



The University of the State of New York

The State Education Department
State Review Officer

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No. 21-173

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

Appearances:

Harris Beach PLLC, attorneys for petitioner, by Anne M. McGinnis, Esq.

Cara M. Briggs, Esq., attorney for respondents

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from the decision of an impartial hearing officer (IHO) which found that the district failed to offer an appropriate educational program to respondents' (the parents') son and ordered it to reimburse the parents for their son's tuition costs at the Norman Howard School (Norman Howard) for the 2020-21 school year.¹ The parents' cross-appeal from the IHO's determination which failed to make findings with respect to the district's recommended program and services for the 2020-21 school year. The appeal must be dismissed. The cross-appeal must be dismissed.

¹ Norman Howard is a nonpublic school that has been approved by the Commissioner of Education as a school with which districts may contract for the instruction of students with disabilities (Tr. p. 591; see 8 NYCRR 200.1[d], 200.7).

II. Overview—Administrative Procedures

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

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

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

III. Facts and Procedural History

The student has a "complex medical history" and has received numerous diagnoses including among others, Pervasive Developmental Disorder Not Otherwise Specified (PPD-NOS), generalized anxiety disorder, Cognitive Cerebellar Affective Syndrome (CCAS), and a specific learning disability in reading and in written expression (Joint Exs. 30 at p. 2; 42 at pp. 1-2; 44 at pp. 1-2, 10).²

The student received early intervention services at three months of age for a feeding disorder and subsequently received occupational therapy (OT), physical therapy (PT), and speech-language therapy through the program (Joint Ex. 44 at p. 1). Later, he also received preschool special education services of speech-language therapy, OT, and PT (Joint Exs. 30 at p. 2; 44 at p. 2). Thereafter, the student attended the district schools from kindergarten through fourth grade and received special education services pursuant to IEPs for each school year (Joint Ex. 44 at p. 2). Beginning in fifth grade the student was placed by his parents at Norman Howard where he continued to receive special education services through an individualized education services plan (IESP) (*id.*).³

On January 25, 2019, the CSE for the school district of location of Norman Howard convened for a reevaluation review (*see* Parent Ex. O).⁴ The January 2019 CSE found the student remained eligible for special education as a student with autism and developed an IESP for the student, which recommended related services of two 45-minute sessions per week of small group speech-language therapy, one 45-minute session per week of small group counseling services, and one 30-minute session per week of individual OT (Parent Ex. O at pp. 1, 14-15). The CSE convened on March 29, 2019 for an annual review and developed an IESP for the student for the 2019-20 school year (*see* Joint Ex. 22). The CSE recommended related services of two 45-minute sessions per week of small group speech-language therapy and one 45-minute session per week of small group counseling services together with one 60-minute OT consultation per quarter (Joint Ex. 22 at pp. 1, 8-9).

² A 2016 neuropsychological report included a description of CCAS as the evaluator indicated there was a general lack of understanding of the diagnosis and that it was a "fairly new diagnosis with not a lot of literature (or recognition) on it until recently" (Joint Ex. 30 at p. 9). The report described in detail the specific area of cerebellar damage the student presented with, the effect of the damage on the student's functioning in various areas, as well as the emotional and behavioral components of the syndrome, and noted that such damage could be connected to atypical autistic behaviors (*id.* at pp. 9-10).

³ The State's dual enrollment statute provides that the district of location's CSE must review a parent's written request for services and "develop an [IESP] for the student based on the student's individual needs in the same manner and with the same contents as an [IEP]" (Educ. Law §§ 3602-c[2][a]; [2][b][1]). A school district of location is defined as the school district in which the nonpublic elementary or secondary school attended by the student is located (Educ. Law § 3602-c[1][f]).

⁴ Rush-Henrietta Central School District was the district of location and developed the IESPs for the student (Tr. p. 36).

On June 27, 2019, the CSE of the district of residence convened for the purposes of conducting an annual review (see Joint Ex. 8).⁵ The CSE determined the student was eligible for special education as a student with autism (*id.* at p. 1). The student was described as demonstrating "weaknesses in emotional regulation, sensory processing abilities and motor coordination" with delayed "pragmatic language skills" (*id.* at p. 8). The June 2019 CSE recommended a 15:1+1 special class for English, math, science, and social studies, together with one 30-minute session per week of small group speech-language therapy (in class), one 30-minute session per week of small group speech-language therapy (in therapy room), one 30-minute session per week of small group counseling services, and one 60-minute OT consultation per quarter, as well as supplementary aids, services, and program modifications (*id.* at pp. 9-11).

The student attended Norman Howard for the 2019-20 school year and received related services from the district of location (see Parent Exs. L; O).

A CSE for the district of location convened on May 8, 2020 and developed an IESP for the student for the 2020-21 school year (ninth grade) (see Joint Ex. 24). The CSE continued to recommend related services of two 45-minute sessions per week of small group speech-language therapy, one 30-minute session per week of small group counseling services, and one 60-minute OT consultation per quarter (*id.* at pp. 1, 10-11).

The CSE of the district of residence convened on June 25, 2020 for an annual review and to develop an IEP for the 2020-21 school year (ninth grade) (see Joint Ex. 11). The student's management needs were described as requiring structured choices, directions written and spoken in a simple and clear manner, modeling of flexible thinking, frequent breaks, advanced notice for schedule/routine changes, opportunities for frequent movement, reminders to slow down, and wait time to address his delayed processing speed (*id.* at p. 7). Based on the student's needs, the June 2020 CSE recommended a daily 15:2 special class for English, science, and social studies; a 15:2 special class for reading once per week; daily integrated co-teaching (ICT) services for math; and one 40-minute session per day of resource room services (5:1) (*id.* at p. 9). Additionally, the June 2020 CSE recommended one 30-minute session per week of small group counseling services, two 30-minute sessions per week of small group speech-language therapy, and one 60-minute OT consultation per quarter (*id.* at pp. 9-11).

The parents disagreed with the recommendations contained in the June 2020 IEP, as well as with the public-school site to which the district assigned the student to attend for the 2020-21 school year and, as a result, on August 10, 2020, notified the district of their intent to unilaterally place the student at Norman Howard (see Joint Ex. 6).

In response to the August 10, 2020 letter, the CSE for the district convened to conduct a requested review on August 20, 2020 (see Joint Exs. 6; 14). The August 2020 CSE identified the student's needs and described numerous environmental, human, and material resources the student required to address his needs (Joint Ex. 14 at pp. 5-10). The August 2020 CSE recommended daily 15:2 special classes in English, science, social studies, and reading, a daily ICT class for math, and one 40-minute class per day of resource room (*id.* at p. 12). Also, the August 2020 CSE

⁵ Pittsford Central School District is the district of residence of the student and the district that is a party to this proceeding (see Tr. p. 35).

recommended one 30-minute session per week of small group counseling services, two 30-minute sessions per week of small group speech-language therapy, one 60-minute OT consultation per quarter, and five 60-minute sessions of assistive technology consultation per year (id. at pp. 12, 15). Further, the August 2020 CSE recommended numerous supplemental aids, services, and program modifications, including the provision of home/school communication, advance notice for routine/schedule changes specifying a transition plan to increase the student's exposure to and comfort level to the district school building, extra time between classes, environmental modifications (quiet location as needed), use of a computer, instructional material in large print, special seating, and the use of modeling (id. at pp. 13-15).

The CSE for the district of residence reconvened on November 12, 2020 for a reevaluation review, while the student was attending Norman Howard (see Joint Ex. 17). The November 2020 CSE did not make any changes to the student's recommended program or related services from August 2020 but modified one of the student's reading goals (compare Joint Ex. 14 at pp. 1, 11-15 with Joint Ex. 17 at pp. 1, 13-17). The CSE for the district of residence convened again on February 4, 2021 for a requested review; no changes were made to the student's program or related services (compare Joint Ex. 17 at pp. 1, 13-17 with Joint Ex. 20 at pp. 1, 15-18). The student remained at Norman Howard for the entire 2020-21 school year (Request for Review at ¶ 4;see Tr. p. 35).

A. Due Process Complaint Notice

In a due process complaint notice, dated November 23, 2020, and an amended due process complaint notice, dated February 22, 2021, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2020-21 school year (see Joint Exs. 1; 4).⁶

In connection with the 2020-21 school year, the parents argued that both the August 2020 and November 2020 IEPs were inappropriate and not reasonably calculated to enable the student to make progress (Joint Ex. 4 at p. 5). More specifically, the parents alleged that the August 2020 and November 2020 IEPs failed to offer an appropriate program and services for the student's sensory, upper body and core strength, coordination, writing, pragmatic language, social communication, executive functioning, social/emotional, special transportation, academic and instructional, and assistive technology needs (id. at pp. 6-8). Further, the August 2020 and November 2020 IEPs failed to offer specially designed physical education, failed to provide extended school year (ESY) services and failed to offer parent counseling and training (id.). Finally, the parents argued that the program and services as set forth in the IEPs would not have been provided because of the hybrid learning program for the 2020-21 school year (id. at p. 6). The parents next argued that the February 2021 IEP recommended the same inappropriate program and services and made recommendations in direct contravention of evaluative information provided by the parents (id.). The parents also argued that the district failed to reevaluate the student every three years, failed to comprehensively evaluate the student, failed to evaluate the

⁶ The parents' counsel sought permission from the IHO to amend the due process complaint notice to add a request for tuition reimbursement, and allegations pertaining to the February 4, 2021 IEP (Feb. 1, 2021 Tr. pp. 34, 39-40; see Joint Exs. 1, 4).

student's assistive technology needs, and failed to conduct updated evaluations which impeded the parents' ability to meaningfully participate in the CSE process (id. at p. 7).

Lastly, the parents contended that the program at Norman Howard was appropriate for the student and met his needs, and that equitable considerations favored the parents (Joint Ex. 4 at p. 8).

As relief, the parents sought a declaration that the district's failures and violations of the IDEA denied the student a FAPE for the 2020-21 school year, and that such violations impeded the parents' ability to meaningfully participate in the CSE process (Joint Ex. 4 at p. 8). Additionally, the parents requested a directive that the CSE reconvene and develop an appropriate IEP that included placement of the student at Norman Howard (id.). As the ultimate relief, the parents sought reimbursement for the costs of tuition at Norman Howard for 2020-21 school year (id.).

The district responded to both due process complaint notices (see Joint Exs. 3, 5). The district generally denied each allegation contained in the parents' due process complaint notices and described how each IEP (August and November) offered the student a FAPE for the 2020-21 school year (id. at pp. 3-7). Additionally, the district argued that Norman Howard was not appropriate as the student did not require the highly intensive support and services offered by the nonpublic school (id. at p. 7). The district also argued that Norman Howard was too restrictive and was not the least restrictive environment (LRE) for the student (id.). Finally, the district denied that it should be ordered to reimburse the parents for the costs of the student's tuition at Norman Howard for the 2020-21 school year (id. at p. 9).

