CSE failed to consider or recommend direct OT services and failed to consider or recommend any OT goals; the OT consultant from the 2019-20 school year neither participated in nor provided a written report to the CSE; the CSE failed to consider or make a determination regarding whether the student needed extended school year services; the CSE failed to consider or make a recommendation regarding the student's need for assistive technology devices and/or services; and the CSE failed to consider to recommend parent counseling and training (id. at pp. 7-8). The parent argued that the procedural violations individually and collectively substantively deprived the student of a FAPE (id. at p. 8).

For relief, the parent requested that the IHO order the CSE to reconvene within 10 days and develop an IEP that placed the student at Norman Howard with all appropriate related services including OT, and an order directing additional services for district's failure to provide the student with a FAPE in an amount, type and scope to be determined by the Hearing Officer (Dist. Ex. 1 at p. 9).

B. Impartial Hearing Officer Decision

An impartial hearing convened on October 29, 2020 and concluded on December 15, 2020, after four hearing dates. In a final decision dated March 29, 2021, the IHO (IHO 2) found that the district offered the student a FAPE for the 2020-21 school year (IHO Decision at p. 23).

IHO 2 reviewed the student's educational history and the CSE's decision to intensify the student's proposed services in the IEP for seventh grade (IHO Decision at pp. 4-5). IHO 2 explained that the issue was whether the 2020-21 CSE drafted an IEP that was reasonably designed to confer educational benefit (IHO Decision at p. 13). IHO 2 found that IHO 1's finding from the 2019-20 school year was clear and unambiguous (id.). IHO 2 disagreed with the parent's argument that the findings regarding the 2019-20 school year had no bearing and found that "[e]very subsequent year builds on the year previously and the District is under an inherent obligation to

review the previous plan in addition to the student's current function in order to craft next year's educational plan" (id. at p. 14). IHO 2 stated that "[i]dentifying the interventions and services that worked last year, modifying or changing the ones that didn't is an essential step in the formation of a subsequent IEP" (id.). IHO 2 concluded that he must review the 2020-21 school year within the framework of IHO 1's decision (id.).

Turning to the 2020-21 school year, IHO 2 held that there was no dispute in the due process complaint notice that the IEP did not contain an accurate description of the student's present levels of performance or needs and "no evidence, data, or other information" presented to either the May or June 2020 CSE that indicated the student's special education needs had increased since the previous IEP developed in June 2019 (IHO Decision at pp. 15-16). IHO 2 found that there was no objective evidence leading to a conclusion that the student must be placed in either a special class or in a private school (id.). IHO 2 determined that the district was obligated to place the student in the least restrictive environment and that the CSE recommendation of an ICT program was significantly less restrictive on the continuum of services compared to an approved private school for students with disabilities (id. at pp. 16-17).

Next, IHO 2 discussed parental concerns and held that the parents were active participants in the June 2020 CSE meeting, even if they disagreed with the outcome (IHO Decision at p. 17; see Parent Ex. B). IHO 2 then turned to specific procedural violations alleged by the parents, holding that the procedural violations alone were insufficient to warrant finding against the district (IHO Decision at p. 18). IHO 2 held that the parents' argument that the Norman Howard staff should have attended the June 2020 CSE meeting was without merit because the district did not have authority over the private school personnel and there is no statutory requirement that they be included, noting that while the district did not invite them, they were not prohibited from attending at the request of the parent (id.). IHO 2 determined that the district failed to provide notice of the additional June 2020 CSE participants but found that it was a procedural violation that did not result in a denial of a FAPE (id.). IHO 2 noted that the parents did not object or request an adjournment at the June 2020 meeting and the presence of additional attendees at the meeting did not significantly impede the parent's opportunity to participate (id. at pp. 18-19). IHO 2 found that the record did not establish that the district predetermined the outcome of the CSE meeting, the district did not ignore or minimize data that would have suggest a more appropriate placement, and that the parties had differing views of the most appropriate placement for the student (id. at p. 19).

IHO 2 concluded that the parent's allegations regarding procedural violations did not satisfy the additional requirements needed to constitute a denial of a FAPE (IHO Decision at p. 19). IHO 2 ruled that "the CSE and the majority of the participants crafted an IEP that was reasonably calculated to confer educational benefit" and that the CSE considered the previous years proposed placement, which had been found to confer a FAPE to the student (IHO Decision at p. 19). According to IHO 2, the CSE "reviewed the student's current function against that of last year and determined, correctly, that the improvement exhibited by the student at the parental placement did not warrant continued placement" at that school (id. at pp. 19-20). IHO 2 explained that the parents were proceeding from a position of "if it is not broken, don't fix it" but that the district is charged with a greater responsibility that considers the least restrictive environment (id.). IHO 2 noted that the student saw great success at the parental placement, but that it is not the district's responsibility "to mirror that success," instead, the district must provide the student the most appropriate

placement based on their "strengths, deficits, and in an environment that affords them the opportunity to remain among [] similarly aged peers with a variety of different levels of functioning and backgrounds" (id. at p. 20). IHO 2 held that the district met its obligation (id.).

Next, IHO 2 turned to an analysis of the appropriateness of the unilateral placement, conceding that although it was not necessary, he determined that it should be included due to "consideration of the reader and any appellate scrutiny" (IHO Decision at p. 20). IHO 2 held that the student's needs were met at the Norman Howard and that the student found success within its programs and clearly benefitted from the small specialized instruction (id.). However, IHO 2 noted that "the placement c[ould] be arguably considered an optimal placement for the [s]tudent" but that [wa]s "neither the standard nor the requirement within the context of the IDEA" (id.). Still, IHO 2 found that the parent would have succeeded in her burden that Norman Howard was an appropriate placement for the student if the district did not offer the student a FAPE (id. at p. 21). With regard to equitable considerations, IHO 2 found that the parent participated in the CSE meetings and actively discussed matters but also determined that she was "singularly focused on maintaining the [s]tudent's placement at the parental placement" and that while she did not thwart the district, the parent's position failed to acknowledge that she did not appeal a decision for 2019-20 school year that was contrary to her position (id. at p. 22). IHO 2 found that the parent also failed to acknowledge that other placements might exist that could confer educational benefit upon the student (id.). Although making factual findings, IHO 2 did not rule on whether equitable considerations favored either party because the district prevailed by offering the student a FAPE (id.).

IV. Appeal for State-Level Review

The parent appeals. The parent contends that IHO 2 erred in according to undue weight to a prior IHO determination "instead of confining his consideration to whether" the 2020-21 IEP offered a FAPE based on all of the information available to the CSE at the time it made its decision. According to the parent, IHO 2 ignored the differences in available information between the 2019 and 2020 CSEs as there was information that postdated the June 2019 CSE that was available to the May and June 2020 CSEs that demonstrated the student would not progress in a classroom with ICT services. The information included evaluations and input provided by the Norman Howard staff that the ICT program was unlikely to produce progress. The parent argues that the OT IEE and input of Norman Howard staff demonstrated that the student requires a smaller, quieter, more structured learning environment with a decreased pace. The parent asserts that the district's autism consultant confirmed a correlation between small class size and the student's increased independent engagement without the need for adult support. The parent further asserts that the evidence ignored by IHO 2 debunked the opinion of the consultant teacher, which IHO 1 had heavily relied upon in making a determination in the 2019-20 school year proceeding. The parent asserts that IHO 2 should have realized that the June 2020 IEP only provided for 3 hours per year of autism consultation whereas the prior year IEP provided for 10 hours of autism consultation per year.

The parent makes numerous comparisons between the findings by IHO 1 who presided over the 2019-20 proceeding and purportedly changed circumstances present at the time of the June 2020 CSE meeting. The parent contends that IHO 2 ignored evidence that showed that the student's pragmatic language needs were more significant than the district believed when the CSE