B. Impartial Hearing Officer Decision

Following prehearing conferences held on February 1, 2021 and March 16, 2021, an impartial hearing convened on March 25, 2021, and concluded on May 14, 2021, after nine total days of proceedings (February 1, 2021 Tr. pp. 1-42; March 16, 2021 Tr. pp. 1-48; Tr. pp. 1-1168).⁷ In a decision dated July 13, 2021, the IHO determined that the district failed to offer the student a FAPE for the 2020-21 school year, that Norman Howard was an appropriate unilateral placement, and that equitable considerations weighed in favor of the parents' request for an award of tuition reimbursement (IHO Decision at pp. 17-20).

The IHO held "that the CSE did not recognize the severity and delicacy of the student's condition" and the CSE's inappropriate placement recommendation "was an error in professional judgment" (IHO Decision at p. 25). Also, the IHO held that the recommendation for extra time for the student to transition between classes would have resulted in the student missing class time (id. at p. 17). Additionally, the IHO held that the larger environment of the district's high school would have been overwhelming for the student, and a smaller environment could not be carved out within the larger high school as the IHO determined was proposed in several of the accommodations included in the IEP (id.). The IHO held that anything the staff at the assigned

⁷ As the transcripts of the prehearing conferences were separately paginated from the rest of the hearing, any citations to the transcripts for the prehearing conferences will be preceded by the date of the conference.

school did to address the size of the high school would have been more "reactive" rather than "proactive" (id.).⁸

Additionally, the IHO held that the IEP was calculated with the "intention" of enabling the student to make progress, but it fell short of meeting the reasonably calculated standard (IHO Decision at p. 18). The IHO further held that an IEP that cannot be implemented is an inappropriate IEP (id.).

The IHO did, however, agree with the district that there was no evidence that the student required specially designed instruction in physical education, special transportation, or parent counseling and training (IHO Decision at p. 26). He also held that the CSE allowed participation of the parents in CSE meetings, and the district had not predetermined placement for the 2020-21 school year (id. at p. 18).

Next, the IHO held that the parents met their burden of showing Norman Howard was an appropriate placement for the student (IHO Decision at p. 19). The IHO held that the student's achieving passing marks established that the program was appropriate (id. at p. 20). Also, the IHO held that the equities favored the parents' request for tuition reimbursement (id.).

The IHO ordered the district to reimburse the parents for the costs of the student's tuition at Norman Howard for the 2020-21 school year upon presentation of proof of payment (IHO Decision at p. 26).

IV. Appeal for State-Level Review

The district appeals arguing that the IHO erred by finding that it denied the student a FAPE for the 2020-21 school year, that Norman Howard was appropriate for the student, and that the equities favored the parents.

The district argues that the IHO provided little justification to support his conclusion that the district denied the student a FAPE but argues that it appears that the IHO made this determination in finding that the district would be unable to implement the IEP. The district argues that any implementation finding is "impermissibly speculative" as the district contends it could have implemented the IEP for the 2020-21 school year. In addition, the district argues that the IHO's determination that the district denied the student a FAPE based on a finding that the IEP accommodation of allowing the student to have extra time to navigate the school building between classes would have caused him to miss class time was speculative. Also, the district argues that the IHO erred in determining that the denial of FAPE was based on a finding that the IEPs were

⁸ The IHO included an image that he found on the internet to describe how he thought the student would respond to one of the service delivery recommendations connected with the accommodation for use of modeling (IHO Decision at pp. 17-18; see Dist. Ex. 14 at p. 15). While as noted by the IHO, "a picture is worth a thousand words," any reading of the IHO's use of an image as part of his decision would be entirely subjective and as it is unclear to what extent the IHO relied on his selected imagery to form part of his conclusion, it will not be discussed further (see IHO Decision at p. 17-18).

"reactive," and "not proactive" and that the larger high school would have overwhelmed the student (see IHO Decision at p. 17).

Next, the district argues that Norman Howard was not an appropriate program for the student as the student failed to make meaningful progress, the school did not address the student's needs, and the school was overly restrictive. The district also argues that Norman Howard was not appropriate because it did not provide all of the special education services the student required as the student received some services through an IESP developed by the district of location. Further, the district contends that the IHO ignored evidence that the 2020-21 IEP addressed the student's needs in the least restrictive environment.

Ultimately, the district argues that the IHO erred in finding the district's 2020-21 IEP denied the student a FAPE and seeks a reversal of the IHO's order for tuition reimbursement.

In their answer, the parents generally deny the allegations contained within the district's request for review. The parents argue that the IHO's finding that the district failed to meet its burden to demonstrate that the 2020-21 IEP offered the student a FAPE is supported by the evidence in the hearing record. The parents argue that the district's recommended placement was overwhelming in size and "incompatible" with the student's needs. Further, the parents agree with the IHO's finding that the district failed to understand the student's needs and that the IEP for the 2020-21 school year did not provide "sufficient means" to deliver the recommended accommodations. The parents seek to uphold the IHO's finding that Norman Howard was appropriate and that the equitable considerations favored the parents.

The parents cross-appeal several findings, as well as the IHO's failure to address all of the issues raised. The parents argue that the IHO failed to hold the district to its burden to show that the student did not require specially designed physical education, specialized transportation, or parent counseling and training. Although the IHO found that the district failed to meet its burden of proof, the parents argue that the IHO failed to address all of the parents' claims or find that the district's violations of IDEA either "individually and/or collectively" denied the student a FAPE. Specifically, the parents seek a finding that the 15:2 special class and ICT services were not appropriate; that the recommended program and goals failed to meet the student's reading, writing, and executive functioning needs; that the speech-language services and goals were not appropriate for the student's pragmatic language needs; and that the counseling services and goals were not appropriate for the student's social/emotional needs. The parents further claim that the IHO failed to address the parents' claims that the student required ESY, assistive technology, direct OT services, or that the district failed to timely evaluate the student and that the district's hybrid learning plan would not have implemented the recommended program and services.

In an answer to the cross-appeal, the district generally denies the allegations set forth in the parents' answer and cross-appeal. The district argues that the parents "abandoned" several claims raised in their due process complaint notice that they did not cross-appeal. Specifically, the district refers to the parents' claims pertaining to predetermination and that the CSE was not properly constituted. In addition, the district argues that the parents impermissibly raised claims in their cross-appeal for the first time, to wit, the "IEP lacks integration of services through the day and provides no supports during unstructured time," speech-language services were inappropriate,

counseling services were inappropriate, and that there was no order for direct OT. Lastly, the district reiterates its request for a reversal of the IHO's decision.

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]).⁹

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).

⁹ 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. Preliminary Matter

1. Scope of Impartial Hearing

The district asserts, in its answer to the cross-appeal, that the parents challenge several issues for the first time in their answer and cross-appeal and that these issues were not raised in their due process complaint notices, and further that the district did not agree to expand the scope of the impartial hearing. More specifically, the district argues that the parents raised for the first time in their cross-appeal that the IEP lacked an "integration of services" and no support during unstructured time/electives; that the speech-language services were not appropriate; that the IEP reduced the level of direct speech-language therapy; that the counseling services were not appropriate; and that the IHO failed to order the district to provide direct OT services (Answer to Cross-Appeal at ¶¶ 33-36; see Answer and Cross-Appeal at ¶¶ 9, 20-21, 24).

Generally, the party requesting an impartial hearing has the first opportunity to identify the range of issues to be addressed at the hearing (Application of a Student with a Disability, Appeal No. 09-141; Application of the Dep't of Educ., Appeal No. 08-056). Under the IDEA and its implementing regulations, a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.507[d][3][i], 300.511[d]; 8 NYCRR 200.5[j][1][ii]), or the original due process complaint notice is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.507[d][3][ii]; 8 NYCRR 200.5[i][7][b]). Indeed, "[t]he parent must state all of the alleged deficiencies in the IEP in their initial due process complaint in order for the resolution period to function. To permit [the parents] to add a new claim after the resolution period has expired would allow them to sandbag the school district" (R.E., 694 F.3d 167 at 187-88 n.4; see also B.M. v. New York City Dep't of Educ., 569 Fed. App'x 57, 58-59 [2d Cir. June 18, 2014]).

Here, a careful review of the due process complaint notices shows that these specific and detailed issues were not previously raised (see Joint Exs. 1; 4). In their complaints, the parents discussed the fact that they sought a private OT evaluation in August 2020 (Joint Exs. 1 at p. 4; 4 at p. 4; see Joint Ex. 38). The parents stated in their complaints that the findings in the private OT report "confirmed the validity of the concerns expressed by the [p]arents regarding the inappropriateness of the proposed IEP" and "underscored" the student's need for supports for "executive functioning, social skills and self-advocacy built into the overall school program" (Joint Exs. 1 at p. 4; 4 at p. 4). The complaints further made general allegations that the August and November 2020 IEPs "were inappropriate, not reasonably calculated to enable [the student] to make meaningful progress in his educational program, would serve to deprive [the student] of the same access to his education as his nondisabled peers and would fail to provide [the student] with a" FAPE (Joint Exs. 1 at p. 5; 4 at p. 5). The parents generally alleged that both the August and

November 2020 IEPs failed to meet the student's "academic, physical, social emotional and management needs" (Joint Exs. 1 at p. 6; 4 at p. 6). On this point, the parents further elaborated, stating that the "IEPs fail[ed] to provide appropriate programming and services to meet [the student's] combination of sensory, upper body and core strength, coordination and writing needs, his pragmatic language and social communication needs, his executive functioning needs, [and] his social emotional needs" (*id.*).

In their cross-appeal, the parents specifically argue that the IEP lacks "daily writing instruction, common reading and writing strategies and built-in routines and executive functioning supports across all content areas throughout the entire school day" (Answer at ¶ 19). In connection with the speech-language therapy services, the parents allege that the IEP "reduced the level of direct speech service" by one-third and "failed to provide the combination of explicit teaching of social competency skills together with the common language, strategies and direct adult support throughout the school day" and "especially in unstructured settings" (*id.* at ¶ 20). Further, the parents allege that the speech-language therapy goals for the 2019-20 IESP were the same as the 2020-21 IEP goals (*id.*). As for counseling, the parents contend that the IEP does not provide for "systemic strategies, supports and constant coordination among school team and with [p]arents and the immediate access to familiar, trusted adults throughout the school day" to support the student's coping and social thinking strategies and remain regulated (*id.* at ¶ 21). Also, the parents assert that the social/emotional goals do not align with the student's current needs (*id.*). Finally, the parents argue in their cross-appeal that the district "failed in its burden to affirmatively show that [the student] did not need direct OT services to address his significant sensory processing deficits and core and upper extremity weakness and weak coordination, which adversely impact[ed] his stamina for handwriting, typing and other routine school activities" (*id.* at ¶ 24). None of these detailed and specific claims in the cross-appeal can be found within either due process complaint notice.

The next inquiry focuses on whether the district through the questioning of its witnesses "open[ed] the door" under the holding of M.H. v. New York City Department of Education (685 F.3d at 250-51; see also B.M. v. New York City Dep't of Educ., 569 Fed. App'x 57, 59 [2d Cir. June 18, 2014]; D.B. v. New York City Dep't of Educ., 966 F. Supp. 2d 315, 327-28 [S.D.N.Y. 2013]; N.K. v. New York City Dep't of Educ., 961 F. Supp. 2d 577, 584-86 [S.D.N.Y. 2013]; A.M. v. New York City Dep't of Educ., 964 F. Supp. 2d 270, 282-84 [S.D.N.Y. 2013]; J.C.S. v. Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, *9 [S.D.N.Y. Aug. 5, 2013]).