convened in June 2019 and ignored evidence that the level of speech-language support on the 2020-21 IEP was inadequate to meet his needs. The parent asserts that for the 2020-21 school year, it was unknown whether the student would receive AIS services in math and reading and there was no evidence provided regarding whether the student's classes would be in "close proximity." The parent contends that IHO 1 noted concerns regarding the lack of counseling and assistive technology, yet, in this case, this IHO ignored the fact the June 2020 IEP also lacks counseling and assistive technology. According to the parent, the IHO ignored that the June 2020 IEP reduced the level of services from the June 2019 IEP in that it provided for 20 minutes fewer of ICT services each day as well as fewer autism consultation hours per year. The parent also asserts that the June 2020 IEP eliminated the quarterly team meetings with the parents. The parent argues that IHO 2 ignored evidence that the June 2020 IEP failed to meet the student's needs for daily 1:1 multisensory reading instruction, daily writing instruction and failed to provide the directed instruction and built-in daily supports the student needed to address his executive functioning needs.

The parent alleges that IHO 2 erred in finding that there was no indication that the student's needs were such that he would not make progress in with ICT services and such a finding was contrary to the evidence in the hearing record. The parent argues that reports available to the CSE and input from Norman Howard staff and the parent at the May 2020 CSE meeting showed that the student was not likely to make progress in a general education class with ICT services and that placement in that setting would be detrimental.

The parent further argues that IHO 2 erred by finding that the parent did not contest, in the due process complaint notice, the substance of the present levels of performance or special education needs in the IEP as the issue was clearly raised and IHO 2 should have ruled in the parents favor regarding this claim. The parent asserts that the "IEP lacks critical information regarding the student's academic, social, physical/sensory, management and executive functioning levels and needs, their effect on his progress in the general education curriculum and [the student's] expected level of functioning in an [ICT] program" in the district. The parent contends that IHO 2 erred in citing to the present levels of performance created by Norman Howard staff without considering that those levels describe the student's performance at Norman Howard which has embedded supports and specialized instruction and do not represent the student's "expected [present levels of performance]" in the district's ICT program. The parent asserts that none of the student's services inherent in the Norman Howard program were contained in the present levels of performance in the IEP as those present levels of performance were written for the IESP, not IEP.

The parent argues that although the record demonstrates that the student made progress at Norman Howard, the record "does not show that [the student's] special education needs had improved." The parent contends that the student's progress was attributable to the educational supports provided by Norman Howard, which included a "small, quiet, structured environment, with built-in executive functioning, [assistive technology], social language and social emotional supports, small class size and reduced instructional pacing."

The parent asserts that IHO 2 erred by failed to correctly apply the Burlington/Carter standard when he found that there was no objective information that the student required either a 12:1+1 special class or an in-state private school, as well as IHO 2's conclusion that the ICT services could meet the student's needs on the continuum of services. The parent also contends

that IHO 2 erred by failing to allow evidence into the hearing record regarding the district's reopening plan and failing to address her claim that the hybrid learning plan would have contributed to the deprivation of a FAPE.

Next, the parent argues that IHO 2 failed to conclude that the procedural violations raised resulted in a denial of a FAPE. The parent contends that IHO 2 erred by ruling that the exclusion of the Norman Howard staff from the June 2020 CSE meeting was not a procedural violation that impeded the parent's ability to participate in student's education or deprived him of educational benefit. Additionally, the parent asserts that IHO 2 erred in finding that the district did not predetermine the outcome of the June 2020 CSE meeting as the meeting was conducted solely to develop an in-district IEP. Specifically, the parent argues that IHO 2's statement that "the CSE's role was to devise an IEP as if the [s]tudent were enrolled at the [d]istrict" misstated the evidence and that IHO 2 should have concluded that CSE predetermined the student's placement because the district representative directed the CSE to develop an IEP as if the student was to attend the district junior high school.

The parent argues that IHO 2 erred when he found that the June 2020 IEP was reasonably calculated to enable the student to derive educational benefit in the least restrictive environment because the IEP was created without consideration of the student's strengths and needs or consideration for the least restrictive environment. According to the parent, the "CSE was foreclosed from engaging in the required" least restrictive environment analysis because the district representative declared that the sole purpose of the CSE was to develop an in-district program. The parent contends that the June 2020 IEP was developed solely to use as evidence for the impeding impartial hearing and that IHO failed to address her claim that this was improper. The parent asserted that the district does not typically create IEPs for a parentally placed student, and it was only after the parent indicated that she intended to seek tuition reimbursement that the district convened the June 2020 CSE to create the in-district IEP.

The parent asserts that IHO 2 erred in finding that her ability to participate was not significantly impeded. The parent also asserts that the IHO failed to render a determination regarding whether the CSE improperly failed to consider the student's counseling needs, assistive technology needs, extended school year needs, and failed to consider parent counseling and training for the 2020-21 school year. The parent contents that IHO 2 failed to address claims regarding the student's needs for specially designed physical education and that the inclusion of it on the IEP was carried over by from IESP by mistake as the hearing record shows that there was no specially designed physical education class at the district junior high. According to the parent, the IHO failed to address the parent's claims that the district representative unilaterally determined that four hours of OT consultation would be on the IEP and no specialized transportation would be on the June 2020 IEP. The parent asserts that IHO 2 erred by failing to address a claim that the district failed to timely develop an IESP and implement services for the 2019-20 school year, failed to give the parent access to the IESP present levels of performance draft used by the June 2020 CSE, and failed to rule on the defective meeting notices. The parent contends that the alleged procedural violations collectively resulted in a deprivation of FAPE.

Lastly, the parent asserts that IHO 2 should have found that equitable considerations weighed in her favor because the evidence shows that the parent was cooperative and did not engage in any unreasonable conduct. As relief the parent seeks reversal of IHO 2 decision and an

order directing the district to change the student's placement for the 2020-21 school year to Norman Howard as well as tuition reimbursement for Norman Howard for the 2020-21 school year.

In the answer, the district denies the parent's material allegations and requests that the petition be dismissed.

V. Applicable Standards

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

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

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at

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

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).[5]

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).

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

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. Scope of Review

IHO 2 noted that even though an analysis regarding the appropriateness of Norman Howard was not necessary, he would address the issue (IHO Decision at p. 20). IHO 2 found that it was "undeniable that the [s]tudent's needs were met at the placement" and that the school's "small specialized instruction clearly benefited the student" (id.). He concluded that under the relaxed standards imposed on the parent, the parent met her burden of showing that the unilateral placement of Norman Howard was appropriate for the student (id. at p. 21). An IHO's decision is final and binding upon the parties unless appealed to a State Review Officer (34 CFR 300.514[a]; 8 NYCRR200.5[j][5][v]). Here, neither party appealed IHO 2's finding that the unilateral placement at Norman Howard was appropriate. As such, IHO 2's finding that Norman Howard was an appropriate unilateral placement for the student has become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]).

B. FAPE & Remand

As an initial matter, I note that IHO 2's failure to address multiple claims asserted by the parent in the due process complaint notice substantially hampers my ability to review his findings concerning whether the district offered the student a FAPE for the 2020-21 school year. Accordingly, as further discussed below, I will remand this matter to IHO 2 for further proceedings. When an IHO has not addressed claims set forth in a due process complaint notice, an SRO may consider whether the case should be remanded to the IHO for a determination of the claims that the IHO did not address (8 NYCRR 279.10[c]; see Educ. Law § 4404[2]; F.B. v. New York City Dep't of Educ., 923 F. Supp. 2d 570, 589 [S.D.N.Y. 2013] [indicating that the SRO may remand matters to the IHO to address claims set forth in the due process complaint notice that were unaddressed by the IHO], citing J.F. v. New York City Dep't of Educ., 2012 WL 5984915, at *9 n.4 [S.D.N.Y. Nov. 27, 2012]; see also D.N. v. New York City Dep't of Educ., 2013 WL 245780, at *3 [S.D.N.Y. Jan. 22, 2013]). However, as IHO 2 did make several findings with respect to FAPE for the 2020-21 school year that were in error, and therefore capable of review in this decision, I will also address those issues below.