During the impartial hearing, general inquiries were made about the appropriateness of the related services and goals on the IEPs in question; however, the specifics as detailed by the parents in their cross-appeal were not discussed. Accordingly, these issues were outside the scope of the impartial hearing and are outside the scope of review in this appeal.

B. 2020-21 School Year

1. Operative IEP – August 20, 2020

In connection with the 2020-21 school year, four separate IEPs were developed: June 25, 2020; August 20, 2020; November 12, 2020; and February 4, 2021. The parents objected to the June 2020 IEP in an August 2020 letter; the CSE reconvened in August 2020 in response to the

parents' letter; the parents then filed a due process complaint notice in November 2020, which they amended in February 2021 (see Joint Exs. 1; 4; 6; 11; 14). Although the district also developed a November 2020 IEP and a February 2021 IEP, the program recommendations included in those IEPs did not change from the June 2020 IEP (compare Joint Ex. 14 at pp. 1, 11-15, with Joint Exs. 17 at pp. 1, 13-17; 20 at pp. 1, 15-18).

Here, the parents argue that the June 2020 IEP was superseded by the August 2020 IEP, which became the operative IEP for the 2020-21 school year (M.P. v. Carmel Cent. Sch. Dist., 2016 WL 379765, at *5 [S.D.N.Y. Jan. 29, 2016] [concluding that a later-developed IEP was the operative IEP as the operative IEP is the IEP the district chooses to defend at the end of the resolution period]; McCallion v. Mamaroneck Union Free Sch. Dist., 2013 WL 237846, at *8 [S.D.N.Y. Jan. 22, 2013] [finding the later developed IEP to be "the operative IEP"]; see also M.C. v. Mamaroneck Union Free Sch. Dist., 2018 WL 4997516, at *25 n.3 [S.D.N.Y. Sept. 28, 2018] [finding the later developed IEP to be operative even though it was developed during the first weeks of school]; Application of the Dep't of Educ., Appeal No. 12-215). However, as the recommendations included in the operative August 2020 IEP were developed at both the June and August 2020 CSE meetings, the conduct of both meetings are relevant to the analysis of the district's offer of a FAPE to the student for the 2020-21 school year (see Application of a Student with a Disability, Appeal No. 16-035).

At the time the parents unilaterally placed the student at Norman Howard for the 2020-21 school year the August 2020 IEP was in effect; further, the November 2020 and February 2021 IEPs did not change the student's program recommendations. Accordingly, for purposes of the appeal and cross-appeal, the August 2020 IEP will be considered as the operative IEP in relation to the district's offer of FAPE for the 2020-21 school year.

2. Sufficiency of IHO's Findings

Prior to reaching the merits of the parties' substantive arguments relating to the June 2020 and August 2020 IEPs, I must first address the district's challenge to the IHO's findings regarding implementation. In finding that the district failed to meet its burden of demonstrating that the recommended placement for the 2020-21 school year was appropriate, the IHO made several findings unrelated to the substantive challenges made by the parents to the IEP. The IHO found that "[a]n IEP that cannot be implemented is an inappropriate IEP"; this finding appeared to be based off of the IHO's findings that "the larger environment of the [d]istrict's high school would be overwhelming for the student," that a smaller environment for the student could not be "carved out within the larger environment" as suggested by the accommodations included in the student's IEP, and that anything the staff did about the larger environment would have been more "reactive" rather than "proactive" (IHO Decision at pp. 17, 18). Reviewing these findings, they cannot support the IHO's ultimate determination that the district could not implement the student's IEP.

Generally, the sufficiency of the program offered by the district must be determined on the basis of the IEP itself (R.E., 694 F.3d at 186-88). The Second Circuit has explained that "[s]peculation that the school district will not adequately adhere to the IEP is not an appropriate basis for unilateral placement" (R.E., 694 F.3d at 195; see E.H. v. New York City Dep't of Educ., 611 Fed. App'x 728, 731 [2d Cir. May 8, 2015]; R.B. v. New York City Dep't of Educ., 603 Fed. App'x 36, 40 [2d Cir. Mar. 19, 2015] ["declining to entertain the parents' speculation that the

'bricks-and-mortar' institution to which their son was assigned would have been unable to implement his IEP"], quoting T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 419 [2d Cir. 2009]; R.B. v. New York City Dep't of Educ., 589 Fed. App'x 572, 576 [2d Cir. Oct 29, 2014]).¹⁰ However, a district's assignment of a student to a particular public school site must be made in conformance with the CSE's educational placement recommendation, and the district is not permitted to deviate from the provisions set forth in the IEP (M.O. v. New York City Dep't of Educ., 793 F.3d 236, 244 [2d Cir. 2015]; R.E., 694 F.3d at 191-92; T.Y., 584 F.3d at 419-20; see C.F. v. New York City Dep't of Educ., 746 F.3d 68, 79 [2d Cir. 2014] [holding that while parents are entitled to participate in the decision-making process with regard to the type of educational placement their child will attend, the IDEA does not confer rights on parents with regard to the selection of a school site]). The Second Circuit has held that claims regarding an assigned school's ability to implement an IEP may not be speculative when they consist of "prospective challenges to [the assigned school's] capacity to provide the services mandated by the IEP" (M.O., 793 F.3d at 245; see Y.F. v. New York City Dep't of Educ., 659 Fed. App'x 3, 5-6 [2d Cir. Aug. 24, 2016]; J.C. v. New York City Dep't of Educ., 643 Fed. App'x 31, 33 [2d Cir. Mar. 16, 2016]; B.P. v. New York City Dep't of Educ., 634 Fed. App'x 845, 847-49 [2d Cir. 2015]). Permissible prospective challenges must be "tethered" to actual mandates in the student's IEP (see Y.F., 659 Fed. App'x at 5). Additionally, the Second Circuit indicated that such challenges are only appropriate if they are evaluated prospectively (as of the time the parent made the placement decision) and if they were based on more than "mere speculation" that the school would not adequately adhere to the IEP despite its ability to do so (M.O., 793 F.3d at 244). In order for such challenges to be based on more than speculation, a parent must allege that the school is "factually incapable" of implementing the IEP (see M.E. v. New York City Dep't of Educ., 2018 WL 582601, at *12 [S.D.N.Y. Jan. 26, 2018]; Z.C. v. New York City Dep't of Educ., 222 F. Supp. 3d 326, 338 [S.D.N.Y. 2016]; L.B. v. New York City Dep't of Educ., 2016 WL 5404654, at *25 [S.D.N.Y. Sept. 27, 2016]; G.S. v. New York City Dep't of Educ., 2016 WL 5107039, at *15 [S.D.N.Y. Sept. 19, 2016]; M.T. v. New York City Dep't of Educ., 2016 WL 1267794, at *14 [S.D.N.Y. Mar. 29, 2016]). Such challenges must be based on something more than the parent's speculative "personal belief" that the assigned public school site was not appropriate (K.F. v. New York City Dep't of Educ., 2016 WL 3981370, at *13 [S.D.N.Y. Mar. 31, 2016]; Q.W.H. v. New York City Dep't of Educ., 2016 WL 916422, at *9 [S.D.N.Y. Mar. 7, 2016]; N.K. v. New York City Dep't of Educ., 2016 WL 590234, at *7 [S.D.N.Y. Feb. 11, 2016]).

As described by the parents in their August 10, 2020 email and repeated in their due process complaint notice and amended due process complaint notice, the parents' main concern with having the student attend a public school in the district was the large high school environment (Joint Exs. 1 at pp. 3-4; 4 at pp. 3-4; 6 at p. 2). The parents explained that the larger environment

¹⁰The Second Circuit has held that a district's assignment of a student to a particular public school site is an administrative decision that must be made in conformance with the CSE's educational placement recommendation, and the district is not permitted to deviate from the provisions set forth in the IEP (R.E., 694 F.3d at 191-92; T.Y., 584 F.3d at 419-20; see C.F., 746 F.3d at 79 [holding that, while parents are entitled to participate in the decision-making process with regard to the type of educational placement their child will attend, the IDEA does not confer rights on parents with regard to the selection of a school site]). The district is required to implement the IEP and parents are well within their rights to compel a non-compliant district to adhere to the terms of the written plan (20 U.S.C. §§ 1401[9][D]; 1414[d][2]; 34 CFR 300.17[d]; 300.323; 8 NYCRR 200.4[e]).

"would be filled with constant, unpredictable social and sensory challenges that would be overwhelming" for the student (id.).

The August 2020 CSE discussed the parents' concerns regarding the size of the high school (Tr. p. 72; Joint Ex. 16 at pp. 1-2). The recommendations included on the August 2020 IEP to address those concerns included: advanced notice for changes in the student's routine/schedule; a transition plan to expose the student to the district's high school; extra time to transition between classes; as well as an environmental modification to provide the student with a quiet location (Joint Ex. 14 at pp. 13-14). The district's CSE coordinator testified that the August 2020 IEP could be implemented within the school for the 2020-21 school year (Tr. p. 116). Additionally, nothing within the August 2020 IEP indicated that the student needed a smaller class size than what was available in the district (see id.).

Although the IHO made a finding that the IEP could not be implemented, there is nothing in the hearing record to suggest that the district would have been unable to implement the supports, that were identified in the August 2020 IEP nor did the IHO make a specific finding that any specific service included on the student's IEP could not be implemented. Rather, the IHO's implementation finding appears to be more of a finding regarding the adequacy of the recommended program to address the parents' concerns regarding the potential for the student to become overwhelmed in a larger environment (see IHO Decision at pp. 17-18). Accordingly, to the extent that the IHO found the IEP could not be implemented, this finding was improper as it was really a finding based on a "substantive attack[] on [the] IEP . . . couched as [a] challenge[] to the adequacy" of the assigned public school site's capacity to implement the IEP (M.O. v. New York City Dep't of Educ., 793 F.3d 236, 245 [2d Cir 2015]). Nevertheless, a full review of the parents' concerns regarding the program recommended in the August 2020 IEP, including a review of the student's needs and whether a smaller environment was required to address those needs, will be discussed below.

As an additional matter that should be addressed prior to delving into the substance of the recommended program, the IHO agreed with the evidence presented by the parents and nonpublic school staff, but also determined that it was his "impression that the 'case' made out by the parents and the nonpublic school staff before the CSE was not as strongly made out as the case made out by the parents at this impartial hearing," and therefore, the IHO found it "hard to fault the [d]istrict members of the CSE for wanting to be optimistic regarding the student's prospects for success in [d]istrict" (IHO Decision at p. 19). To the extent that the IHO relied on evidence that was not available to the CSE in making his determination, such a decision was improper. Information not available to a CSE may not be relied upon to rehabilitate a defective IEP or invalidate a substantively appropriate IEP (C.L.K. v. Arlington Sch. Dist., 2013 WL 6818376, at *13 [S.D.N.Y. Dec. 23, 2013]; see J.M. v New York City Dep't of Educ., 2013 WL 5951436, at *18-*19 [S.D.N.Y. Nov. 7, 2013] [holding that a progress report created subsequent to the CSE meeting may not be used to challenge the appropriateness of the IEP]; F.O. v New York City Dep't of Educ., 976 F.Supp.2d 499, 513 [S.D.N.Y. 2013] [refusing to consider subsequent year's IEP as additional evidence because it was not in existence at time IEP in question was developed]). In grappling with the permissibility of retrospective evidence, the Second Circuit squarely held that the question of whether an IEP was reasonably calculated to enable the student to receive education benefits "must be evaluated prospectively as of the time [the IEP] was created" (R.E., 694 F. 3d at 184-88 [explaining that with the exception of amendments made during the resolution period, the

adequacy of an IEP must be examined prospectively as of the time of its drafting and that "retrospective testimony" regarding services not listed in the IEP may not be considered]). In so holding, the Court further explained that "[t]his rule recognize[d] the critical nature of the IEP as the centerpiece of the system, ensure[d] that parents w[ould] have sufficient information on which to base a decision about unilateral placement, and put[] school districts on notice that they must include all of the services they intend to provide in the written plan" (R.E., 694 F. 3d at 188).

Based on the above, in order to determine whether the district offered the student a FAPE for the 2020-21 school year, I will conduct a full review of the program recommended by the August 2020 CSE, with a focus on the information that was available to the June 2020 and August 2020 CSEs, a description of the student's needs—as known at the time the IEPs were developed, and a review of each of the parents' challenges to the recommended program.

3. June 2020 IEP

The district CSE coordinator who chaired the June 25, 2020 CSE meeting testified that the June 2020 CSE utilized information from the Rush-Henrietta IESP (May 2020) to develop the student's present levels of performance for the June 2020 IEP, as well as input from the student's Norman Howard teachers, the parents, and any new evaluations and reports that were available (March 25, 2021 Tr. pp. 33-34, 45-46; Parent Ex. A at p. 1; see Joint Ex. 24). However, I note that the information included in the present levels of performance section of the June 2020 IEP reiterates almost verbatim the information contained in the previous June 27, 2019 IEP (compare Joint Ex. 8 at pp. 5-7 with Joint Ex. 11 at pp. 4-7). The June 2020 IEP reflects that the CSE also had before it a March 2019 Level 1 Vocational Assessment, a March 2019 Counseling Report, and results of previous 2013 and 2016 standardized testing related to the student's cognition, achievement, speech-language skills, motor development, and social /emotional functioning (Joint Ex. 11 at pp. 2-4).

Notwithstanding, a review of the present levels of performance in the June 2020 IEP indicates that regarding speech-language skills, the student's greatest deficit was in understanding language that was not literal or explicitly stated including auditory reasoning, idiomatic language, and nonliteral language where the student needed to interpret implied meaning, figurative language, humor, sarcasm, indirect requests or statements, predictions, and conclusions (Joint Ex. 11 at p. 4).¹¹

With regard to mathematics, the June 2020 IEP reflected that the student was at an eighth-grade level, had a good understanding of numeration and one-step problems, however required moderate teacher support with polynomials, multi-step problems and exponents (Joint Ex. 11 at p. 4). The June 2020 IEP further reflected that the student became anxious when working independently or when taking quizzes or tests and needed frequent check-ins for understanding (id.). In addition, the student required teacher prompts to use his notes or a calculator when trying to recall information, modeling, multi-step problems broken down into manageable chunks, and

¹¹ The IEP indicated that the student's most recent speech-language evaluation was conducted during the 2019-20 school year, however, the hearing record does not include a speech-language evaluation conducted during that time frame (Joint Ex. 11 at p. 4).

review of procedures (id.). Although the student had good number sense, he confused concepts and needed teacher assistance to determine salient information in word problems (id.).

In the area of reading, the June 2020 IEP reflected that the student participated in a reading comprehension class that focused on active reading strategies that concentrated on identifying the main idea and supporting details, that he was using the Mega Words curriculum to address his decoding skills, was excited about books and sometimes read ahead, and actively participated in class discussions about the text (Joint Ex. 11 at p. 4). The June 2020 IEP included a reference to a "RH 2020 update" that indicated the student was still working on reading comprehension and literacy elements, did not like to read aloud, and continued to require some decoding, reading comprehension, and vocabulary support (id. at p. 5).¹²

In the area of writing, the June 2020 IEP reflected that the student was able to use Thinking Maps to organize his writing ideas and the EmPOWER writing strategy to compose his written work but required frequent check-ins to stay on task as he was easily distracted, became too focused on a word or phrase, could rush through assignments and needed teacher cues to take his time with his writing (Joint Ex. 11 at p. 5). While the June 2020 IEP indicated that the student was eager to do well and able to revise his writing when prompted, a new "RH 2020 update" reflected that writing was laborious for the student, that he needed support to get through the writing process, and help understanding what the task was asking (id.).

With respect to the student's study skills, the June 2020 IEP indicated that he used a master binder and folder system to organize his materials, was independently able to keep track of assignments in an agenda and during advisory time at the end of the day, checked the agenda to make sure he completed everything or sought out additional help from other teachers, as needed (Joint Ex. 11 at p. 5).

A section of the June 2020 IEP related to the student's career/vocational/transition performance indicated that the student and his parents were interested in the student attending college and that the parents wanted him to have work experience in high school and beyond, probably with a job coach, as he liked earning money and feeling responsible (Joint Ex. 11 at p. 5). The June 2020 IEP indicated the student had limited interests, that the parents were working on exposing him to various things, and that although he was strong in math, liked science, karate, and photography, he had little understanding of what jobs and careers were available and would need guidance to pursue a career choice (id.).

In connection with the student's social development, the present levels of performance in the June 2020 IEP reiterated from the previous June 2019 IEP that the student was friendly, respectful, and demonstrated progress at Norman Howard, that he participated in a weekly Skills for Life push-in program and was consistently able to demonstrate skill concepts in a structured setting including re-frame, self-advocacy, and perspective taking (compare Joint Ex. 8 at p. 6 with Joint Ex. 11 at p. 5). The June 2020 IEP reflected that the student was able to manage anxiety more effectively by self-advocating and taking breaks as needed and demonstrated the ability to

¹² The June 2020 IEP refers to Rush-Henrietta 2020 updates that appear to correlate to information provided at the June 25, 2020 CSE meeting by the director of Norman Howard, based on the transcript of that meeting (compare Joint Ex. 11 at p. 5 with Parent Ex. A at pp. 3-4).

work cooperatively with peers (*id.*). In less structured settings such as physical education, the student was also able to take breaks when frustrated rather than disengaging, was less likely to misinterpret social interactions with peers, and less likely to internalize minor peer conflict (*id.*). A "RH 2020 update" indicated that the student got along with peers and adults, that consistency and routine were very important for him, and that small environments would lessen his anxiety but that unexpected changes could make him anxious (*Joint Ex. 11 at p. 5*). The update indicated that the student could misperceive the intentions of his peers in unstructured settings and that application of social skills was difficult for the student (*id.* at pp. 5-6).

In the area of physical development, the June 2020 IEP again reiterated information from the previous June 2019 IEP regarding the student's history of multiple medical issues, multiple surgeries, and among other things, tics (blinking, throat sounds, and shoulder shrugs) (*Joint Ex. 11 at p. 6*). The June 2020 IEP indicated that the student had received a diagnosis of PDD-NOS and that he took medication to address anxiety and to support his emotional regulation (*id.*). The June 2020 IEP further noted that the student had received a diagnosis of CCAS "in the Posterior Inferior Cerebellar Artery (PICA Region), which was relevant to the presentation of [the student's] symptoms" and that the damage to his brain in this region had an effect on error detection, expressive language, visual spatial functions, cognitive processing, mood modulation, spatial awareness and memory, visual processing, and executive functioning (*id.*). The June 2020 IEP indicated that due to the CCAS, the student learned best using semantic learning versus associative learning, that his difficulties with motor tasks were not due to the motor requirement but rather to the "impaired ability to organize the structure and planning of the task," and that the neurologist's report indicated that "the use of movement with cerebellum issues is pivotal in helping push through difficult processes" (*id.*). In addition, the June 2020 IEP indicated that movement breaks and opportunities for multisensory learning that allow the student to move during the encoding process would help the student manage language systems, memory, verbal working-memory and finger tapping tasks, and attention (*id.*).

In addition, the June 2020 IEP included three "OT Updates" that were carried over from the student's previous June 2019 IEP, the first indicated that the student's weakness in his core and upper extremities impacted his stamina for handwriting, typing and other school activities however, overall, his visual and fine motor skills fell within the average range of functioning (*Joint Ex. 11 at p. 6*).¹³ The first update further indicated the student would benefit from receiving OT consultation services for the 2019-20 school year to monitor the student's progress with handwriting, strength and endurance as they impacted his ability to complete educational tasks (*id.*). The second "OT Update" indicated that the student was able to independently follow school routines, manage and organize his materials, and was able to perform fine motor tasks including zippering, buttoning, and tying his shoes independently (*id.*). The student was reported to sit upright during testing, demonstrate range of motion within normal limits with exception of one thumb, use a neat pincer grasp, mature dynamic tripod grasp on writing utensils, spontaneously cross his midline, demonstrate bilateral coordination to string beads, and cut on lines (*id.*). The June 2020 IEP also indicated that the student's ability to process sensory input "appear[ed] to be within appropriate limits within the school and therapy setting" (*id.*). The third "OT Update"

¹³ Although the June 2020 IEP referred to three "OT Updates" the most recent OT evaluation/report listed in the IEP was dated December 2018 (*Joint Ex. 11 at p. 2*).

indicated the student had scored in the average range of functioning on fine motor and visual motor skills during testing although the student's core and upper body strength impacted his ability to engage in classroom tasks such as printing and that his legibility, line quality, and spacing could be improved upon (id.). The June 2020 IEP reflected that the parents wanted the student to continue working on handwriting (id. at p. 7). A new comment included in the June 2020 IEP indicated that the parents had no additional physical concerns (id.).

The effect of the student's needs on his involvement and progress in the general education curriculum was also reflected in the June 2020 IEP (see Joint Ex. 11 at p. 7). The student was described as eligible for special education as a student with autism with delayed communication and social skills, weaknesses in emotional regulation, sensory processing abilities and motor coordination, deficits in pragmatic language skills in the areas of thinking of others and perspective taking, and anxiety related to following classroom rules and performing teacher directed tasks (id.). This section of the June 2020 IEP also mentioned the student's diagnosis of CCAS noting the areas that could be impacted, as described above (id.).

The student's functioning and needs were further documented and described in the transcript of the June 2020 CSE meeting (see Parent Ex. A). With regard to mathematics, the director of Norman Howard stated that the student's area of strength was mathematics and that he would be taking geometry, a tenth-grade course, as a ninth grader, as he had very strong mathematical reasoning abilities (Parent Ex. A at p. 3). With regard to social skills, she indicated that his speech-language support addressed "the whole area" of social thinking and pragmatic language and employed the Michelle Garcia Winters model as a means of assisting the student with developing flexible thinking strategies, strategies to help the student gauge his response with regard to whether a problem was really a big problem or not (id.). The director of Norman Howard reported that the student got along well with peers and adults but at times struggled when he perceived that a peer or adult was criticizing him and would then need assistance to help him through the problem-solving process (id.).