In large part, the IHO based his findings that the district offered the student a FAPE for the 2020-21 school year on IHO 1's unappealed decision noting that "at the time of the CSE the District had reason to understand that Integrated Co-Teaching Services for all four core subjects was appropriate to meet the Student's special education needs during the 2019-2020 school year as evidenced by the unappealed decision of [the] previous IHO" (IHO Decision at p. 14). In addition, IHO 2 determined that "there was no evidence, data, or other information presented to the CSE in May or June 2020 upon which the CSE could determine that the Student's special education needs had increased since the previous IEP had been developed in June, 2019" and further that there was "no contention in the Due Process Complaint that the substance of the [June

2020] IEP [was] not an accurate description of the Student's present levels of performance or special education needs" (id. at pp 14-15). While IHO 2 correctly noted that the consideration of prior programs and placements recommended for the student is a relevant part of the CSE's process in crafting recommendations for subsequent school years, IHO 2's implication that IHO 1's decision finding that a prior year's IEP was appropriate can be used as support for the continued recommendation of the same program in a subsequent school year comes perilously close to ratifying a specific type of predetermination by the district. As noted by IHO 2, the district "is under an inherent obligation to review the previous plan in addition to the student's current function in order to craft next year's educational plan. Identifying the interventions and services that worked last year, modifying or changing the ones that didn't is an essential step in the formation of a subsequent IEP" (id. at p. 15). This necessitates a fresh look each year at the updated evaluative information, assessments, and progress reports available to the CSE at its annual review of the student's educational program. There is a danger, therefore, when the student's program has gained the stamp of approval of an IHO in a prior proceeding, that the IHO's decision will overdetermine the subsequent recommendations of the CSE to the detriment of the comprehensive review the CSE is required to undertake based on the information before it at the time of the annual review. Relatedly, to the extent an IHO overly relies on IHO 1's decision which found the prior school year appropriate, that IHO also runs the risk of "short-cutting" a full analysis of the claims currently presented by the parents in the due process complaint notice by finding that the claims and the evidence in the current case are "close enough" to that presented in the prior proceeding that a finding of appropriateness is warranted. Accordingly, while I cannot know for sure the entirety of IHO 2's thinking in terms of what he did or did not address in his decision, the large number of due process complaint notice claims that were left unaddressed compels a conclusion that over-reliance on IHO 1's decision as the main framework of analysis for the 2020-21 school year resulted in errors and oversights, many of which must now be reexamined by IHO 2 on remand.[6]

A prime example of the necessity to take each school year on its own terms with respect to the claims asserted and evidence presented, as opposed to relying on the previous IHO's finding that the 2019-20 IEP was appropriate, arises with respect to the question of whether the provision of learning lab and AIS services constituted specially designed instruction that were required to be on the IEP. Notably, the testimony regarding the 2020-21 school year indicated that it was not guaranteed that the student would actually receive AIS services (Tr. pp. 106, 127-28, 257-59). Yet, for the 2019-20 school year, IHO 1 similarly appeared to, in part, rely on the AIS and learning lab to bolster his FAPE finding (Dist. Ex. 14 at pp. 33, 44). Accordingly, reliance on the general FAPE findings of the previous IHO does not resolve the present question of what impact the

[6] Moreover, without delving into speculation regarding the motivations of the parties in failing to appeal IHO 1's decision, I note that the decision to appeal is often a strategic one and does not always represent full agreement by the parties with the entirety of the decision although, as a procedural matter, that decision becomes final and binding on the parties. With respect to this case, I note that although the previous IHO found that the district offered the student a FAPE for the 2019-20 year because the proposed public programming was appropriate for the student, the parent was nonetheless awarded tuition for the student's attendance at Norman Howard for the 2019-20 school year. Having obtained the relief sought, it is unsurprising that the parent would not appeal IHO 1's decision, including the FAPE determination, even if the parent was not entirely satisfied with IHO 1's determination that a FAPE was offered to the student. Moreover, the parent notes that IHO 1 found certain deficiencies in the district's 2019-20 IEP that, while not rising to the level of a denial of a FAPE for that school year, were items that the CSE should address.

availability – or lack thereof – of learning lab and AIS for the student has on the issue of whether the district offered the student a FAPE for the 2020-21 school year.