To address the student's needs, the June 2020 CSE determined the student was eligible for special education services as a student with autism and recommended placement in a daily 15:2 special class for English, science, and social studies; a 15:2 special reading class once per week; and daily integrated co-teaching (ICT) services for mathematics (Joint Ex. 11 at pp. 1, 9). The CSE also recommended one 40-minute session per day of group resource room services and related services of one 30-minute session per week of group counseling services and two 30-minute sessions per week of group speech-language therapy (id.). In addition, the June 2020 CSE recommended one 60-minute session per quarter of occupational therapy consultation (id. at p. 11).

The June 2020 IEP also provided the student with one annual goal to address each of the student's deficits in reading, writing, mathematics, and social/emotional/behavioral skills and two annual goals related to the student's deficits in social communication (Joint Ex. 11 at pp. 8-9). The June 2020 IEP also included accommodations (all with specific directions for service delivery) for the student including advanced notice for changes in routine or schedule, provision of materials in large print, special seating, and use of modeling of expected language and the provision of multiple testing accommodations (id. at pp. 10-12).

4. August 2020 IEP

Prior to the August 2020 CSE meeting, and during the 2018-19 school year, the district of location conducted a reevaluation review of the student (Tr. pp. 541, 549-50, 552; see Parent Ex. O; see Dist. Ex. 2). The reevaluation consisted of a January 10, 2019 psycho-social evaluation (Dist. Ex. 2),¹⁴ a speech-language evaluation (Joint Ex. 33), and an OT evaluation (Joint Ex. 34) (Tr. pp. 542-43). The August 2020 CSE had available, the private OT report and test results (August 12, 2020), a 2019-20 Norman Howard report card, a counseling progress summary (April 17, 2020), a speech-language progress summary (February 7, 2020), a level I vocational assessment (March 14, 2019), a speech-language evaluation (December 10, 2018), results of the speech-language evaluation from the reevaluation (December 10, 2018), and an OT reevaluation report (January 14, 2019) (see Joint Exs. 14, 33-34). However, at the August 2020 CSE meeting the CSE members, including the parents and Norman Howard staff, did not have a copy of the January 2019 psycho-social evaluation report, as the report could not be located (Joint Exs. 15 at p. 2; 16 at pp. 2, 7-8; see Dist. Ex. 2). As a result, the district's CSE coordinator requested consent from the parents to conduct updated evaluations (Joint Ex. 16 at p. 2). Thereafter, a CSE reevaluation review meeting was held on November 12, 2020 to review the speech-language evaluation (September 14, 2020), educational evaluation (September 16, 2020), psychological evaluation (September 21, 2020), and an OT reaction statement to the August 12, 2020 private OT report (October 18, 2020) (see Joint Exs. 39-43).¹⁵

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 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

¹⁴ While the psychosocial evaluation report indicates that it was completed on January 10, 2018, the school psychologist who completed the evaluation indicated that the report was in error and should have reflected a completion date of January 10, 2019 (see Tr. pp. 541-42).

¹⁵ According to a notation on the August 2020 IEP, the projected date for the student's next reevaluation is January 25, 2022 (Joint Ex. 11 at p. 1).

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]). Although the IHO did not address the parents' claims that the district failed to timely and appropriately reevaluate the student and the CSE relied on outdated information, based on the evidence in the hearing record, the CSE had sufficient current evaluative information available to it at the August 2020 CSE meeting to recommend a program and services for the student.

The purpose of the CSE reconvening on August 20, 2020 was in response to the parents' letter notifying the district of their intent to place the student at Norman Howard for the 2020-21 school year (see Joint Ex. 6; Joint Ex. 15 at p. 1). An August 20, 2020 prior written notice indicated that the CSE met to consider the parents' request for placement at Norman Howard due to the parents' concerns that the district high school was too large an environment for the student and would result in the student being around constant unpredictable social and sensory challenges that would cause the student social, emotional, and academic challenges and that the ICT and 15:2 special classes at the public high school were not the right fit for the student due to his high aptitude and slow processing, his executive functioning challenges, and because he was easily overloaded with sensory input (*id.*).

A review of the August 2020 IEP indicates that the CSE updated the student's present levels of performance (compare Joint Ex. 11 at pp. 4-7 with Joint Ex. 14 at pp. 5-9). Specifically, the description of the student's speech-language functioning included information from a February 7, 2020 speech-language progress report from Norman Howard, which indicated the student had made consistent progress toward his annual goals and that therapy had focused on the student's knowledge of his own brain and strategies to increase flexible thinking (Joint Ex. 14 at p. 5). The August 2020 IEP reflected that while the student had demonstrated increased awareness of his own "unthinkables," he continued to require prompts to use the flex strategies to become unstuck in his thinking (*id.*).¹⁶ The student had been working on increasing his ability to accurately identify the size of a problem in order to gauge his own responses, had utilized the "emotional expression compression" strategy to inner coach his way through moments of intense emotion, and had tried to focus his thinking on others in order to learn about them and facilitate social interaction (*id.*). While the student was typically able to respond to social-wonder questions asked of him, he required support to wonder socially about others (Joint Exs. 14 at p. 5; 36 at pp. 1-2). The August 2020 IEP indicated that the student had been challenged to think flexibly in social situations, respond to hypothetical questions, made guesses about motives and intentions of others in real-life scenarios, and was showing improvement in his ability to identify relevant details and filter out irrelevant details (Joint Ex. 14 at p. 5). However, the student continued to require support to accurately synthesize details and understand how they fit together into a main idea (*id.*).

The student's present level of functioning in mathematics reflected updated information that indicated the student was able to independently produce above average grade level work, however needed explicit, repetitive instruction that included modeled examples, new vocabulary defined, guided notes, checks for understanding, and tasks broken into smaller parts in order to work through multi-step problems (Joint Ex. 14 at p. 6). Despite this, the August 2020 IEP

¹⁶ "Unthinkables" were described in the February 7, 2020 speech-language progress report from Norman Howard as "things our brains do that cause us to have roadblocks or enter into stuck thinking" (Joint Ex. 36 at p. 1).

indicated that the student was able to master concepts/skills quickly with excellent long-term retention, was able to recognize these when they were presented independently, embedded in word problems, or used in combination, and then successfully solve the problem (id.). The August 2020 IEP stated that the student had excellent math reasoning ability and was able to solve higher order thinking problems that required him to apply multiple concepts (id.).

New information included in the August 2020 IEP regarding the student's performance in reading indicated that when the student read aloud, he was not always able to discuss salient information, however, he actively participated in class discussions related to the text (Joint Ex. 14 at p. 6). The August 2020 IEP additionally indicated that the student was able to find the main idea approximately 85 percent of the time on structured, independent assessments and that while he was able to infer during class discussions, he required teacher support to make inferences independently (id.). The August 2020 IEP also indicated that the student would have the opportunity to participate in reading academic intervention services (AIS) services in order to improve his decoding and reading comprehension skills (id.).

Regarding the student's writing skills, the August 2020 IEP indicated that the student required an opportunity to evaluate and paraphrase directions prior to beginning an assignment to ensure he understood the task (Joint Ex. 14 at p. 6). Given guiding questions, the student could choose an appropriate Thinking Map to use to plan his writing and sometimes used color coding or numbering to organize information (id.).¹⁷ The August 2020 IEP indicated the student sometimes needed cues to elaborate when writing about his own experiences, support to pinpoint information that supported his claims with informational or literary texts, had learned strategies for writing introductions, conclusions, thesis statements, and topic statements, and with teacher support, utilized an editing checklist to determine if he had included all of the required parts in his writing (id.). The student was reported to be able to sustain focus in order to finish a step of the writing process or was generally able to ask for a break if needed (id.). The August 2020 IEP further indicated that writing was "laborious" for the student (id.).

New information related to the student's executive functioning skills was also included in the August 2020 IEP present levels of performance (Joint Ex. 14 at p. 7). In this regard, the IEP reflected information from the August 2020 private OT evaluation which stated that the student demonstrated significant dysfunction in all areas of executive functioning and noted that the most clinically elevated areas included inhibition and cognitive shift (id.). The August 2020 IEP indicated that the student had difficulty breaking long term assignments into smaller tasks, organizing his thoughts, prioritizing tasks, initiating assignments, managing time, and was easily overwhelmed (id.). The student was also reported to make careless mistakes, have difficulty putting details together, and struggle with multi-step tasks (id.).

With regard to the student's social development, in addition to information from the previous June 2020 IEP, the August 2020 IEP added that according to the results of the BRIEF (Behavior Rating Inventory of Executive Function), the student had difficulty tolerating frustration, was prone to outbursts of anger, was easily upset, misread social cues, took offense

¹⁷ The director of Norman Howard described Thinking Maps as visual cognitive tools, similar to graphic organizers, where the visual representation was similar to the type of thinking that was required (Tr. pp. 598-99).

easily, became stuck in his thinking about the same topic or issues, and had difficulty accepting new ideas, adapting to change, and recovering from disappointment (Joint Exs. 14 at pp. 7-8; 38 at p. 11). The student was also reported to understand skills/concepts such as perspective taking, was able to self-advocate independently when he was not overwhelmed, could be respectful in his communication with peers although he would disengage easily in a group setting, and at times required adult support to help him manage what he may perceive as criticism (Joint Ex. 14 at p. 8).

Information from the August 2020 private OT evaluation was also added to the student's present levels of physical performance on the August 2020 IEP (Joint Ex. 14 at p. 8). Specifically, the IEP indicated that the student demonstrated deficits in the areas associated with vestibular control, including balance and vestibulo-ocular responses, which were reported to be associated with emotional regulation (*id.*). The August 2020 IEP indicated the student exhibited symptoms of light sensitivity and that perceptually, the student had difficulty finding things within a competing background, difficulty with visual puzzles, and was frustrated when written material was crowded or visually complex (*id.*). During assessment of proprioceptive functioning, the student demonstrated significant difficulty replicating whole body and hand positions accurately, required extra time, and used extensive visual referencing to compare his position with the model (*id.*). The August 2020 IEP indicated that the student presented with traits associated with over-responsiveness to tactile input including sensitivity to texture and imposed touch, anticipatory anxiety in situations that were likely to result in imposed touch and a bias toward a negative perception of touch (*id.*). According to the IEP the student used tactile strategies to regulate himself including rubbing textures between his fingers, soothing himself, and using weighted materials to calm himself (*id.*). In addition, the student exhibited negative reactions to loud environmental sounds, could be overwhelmed in noisy environments, had difficulty attending and processing in the presence of competing sounds and at times seemed as if he did not hear you, especially if there were many things going on at once (*id.* at pp. 8-9). The August 2020 IEP also noted that the student was unable to exert cognitive effort when there was competing information, for example radio or television, that he had difficulty achieving and/or sustaining mental effort within a complex sensory environment, and that visual and tactile stimuli, particularly sounds, were alerting to the student and commanded some degree of attention, which eroded higher cognitive processes (*id.* at p. 9). The student was described as displaying overall heightening of sensory vigilance and motor activation and dampening of higher cortical functions associated with executive skills (*id.*).

Additional new management needs were also included in the August 2020 IEP, specifically, reducing distracting environments when possible, provision of clear and explicit instructions and expectations at the outset of a task, checking for understanding of directions and tasks, the provision of more time to adjust to changes in schedule or routine, support for approaching new tasks, support for executive functioning, modeling of activities or tasks, more space and less visual distractions on paper, and a copy of class notes when an electronic version was unavailable (Joint Ex. 14 at pp. 9-10).

The August 2020 CSE responded to the parents' concerns by increasing the student's 15:2 special reading class from once per week to once per day (compare Joint Ex. 11 at pp. 1, 9 with Joint Ex. 14 at pp. 1, 12). The CSE also added to the student's program, five 60-minute sessions per year of an assistive technology consult (Joint Ex. 14 at p. 15). The August 2020 CSE also

added two additional reading goals, removed the math goal from the student's previous IEP, changed his writing goal, and added one social/emotional/behavioral goal related to learning appropriate responses to anxiety provoking social situations such as crowded hallways (compare Joint Ex. 11 at pp. 8-9 with Joint Ex. 14 at pp. 11-12).

The August 2020 CSE also made changes to the supplementary aides and supports that would be provided to the student. Notably, the August 2020 IEP indicated that a home/school communication system would be developed so the parents could be kept aware of the student's challenges and successes at school; a transition plan would be created to systematically increase the student's exposure and comfort level to the district school building; the student would be provided with extra time to go between classes in order to avoid crowded hallways; environmental modifications would be provided to the student such as a quiet location when needed for activities that involved large groups of students (i.e., assemblies, pep rallies) if the student became anxious; and the provision of a computer/technology device and software to record responses or complete written tasks in order to compensate for his lack of stamina with handwriting (compare Joint Ex. 11 at p. 10 with Joint Ex. 14 at pp. 13-15).¹⁸

The August 20, 2020 prior written notice indicated that the August 2020 CSE considered new parent input, input from staff at Norman Howard, the August 12, 2020 private OT evaluation report and the results of administration of the Woodcock Reading Mastery test in 2018 and 2019 in making its decision and after review of all evaluative material and school reports the CSE determined that the programming and services at the district would meet the student's needs, therefore denying the parents' request for placement outside the district at Norman Howard (Joint Ex. 15 at pp. 1, 2). The prior written notice also documented other options that were considered, noting that adding direct OT services was rejected because all members of the CSE agreed that the student's needs could be met via a consult model and including a special class for mathematics was rejected because it was an area of strength for the student and CSE members agreed that the student did not require a special class setting for that content area (id. at p. 2).¹⁹ In addition, the prior written notice reflected that the CSE's recommendation for assistive technology consultation included an assistive technology evaluation (id.).

The transcript of the August 2020 CSE meeting reflected that the district's CSE coordinator believed there was nothing the CSE was seeing about the student that would make her say that the CSE could not meet the student's needs within the district and that the district had "lots of students with the same types of needs as [this student]" (Parent Ex. D at pp. 14, 15). The director from Norman Howard politely disagreed with that statement noting that based on the 2016 private

¹⁸ The IEP indicated that the transition plan could include providing the student with a tour of the building, the opportunity to walk his daily schedule, and the opportunity to practice with his locker; identifying key locations within the school such as the nurse's office and counseling office; and connecting the student to a peer mentor for support (Joint Ex. 14 at p. 13).

¹⁹ Testimony by the student's mother indicated that although the prior written notice stated that the CSE considered adding direct OT and that "all members of the CSE team determined that [the student's] needs [could] be met through an Occupational Therapy Consult model," she did not agree that OT consult was adequate to meet the student's OT needs and that the student's needs varied based on the placement (Tr. p. 1057). She testified that the student had needs even at Norman Howard but that his needs would go up "exponentially" if he were placed in the district high school setting (Tr. pp. 1057-58).

neuropsychological report, the August 2020 OT report, and the student's history, he was very complicated and unique, and she did not think that any district had a lot of students like him (id. at p. 15). She added that you have to go beyond just the IEP because it reflected the student's functioning within the Norman Howard setting where his performance was "optimized" and that if you read other information beyond the IEP, you understand that he is a unique student (id.). She specifically noted the student's CCAS (id. at p. 16). The student's father stated at the meeting that the CSE was "misunderstanding and misjudging" the student's needs and that it could not truly understand the complexity of the student's presentation (id. at p. 15).

As noted above, in addition to requesting that the IHO's finding that the parents' and nonpublic school staff's concerns about the public school program being unable to address the student's needs due to the potential for the student to become overwhelmed in large settings be upheld, the parents also raised allegations related to the appropriateness of the recommendations for a 15:2 special class and ICT services, the student's need for specially designed instruction in physical education, the lack of a recommendation for parent counseling and training, the provision of assistive technology, the lack of ESY services, and the lack of a recommendation for specialized transportation.

Initially, at the August 2020 CSE meeting, the CSE sought to address the parents' concerns regarding the size of the high school (Tr. p. 72; Joint Ex. 16 at p. 1). At the August 2020 CSE meeting, the school psychologist stated that they wanted the student to have a "safe place" for the student that is quiet (Joint Ex. 16 at p. 3). On the August 2020 IEP the CSE recommended advanced notice for changes in the student's routine/schedule (Joint Ex. 14 at p. 13). This included a transition plan to expose the student to the district's high school: "tour of the building, walking his daily schedule, practice with his locker, identifying key locations in the school (i.e. nurse's office, counseling office, main office, learning resource officer, speech office), and connecting [the student] to a peer mentor for social support" (Tr. p. 104; Joint Ex. 14 at p. 13). In addition, the August 2020 IEP included extra time between classes which would allow the student to transition to the next class a few minutes early so he would not become "anxious" in the crowded hallways (Joint Ex. 14 at p. 13). Further, the August 2020 IEP listed environmental modifications to provide the student "with a quiet location when needed for activities that involve large groups of students, such as pep rallies, orientations, assemblies" and therefore, the student knew he "ha[d] access to an alternative location if he bec[ame] anxious" (id. at pp. 13-14).

Part of the IHO's decision was based on the IHO's belief that the extra time for the student to transition between classes would result "in the student missing possibly crucial class time" and "would not have enabled the student to avoid interactions with other students" (IHO Decision at pp. 16-17). The testimony cited by the IHO does indicate that even with the additional two minutes to transition between classes, the student would have shared the hallway space with other students when transitioning (Tr. pp. 524-26).

There was also a significant amount of testimony at the impartial hearing regarding the appropriateness of the academic and social supports recommended for the student in the context of his transition to the district high school and his placement in a 15:2 special class and an ICT classroom for mathematics.

The CSE coordinator testified that the student was recommended for 15:2 special classes, integrated coteaching services, and resource room services (Tr. p. 47). She indicated that the district had a 15:2 ratio in its special classes which meant that there were up to 15 students with two certified teachers in the class (Tr. p. 48). She explained that one of the teachers in a 15:2 special class was a general education teacher who was highly qualified in the content area, whatever the subject was, and the other teacher was a special education teacher who specialized in how to accommodate and support the students within that class (Tr. p. 48). The CSE coordinator further explained that integrated co teaching was a general education classroom for a specific content area with special education and general education students mixed together (Tr. p. 49). She noted that in an integrated coteaching class in addition to a general education teacher there was a special education teacher there to support the students (Tr. p. 49). The CSE coordinator testified that the CSE recommended ICT services for the student for math because he had a strength in that area and felt very confident in that area (Tr. p. 49). She noted that the CSE felt that ICT services for math would provide an inclusive opportunity for the student and would be the best place for the student because he could be challenged in the math content, where he excelled, but also be in an environment where he was supported by the special education teacher (Tr. p. 49). The CSE coordinator reported that resource room was recommended for the student to help him with his executive functioning skills (Tr. p. 49; see Tr. pp. 102-03). She indicated that resource room would take place daily and consist of five students with a special education teacher (Tr. pp. 49-50). According to the CSE coordinator, the combination of 15:2 special classes, ICT services and resource room was very common and students with this combination of services had been very successful (Tr. p. 50). The CSE coordinator testified that the CSE considered the parent concerns about the recommend program (Tr. p. 63). She opined that the 15:2 special classes would definitely meet the student's needs in that they were "high aptitude" Regents level classes that employed the general education curriculum (Tr. p. 63). She references the student's slow processing speed and indicated that the 15:2 special classes were highly supportive environments where the teachers worked together well and knew the students and were able to be flexible with instructional pacing and the amount of work and different accommodations (Tr. p. 63; see Tr. pp. 93-94). She reported that the work was not modified in the 15:2 classes and that students still received the general education curriculum (Tr. p. 63).

With respect to the parents' concern that the 15:2 special classes and ICT services were not the right fit for the student given his combination of high aptitude and slow processing speed, executive functioning challenges, and tendency to become easily overloaded with sensory input, the CSE coordinator testified that the 15:2 special classes and ICT services met those needs "exactly" (Tr. p. 101). She stated that the classes were Regents classes so they addressed the student's high level academic functioning (Tr. p. 101). She further stated that special classes and ICT services provided a flexible environment where students were supported and where they could work on social thinking and anxiety and executive functioning (Tr. p. 101). She indicated that staff directly worked with all of the students on those skills (Tr. p. 101). With respect to the parents' concern regarding the size of the district school, the CSE coordinator stated "[W] can't change the size of the school. So what we do is look at the specific needs and how to accommodate for him" (Tr. p. 014). She cited the CSE's recommendation for a transition plan to help mentally prepare the student, and the plan to provide the student with direct support with respect to social communication and coping strategies (Tr. p. 104). The CSE coordinator disagreed that the accommodations put in place by the committee to address the parents' concerns regarding the size of the school would isolate the student and suggested that begin in the district school would be

better than being at Norman Howard where the student was "completely segregated from all of his general education peers" (Tr. p. 105). She disagreed with the perception that in the 15:2 special classes the curriculum was not covered in depth (Tr. p. 212). The CSE coordinator acknowledged that she had not observed the student in a classroom setting in the past year and that no one from the district had observed the student in a classroom as part of its evaluation process (Tr. pp. 184-85).

The district school psychologist discussed the ways in which she the CSE recommendations addressed the student's needs as outlined in her evaluation (Tr. pp. 387-97; see Joint Ex. 42). With regard to class size she testified that the "programs and services that were recommended for special classes would provide a small student -to-teacher ratio" which would allow for individualized support, as well as positive regard and relationship building between the student and teachers (Tr. p. 391). She noted that the student was recommended for placement in a 15:2 special class which would reduce the number of students in a classroom and minimizes the likelihood of distractions due to a larger class size (Tr. p. 391). She further noted that a maximum of 15 students with two teachers would naturally allow the student to be closer to one of the two teachers just because there were fewer students (Tr. p. 393). The school psychologist indicated that she had not observed the student at Norman Howard (Tr. p. 419).