Unfortunately, the hearing record regarding these two services is poorly developed as it does not adequately describe specifically what the services consist of or the degree to which the district staff believed that the student required them in order to make progress. Further factual inquiry is required because if they were not specially designed instruction, State policy would not require their inclusion on the student's IEP; however, if that inquiry shows that the services meet the definition of special education—a determination that IHO 2 should have made upon an adequate record—then they should have been placed on the student's IEP. It must also be determined if the remainder of the services would have been reasonably calculated to enable the student to receive educational benefits in the absence of such services (see, e.g., Application of the Board of Educ., Appeal No. 21-065; Application of the Board of Educ., Appeal No. 21-021; Application of a Student with a Disability, Appeal No. 18-101; Application of a Student with a Disability, Appeal No. 18-101). As such, the issue of FAPE and whether the June 2020 CSE recommendations were appropriate must be remanded for further development of the hearing record and findings by IHO 2. Specifically, IHO 2 should determine whether AIS and learning lab were "specially designed instruction" and if so, whether either was a necessary component of a FAPE for the student in this case (8 NYCRR 200.1[vv]). To be clear, certain additional instructional or supportive services may be available to special education students and non-disabled students alike (e.g., AIS or "building level services"), and according to the State Education Department, such general services should not be listed on a student's IEP (see "Academic Intervention Services: Questions and Answers," at pp. 5, 20, Office of P-12 Mem. [Jan. 2000], available at http://www.p12.nysed.gov/part100/pages/AISQAweb.pdf). But if a component of the AIS is provided to a student with a disability and that aspect of the service meets the definition of "specially designed instruction" under IDEA, the United States Department of Education's Office of Special Education Programs has clarified that services that clearly fall into the realm of special education are required to be listed on an IEP, stating in particular that "[t]he IEP Team is responsible for determining what special education and related services are needed to address the unique needs of the individual child with a disability. The fact that some of those services may also be considered 'best teaching practices' or 'part of the district's regular education program' does not preclude those services from meeting the definition of 'special education' or 'related services' and being included in the child's IEP" (Letter to Chambers, 59 IDELR 170 [OSEP 2012]; see Bd. of Educ. of Uniondale Union Free Sch. Dist. v. J.P., 2019 WL 4315975, at *12 (E.D.N.Y. Aug. 23, 2019), report and recommendation adopted, 2019 WL 4933576 [E.D.N.Y. Oct. 7, 2019]; Urbandale Community Sch. Dist., 70 IDELR 243 [SEA Iowa 2017] [noting that "[i]nstruction becomes special education when it is designed or selected to meet the disability-related needs of an individual student and is necessary for that student to maintain or improve educational performance"]). Thus, if either the AIS services or the learning lab was specially designed instruction which is defined in part, "as adapting the content, methodology, or delivery of instruction to address the unique needs of a student with a disability that result from the student's disability" (see 34 CFR 300.39[b][3]) and the student required those services in order to receive a FAPE, they were required to be listed on the June 2020 IEP.[7]

[7] IHO 1's decision for the 2019-20 school year is equally flawed from a legal perspective, and thus IHO 2 was not

Additionally, as the matter must be remanded, IHO 2 should specifically address all of the claims raised in the due process complaint notice that he failed to address, which include but are not limited to whether the listed needs and present levels of performance were appropriate,[8] whether the district sufficiently evaluated the student to identify the student's educational needs, whether the CSE considered the evaluative information that was available,[9] whether the CSE should have considered offering the student with 12-month extended school year services, the alleged failure to include OT services and assistive technology services in the June 2020 IEP, and the lack of a recommendation for parent counseling and training (see Dist. Ex. 1).[10] Also, the parent raised claims regarding implementation of services under the IESP in the due process complaint notice, which were not addressed by IHO 2 and should be upon remand (id. at pp. 7-8).

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bound to make the same mistake again should not have relied on that aspect of the 2019-20 decision. Furthermore, in my view it was ill-advised for IHO 1 to award tuition at Norman Howard as relief once determining that the district had self-corrected by offering FAPE for the 2019-20 school year. Instead IHO 1 should have identified additional makeup services to be provided to the student by the district. However, to be clear, even if legally flawed and ill advised, by not appealing the decision both parties are bound by IHO 1's decision with respect to the 2019 20 school year, but the same mistakes need not be repeated in these proceedings.

[8] With regard to the parent's arguments regarding the inaccuracies of the present levels of performance, IHO 2 may wish to inquire further regarding the nature of the parent's claim. On appeal, the parent asserts that the present levels of performance in the May 2020 IESP were premised upon services offered by Norman Howard and, therefore, could not be used by the district when creating an IEP for in-district services. However, the present level of performance "section of a student's IEP identifies the areas of unique needs related to the student's disability and the current level of functioning, including the strengths of the student, related to those areas. This is the foundation on which the Committee builds to identify goals and services to address the student's individual needs" ("Guide to Quality [IEP] Development and Implementation," at p. 18, Office of Special Educ. [Dec. 2010], available at http://www.p12.nysed.gov/specialed/publications/iepguidance/IEPguideDec2010.pdf [emphasis added]. To the extent that the parent argues that the student's present levels of performance should change based upon the particular services envisioned under an IESP or IEP model, such an argument is fundamentally flawed on its face because the present levels of performance determined by the student's deficits and areas of need and are the basis upon which the other elements of the IEP or IESP are premised, not the other way around. Thus, it would not be unusual to have similar or even identical present levels of performance listed on the IESP and IEP in this case, and I would find it disturbing if the present levels of performance were dissimilar since the student's needs did not change significantly in the weeks between the two CSE meetings. Furthermore, the evidence in the hearing record already reveals that the Norman Howard staff was largely responsible for the development and drafting of the student's present levels of performance in the May 2020 IESP and, by extension, the June 2020 IEP (Tr. pp. 90-93). If the present levels of performances are in fact inaccurate as the parent contends in the due process complaint notice, then it becomes problematic for the parent's arguments that rely on the opinions and viewpoints of Norman Howard staff in recommending programming for the student for the 2020-21 school year, especially if the Norman Howard staff was unable to accurately describe the student's special education deficits. IHO 2 should inquire with the parent if she wishes to pursue this claim further, which is separate and distinct from the issue of whether the student was sufficiently evaluated.

[9] IHO 2 should inquire of the parent what further information from the December 2018 educational evaluation referenced by the parent should have been discussed by the CSE again in Spring 2020 again after its previous consideration by the CSE during the preceding school year (see Dist. Ex. 14 at p. 24).

[10] Although the parent argues that IHO 2 failed to consider her claims regarding the student's need for specially designed physical education, she did not specifically raise this issue in the due process compliant notice. I shall leave the determination as to whether this issue is ripe for review on remand to the IHO.

Turning next to certain procedural violations addressed in the decision, IHO 2 correctly determined that they did not rise to the level of a denial of FAPE (IHO Decision at pp. 18-19). Regarding the parent's CSE composition claims, IHO 2 properly determined that the failure to provide notice of the CSE participants, pursuant to 8 NYCRR 200.5[c][2][i], was a procedural violation, but the presence of additional attendees at the June 2020 CSE meeting whose attendance was not anticipated by the parent did not significantly impede her opportunity to participate in the CSE process (id. at p. 18). Additionally, the failure to include staff from Norman Howard during the second CSE meeting in June 2020 was not a procedural violation, as the parent was free to invite them. Again, there is no evidence that this failure denied the parent the ability to participate, and the information provided by Norman Howard staff and providers in May 2020 was incorporated into the June 2020 IEP as the June 2020 CSE adopted the present levels of performance created by the Norman Howard staff (compare Dist. Ex. 24 at pp. 7-10 with Dist. Ex. 25 at pp. 7-10). Finally, the hearing record supports IHO 2's finding that the June 2020 CSE did not predetermine the student's program and placement. Although, there was evidence that the CSE anticipated making an in-district recommendation, a preformed opinion is permissible in this instance especially since the district staff concluded that options less restrictive than Norman Howard within the district needed to be considered (see Parent Ex. A at p. 17-18;). Ultimately the meeting minutes do not support a finding that the CSE was unwilling to consider the parent's input for the student's programming (see Parent Ex. B; G.W. v. Rye City Sch. Dist., 2013 WL 1286154, at *21 [S.D.N.Y. Mar. 29, 2013], aff'd, 554 F. App'x 56 [2d Cir. 2014] [discussing the permissibility of using draft IEPs or having pre-formed opinions so long as that is combined with a willingness to hear parental objections and suggestions]).[11] As such, IHO 2's findings regarding these procedural violations were correct and, accordingly, do not have to be further addressed by IHO 2 on remand. However, IHO 2 should address any other procedural violations asserted by the parent in the due process complaint notice that were not addressed in IHO 2's decision.