The director of education for Norman Howard opined that the CSE recommended accommodations of allowing the student to leave class early and providing him with a separate location for assemblies and lunch were inappropriate because they singled the student out and he wanted to be part of the community (Tr. pp. 630-31). She indicated that she could not speak to the appropriateness of the 15:2 special classes for the student because she did not know what they were like instructionally (Tr. p. 631). Rather, she opined that the district's high school was "a big place and a noisy place" and for student to have to be isolated for passing, assemblies and lunches did not make sense to her (Tr. p. 631). The director of education indicated that the student was strong in math but that she did not know what the math class would be like in the district's school (Tr. p. 633). However, she opined that the student could experience sensory overload in a full-size class with over 20 students (Tr. p. 633). She further opined that the physical plant of the high school would be overwhelming of the student (Tr. p. 634). The director of education opined that a 15:2 special class for reading was "a pretty big class for [the student]," as he could easily get overloaded, and opined that the class size at Norman Hoard, which was eight to ten students, were more appropriate to meet the student's needs (Tr. p. 636). The director of education opined the program recommended by the CSE was inappropriate because the student required a smaller environment (building) than the district's high school, smaller class size and consistency (Tr. p. 637). The director of education testified that she had never observed the student in an academic setting outside of Norman Howard (Tr. p. 700). The director reported that she had been at the high school in the past for meetings, the last time being three years ago (Tr. p. 701). She indicated that she had never observed any of the classes at the school and she did not know any of the students in the recommended program (Tr. pp. 701-02). She indicated that she was not familiar with the recommended program and could predict, but did not know, how the student would respond to the program (Tr. pp. 702-03). The director of education indicated that she did not have concerns about the instruction in the recommended program, rather she was concerned about the size of the school; she felt the overall environment would be overwhelming for the student (Tr. p. 705). She opined that the student required a smaller school and a school where the supports were well integrated into the program (Tr. p. 706).

The student's counselor at Norman Howard opined that the district's high school would be overwhelming for the student due to the bigness of the building, number of people and unfamiliarity of the setting (Tr. pp. 669, 688-89, 691). She opined that the student would freeze in that setting and not be able to function (Tr. p. 669). She further opined that a transition plan and participation in a lunch bunch group would not be helpful for the student (Tr. pp. 672-73). The counselor testified that she had never seen the student in any other setting that Norman Howard, that she had been in the district's high school for a meeting approximately ten years ago but that she was not familiar with the 15:2 special classes at the school or the needs of the students in those classes (Tr. pp. 684-85). She agreed that she did not really know about how the high school could meet the student's needs (Tr. pp. 685-86, 691-92).

The student's social studies teacher at Norman Howard testified that he had been in the district building but that he did not teach there (Tr. p. 855). He opined that given the social world the student would have to navigate at the school it would probably inhibit his progress academically (Tr. pp. 855-856). Specifically, he cited the size of the building, lack of advisory support, lack of a specific writing class, and 15:2 classes (Tr. pp. 856, 858). The social studies teacher stated that there were 900 students in the district school and opined that the student would be overwhelmed by the number of students and distracted by the social things going on (Tr. p. 857). He suggested that the student would be better off practicing social skills training with similar students than with general education peers (Tr. p. 860). The social studies teacher testified that he had not observed district classes and had never seen the student in an educational setting outside of Norman Howard (Tr. pp. 864-645). He indicated that he did not have personal knowledge of the 15:2 special classes or resource room, or the needs of the students in those programs (Tr. pp. 865, 872-73).

The occupational therapist hired by the family to assess the student's sensory needs testified that she had been to the district's high school and when she spoke of the physical things in the building that could not be changed, she was referring to the size of the building, length of the hallways, and number of students inhabiting the building at the same time (Tr. pp. 907-08). The occupational therapist opined that an ICT setting would be very challenging for the student and based on her experience with ICT classrooms, there were many students in ICT classes with divergent needs and it was not a culturally cohesive way of delivering information (Tr. p. 908-09). She indicated that there was usually more than one adult teaching simultaneously which created a challenge for people to pay attention and sort through information (Tr. pp. 909-10). In addition, she noted there was generally a lot of movement among students in the classroom (Tr. p. 910). The occupational therapist indicated that she had never observed the student in an academic program (Tr. p. 926). She further indicated that she had not observed or talked to anyone about the district's 15:2 special classes nor was she familiar with the needs of the students in those classes (Tr. p. 927). In addition, the occupational therapist indicated that she never observed the district's ICT program and was not aware of the number of students that would be in the proposed class (Tr. p. 928).

The student's mother testified that there was a discussion at the June or August CSE meeting about the 15:2 special classes (Tr. p 1040). She recalled that the discussion left her with the impression that students in the classes were taught what they needed to know to "pass the exam and just get by" (Tr. p. 1040). She indicated that she was concerned that the student's capability was higher than classroom instruction (Tr. pp. 1041-42, 1058-59). With regard to the ICT class

the parent indicated that she was concerned about the number of students, as well as the number of students with IEPs, the social demands of being placed with students who were a year older, and the pacing of the class (Tr. pp. 1043-45, 1052-54). The student's parents indicated that they had not observed a 15:2 special class or ICT class at the district high school (Tr. pp. 1091, 1099-1100, 1147).

Turning to the parents' arguments raised in the answer and cross-appeal, the parents contend that the student required specially designed instruction in physical education for his "sensory, social and language deficits" (Answer at ¶ 14), the August 2020 IEP states that the student's "core and upper extremity weakness impacts his stamina for handwriting, typing and other school activities" and therefore, he would benefit from an OT consultation to monitor his "progress with handwriting as well as strength and endurance" (Joint Ex. 14 at p. 8). The district's CSE coordinator testified that no concerns were raised at any of the CSE meetings that the student required specially designed instruction in physical education (Tr. pp. 145-46; Joint Ex. 11 at pp. 6-7). She also testified that the May 2020 IESP noted no physical needs outside of management (Tr. p. 146; Joint Ex. 24 at p. 7). Further, the director of education at Norman Howard testified that all students at the school are in a special physical education class because it was the only option at the school for the students (Tr. p. 696). She further testified that the student was doing "fine" in the Norman Howard physical education class (Tr. pp. 696-97). The director of education at Norman Howard testified that "it's a regular [physical education] class, but it's in the special [education] setting" (Tr. pp. 695, 716). Accordingly, I agree with the IHO that the evidence in the hearing record did not demonstrate that the student required specially designed physical education (IHO Decision at p. 26).

The parents further argue that the IHO erred in finding that parent counseling and training was not required (IHO Decision at p. 26). The parents argue that the CSE's failure to consider or recommend parent counseling and training is a violation of the State regulations because the student is classified as a student with autism (Answer at ¶ 16). State regulations require that an IEP indicate the extent to which parent counseling and training will be provided to parents, when appropriate (8 NYCRR 200.4[d][2][v][b][5]). State regulations further provide for the provision of parent counseling and training for the purpose of enabling parents of students with autism to perform appropriate follow-up intervention activities at home (8 NYCRR 200.13[d]). Parent counseling and training is defined as "assisting parents in understanding the special needs of their child; providing parents with information about child development; and helping parents to acquire the necessary skills that will allow them to support the implementation of their child's [IEP]" (8 NYCRR 200.1[kk]; see 34 CFR 300.34[c][8]). The district's CSE coordinator testified that parent counseling and training was not recommended for the 2020-21 school year because the CSE "incorporated" it into "other programs and services" and they have "a lot of communication with parents" (Tr. p. 157).²⁰ The district's CSE coordinator further testified that the August 2020 IEP

²⁰ [T]he Second Circuit has consistently held that the failure to include parent counseling and training on an IEP does not usually constitute a denial of a FAPE (see L.O. v. New York City Dep't of Educ., 822 F.3d 95, 122-23 [2d Cir. 2016]; M.W. v. New York City Dep't of Educ., 725 F.3d 131, 141-42 [2d Cir. 2013]; R.E., 694 F.3d at 191; see also A.M. v. New York City Dep't of Educ., 845 F.3d 523, 538 [2d Cir. 2017]; J.C. v. New York City Dep't of Educ., 643 Fed. App'x 31, 32 [2d Cir. Mar. 16, 2016]; R.B. v. New York City Dep't of Educ., 603 Fed. App'x 36, 39 [2d Cir. Mar. 19, 2015]; but see C.F. v. New York City Dep't of Educ., 746 F.3d 68, 80-82 [2d Cir. 2014]). The Second Circuit explained that, "[t]hrough the failure to include parent counseling in the IEP may, in

supports the parents in other ways, for example, the related service providers contact the parents "on a regular basis" about the student's skills and the "carryover into the home" and the IEP contains the home to parent communication in the supplemental aids and services" to keep the parents apprised of the student's challenges and successes at school (Tr. p. 159; Joint Ex. 14 at pp. 12-13). She further testified that neither the parents nor Norman Howard raised concerns about parent counseling and training, and it was not a service provided at Norman Howard (March 25, 2021 Tr. pp. 157-58). The director of education at Norman Howard confirmed in her testimony that the school does not provide parent counseling and training and if it is on a student's IEP the service is provided by the district (Tr. p. 700). Here, the hearing record does not support a finding that the district's failure to specify parent counseling and training on the student's IEP constituted a procedural violation that would result in a finding of a denial of a FAPE.

The parents assert that the IHO failed to find that the CSE failed to consider the student's assistive technology needs, failed to conduct an assistive technology evaluation, and failed to recommend appropriate assistive technology for the student, resulting in a denial of FAPE.²¹ The August 2020 CSE recommended that the student be allowed to use the computer "to record his responses or to complete written tasks in order to compensate for his limited stamina with handwriting" (Joint Ex. 14 at p. 14). The student would also be permitted to use "voice-to-text technology to speak his response" instead of providing a written response (Tr. p. 160; Joint Ex. 14 at p. 14). Additionally, the August 2020 CSE recommended an assistive technology consult to support and teach the student to use the assistive technology and support his handwriting (Tr. p. 83; Joint Ex. 14 at p. 15). The district's CSE coordinator testified that the student's "executive functioning skills would be directly related to the need for assistive technology to support him" and based upon that need, the CSE recommended the assistive technology consultation (Tr. p. 83). Further, the district's CSE coordinator testified that the assistive technology consultant determines along with the teachers if an assistive technology evaluation is warranted (Tr. p. 160, 286). She testified that the student's assistive technology needs were adequately met in the August 2020 IEP (Tr. p. 160).

Although the meeting minutes of the August 2020 CSE meeting do not address a request or discussion pertaining to ESY services, the parents argue on cross-appeal that the IHO should have found that the student required ESY services. The parents argue that the CSE failed to recommend ESY services despite evidence that the student "would likely regress in reading, social

some cases (particularly when aggregated with other violations), result in a denial of a FAPE, in the ordinary case that failure, standing alone, is not sufficient to warrant reimbursement" (R.E., 694 F.3d at 191; see F.L. v. New York City Dep't of Educ., 553 Fed. App'x 2, 7 [2d Cir. Jan. 8, 2014]; K.L. v. New York City Dep't of Educ., 2013 WL 3814669 [2d Cir. Jul. 24, 2013]).