Finally, the parent argues that IHO 2 erred in finding that equities did not favor tuition reimbursement. First, that argument clearly misstates IHO 2's decision, because he did not make an explicit finding that the equities did not favor the parent, instead ruling that "no determination as to award is warranted" (IHO Decision at p. 22). However, IHO 2 did as a factual matter fault the parent for what he determined was a failure on her part to consider any other placement than Norman Howard for the student (id. at pp. 21-22). Pointedly, IHO 2 stated that while "the Parent did not actively thwart the District's ability to convene, hold, and discuss the Student," the parent

[11] Once a CSE determines that an appropriate class placement for the student is available within the district, the district is not obligated to consider a more restrictive setting, such as a nonpublic school (see B.K. v. New York City Dep't of Educ., 12 F. Supp. 3d 343, 359 [E.D.N.Y. 2014] [indicating that "once the CSE determined that a 6:1:1 placement was appropriate for [the student], it was under no obligation to consider more restrictive programs"]; E.F. v. New York City Dep't of Educ., 2013 WL 4495676, at *15 [E.D.N.Y. Aug. 19, 2013] [explaining that "under the law, once [the district] determined . . . the [LRE] in which [the student] could be educated, it was not obligated to consider a more restrictive environment"]; A.D. v. New York City Dep't of Educ., 2013 WL 1155570, at *7-*8 [S.D.N.Y. Mar. 19, 2013] [finding that "[o]nce the CSE determined that [the public school setting] would be appropriate for the [s]tudent, it had identified the [LRE] that could meet the [s]tudent's needs and did not need to inquire into more restrictive options"]). The parent's preference for the student to remain at Norman Howard is understandable, but IHO 2's points about the district's need to observe the LRE mandate are well-taken and the district's proposed placement is far less restrictive than Norman Howard; however, as described above, it remains to be seen if the June 2020 IEP is otherwise appropriate to address the student's needs.

did not appeal a contrary decision to her original position that the 2019-20 IEP was inappropriate or that there may be other education placements that could confer benefit to the student (id. at p. 22). To the extent that IHO 2's factual findings were a precursor to a finding that equitable considerations do not favor the parent, those findings on the record evidence thus far, even if accurate, are not sufficient to support a reduction or denial of reimbursement. Instead, the findings that the parent was a full and active participant in the CSEs would tend to support reimbursement, because a parent's predetermined desire to pursue a unilateral placement for the student is typically insufficient to hold that equitable considerations weigh against a parent's tuition reimbursement claim (see C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 840 [2d Cir. 2014]). I will leave the final determination of equitable considerations to IHO 2 upon the fully developed hearing record.

VII. Conclusion

Having found that IHO 2's determinations that the student was offered a FAPE for the 2020-21 school year were based on a faulty premise, IHO 2's decision regarding a FAPE must be reversed, and the matter must be remanded for reconsideration by IHO 2 upon further development of the hearing record and in accordance with this decision. In addition, having determined that IHO 2 properly concluded that the CSE did not predetermine the outcome of the June 2020 meeting or significantly impede the parent's participation due to the meeting notices or membership composition of the June 2020 CSE meeting, IHO 2 need not further address those particular claims upon remand.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the March 29, 2021, decision is modified by reversing that portion that concluded the district offered a FAPE for the 2020-21 school year; and

IT IS FURTHER ORDERED that the matter is remanded to IHO 2 to reconvene the impartial hearing and issue a new determination of whether the district offered the student a FAPE for the 2020-21 school year and, if necessary, whether equitable considerations favor the parent.

Dated: **Albany, New York**
June 9, 2021

JUSTYN P. BATES
STATE REVIEW OFFICER