²¹ Under the IDEA, a CSE may be required to consider special factors in the development of a student's IEP. One of the special factors that a CSE must consider is whether the student "requires assistive technology devices and services, including whether the use of school-purchased assistive technology devices is required to be used in the student's home or in other settings in order for the student to receive a [FAPE]" (8 NYCRR 200.4[d][3][v]; see 20 U.S.C. § 1414[d][3][B][v]; 34 CFR 300.324[a][2][v]; see also Educ. Law § 4401[2][a]). Accordingly, the failure to recommend specific assistive technology devices and services rises to the level of a denial of a FAPE only if such devices and services are required for the student to access his educational program (see, e.g., Application of the Bd. of Educ., Appeal No. 13-214; Application of a Student with a Disability, Appeal No. 11-121).

language and social emotional coping skills" without such services (Answer at ¶ 22).²² The district's CSE coordinator testified that there was no information presented to the CSE that the student demonstrated substantial regression (Tr. pp. 152-54). In fact, the director of education at Norman Howard who participated in each of the four CSE meetings for the 2020-21 school year, had no opinion whether the student regressed after summer breaks (Tr. pp. 623-24, 637). She also testified that Norman Howard does not offer a 12-month program and if students required ESY it must be obtained from their district (Tr. p. 700).²³ Accordingly, there is no basis in the hearing record for a finding that the student needed such services.

The parents also argue, in connection with the 2020-21 school year, and again not raised at any CSE meeting, the parents argue that the IHO erred in determining that the student did not require specialized transportation (IHO Decision at p. 26; see Joint Exs. 11, 13-14, 16).²⁴ The parents argue that due to the student's anxiety, social communication, and sensory processing deficits he becomes easily overwhelmed and he requires special transportation. They further argue that because the student rides a small bus to and from Norman Howard with only one other student, he is essentially receiving special transportation to meet his needs (Answer at ¶ 15;). While the student was on a bus with only two other students when he was transported to and from Norman Howard, the district's CSE coordinator testified that only students who demonstrate safety concerns or physical needs require special transportation and the student did not manifest any

²² State regulations require that students "shall be considered for 12-month special services and/or programs in accordance with their need to prevent substantial regression" (8 NYCRR 200.6[k][1][v]). "Substantial regression" is defined as the "student's inability to maintain developmental levels due to a loss of skill or knowledge during the months of July and August of such severity as to require an inordinate period of review at the beginning of the school year to reestablish and maintain IEP goals and objectives mastered at the end of the previous school year" (8 NYCRR 200.1[aaa], [eee]). State guidance indicates that "an inordinate period of review" is considered to be a period of eight weeks or more (see "Extended School Year Programs and Services Questions and Answers," VESID Mem. [Feb. 2006], available at <http://www.p12.nysed.gov/specialed/applications/ESY/2014-QA.pdf>).

²³ State guidance indicates that for dually enrolled students—that is students parentally placed in a nonpublic school—who qualify for 12-month services, the district of location is required to develop an IESP for the regular school year and the district of residence is required to develop an IEP for the 12-month services programming, resulting in a 10-month IESP and a 6-week IEP ("Questions and Answers on Individualized Education Program (IEP) Development, The State's Model IEP Form and Related Documents," at pp. 39-40, Office of Special Ed. [Apr. 2011], available at <http://www.p12.nysed.gov/specialed/formsnotices/IEP/training/QA-411.pdf>).

²⁴ The IDEA includes transportation, as well as any modifications or accommodations necessary in order to assist a student to benefit from his or her special education, in its definition of related services (20 U.S.C. § 1401[26]; see 34 CFR 300.34[a], [c][16]). In addition, State law defines special education as "specially designed instruction . . . and transportation, provided at no cost to the parents to meet the unique needs of a child with a disability," and requires school districts to provide disabled students with "suitable transportation to and from special classes or programs" (Educ. Law §§ 4401[1]; 4402[4][a]; see Educ. Law § 4401[2]; 8 NYCRR 200.1[ww]). Specialized transportation must be included on a student's IEP if required to assist the student to benefit from special education (Application of a Child with a Disability, Appeal No. 03-053). If a CSE determines that a student with a disability requires transportation as a related service in order to receive a FAPE, the district must ensure that the student receives the necessary transportation at public expense (Transportation, 71 Fed. Reg. 46576 [Aug. 14, 2006]; see 8 NYCRR 200.1[ww]).

transportation concerns (Tr. pp. 154-56, 245).²⁵ She testified that typically the transportation department would let her know if there was a concern regarding a particular student and no concerns were raised about this student (Tr. pp. 155-56). Further, no concerns were raised by the parents or Norman Howard staff about the student's need for special transportation (Tr. pp. 155-57, 245). Accordingly, the hearing record supports the IHO's decision that the student did not require special transportation.

Finally, the parents argue in the answer and cross-appeal that the IHO should have made specific findings that the placement of the student in a 15:2 special class and an ICT classroom for mathematics was inappropriate. The parents contend that by recommending a 15:2 special class and ICT classroom, the August 2020 IEP failed to provide, among other things, "the small, structured group instruction, the consistent, predictable strategies, reduced auditory and visual distractions" and "flexible/decreased pacing of instruction" necessary to address the student's academic and social-emotional needs, particularly in the context of the student's transition to a large district high school.

Based on the totality of the evidence in the hearing record, I find that the district failed to demonstrate that its recommendation of a 15:2 special class and ICT classroom for the student was appropriate. As per the August 2020 IEP, the student "had difficulty tolerating frustration, was prone to outbursts of anger, was easily upset, misread social cues, took offense easily, became stuck in his thinking about the same topic or issues, and had difficulty accepting new ideas, adapting to change, and recovering from disappointment" (Joint Exhibit 14 at pp. 7-8). The August 2020 IEP further noted that the student "demonstrated significant dysfunction in all areas of executive functioning" and "had difficulty breaking long term assignments into smaller tasks, organizing his thoughts, prioritizing tasks, initiating assignments, managing time, and was easily overwhelmed" (*id.* at p. 7). While the district envisioned its recommended program as providing the student with a smaller, more structured educational setting within a large district high school, it failed to provide sufficient evidence that the August 2020 IEP provided the student with adequate adult support and individual attention within the classroom given his unique educational profile, including a diagnosis of rare condition that affects every aspect of his academic and social-emotional functioning, and his transition from a considerably smaller learning environment with a high degree of direct individualized support from staff and teachers who were familiar with his academic and social-emotional needs. Moreover, while the district developed a transition plan to assist the student in his acclimation to the high school, the plan largely consisted of resources the student was expected to access himself without reference to what supports – particularly adult supports – would be available to him if he encountered difficulty as he navigated the overall new school environment in real time due to his considerable anxiety, susceptibility to sensory overload and tendency toward perseveration. While it is understandable that to the district, a 15:2 class and

²⁵ The State Education Department has indicated that a CSE should consider a student's mobility, behavior, communication, physical, and health needs when determining whether or not a student requires transportation as a related service, and that an IEP "must include specific transportation recommendations to address each of the student's needs, as appropriate" ("Special Transportation for Students with Disabilities," VESID Mem. [Mar. 2005], available at <http://www.p12.nysed.gov/specialed/publications/policy/specialtrans.pdf>). Other relevant considerations may include the student's age, ability to follow directions, ability to function without special transportation, the distance to be traveled, the nature of the area, and the availability of private or public assistance (see *Donald B. v. Bd. of Sch. Comms.*, 117 F.3d 1371, 1375 [11th Cir. 1997]; *Malehorn v. Hill City Sch. Dist.*, 987 F. Supp. 772, 775 [D.S.D. 1997]).

an ICT classroom presented as among the smaller, more structured options available in a large public school setting for the student given his level cognitive and academic functioning, the August 2020 IEP failed to address with sufficient particularity how the student's academic and social-emotional needs could be addressed without either additional adult support or a smaller class size or a more supervised and structured transition plan. Accordingly, while my analysis of the FAPE issue focuses on grounds other than that identified by the IHO in his decision, I nonetheless reach the same conclusion, namely that the district failed to offer the student a FAPE for the 2020-21 school year.

5. Assigned School Claims

In addition to the above challenges to the operative August 2020 IEP, the parents also challenged the district's ability to implement the operative IEP during the 2020-21 school year. The parents assert that the district's "hybrid" reopening plan provided to the parents in July 2020 "would have resulted in SH receiving less of the programming, services and instruction than specified on the IEP" and lacked a "consistent and predictable school schedule" that the student needed (Answer with Cross-Appeal ¶27; see Joint Exs. 1 at p. 6; 4 at p. 6).

As discussed above regarding the IHO's decision that the district could not implement the student's IEP, a district's assignment of a student to a particular public school site must be made in conformance with the CSE's educational placement recommendation, and the district is not permitted to deviate from the provisions set forth in the IEP (M.O. v. New York City Dep't of Educ., 793 F.3d 236, 244 [2d Cir. 2015]; R.E., 694 F.3d at 191-92; T.Y., 584 F.3d at 419-20; see C.F. v. New York City Dep't of Educ., 746 F.3d 68, 79 [2d Cir. 2014] [holding that while parents are entitled to participate in the decision-making process with regard to the type of educational placement their child will attend, the IDEA does not confer rights on parents with regard to the selection of a school site]). The Second Circuit has held that claims regarding an assigned school's ability to implement an IEP may not be speculative when they consist of "prospective challenges to [the assigned school's] capacity to provide the services mandated by the IEP" (M.O., 793 F.3d at 245; see Y.F. v. New York City Dep't of Educ., 659 Fed. App'x 3, 5-6 [2d Cir. Aug. 24, 2016]; J.C. v. New York City Dep't of Educ., 643 Fed. App'x 31, 33 [2d Cir. Mar. 16, 2016]; B.P. v. New York City Dep't of Educ., 634 Fed. App'x 845, 847-49 [2d Cir. 2015]).

According to the district's remote learning plan, most students would have received in person instruction two days per week and remote learning three days per week; special education students in the district would have attended school four days per week, with one day of remote learning (Parent Ex. B at p. 1). It appears from testimony, that when the student started school in the fall, he would have been in attendance two days per week, with three days of remote instruction (Tr. pp. 246-47). Additionally, according to the plan students would have continued to receive services "in the hybrid learning environment, through a combination of remote and in-person learning experiences" (Parent Ex. B at p. 2). Further, it was expected that teachers would have continued to "provide students with regular feedback on their learning as it relates to progress towards established learning targets" (id.).

The CSE discussed the remote learning plan during the August 2020 CSE, with district staff expressing the opinion that the hybrid environment would have been beneficial for the student as an opportunity for a transition into the public school with smaller class sizes; however, the

parents and the director of education at Norman Howard expressed the belief that transitioning the student into the public school with the hybrid plan would not have been good for him because of a lack of consistency in school days (Parent Ex. D at pp. 3, 9-10, 12-13).

State guidance regarding the use of remote learning during the Covid-19 pandemic indicates that students with disabilities should have "equal access to the continuity of learning and receive educational benefits that are comparable to those received by others in the program and modified, or separate, aids and services necessary to provide access to students with disabilities" ("Provision of Services to Students with Disabilities During Statewide School Closures Due to Novel Coronavirus (COVID-19) Outbreak in New York State," at p. 3, Off. Of Spec. Educ. Policy Memo [March 27, 2020], available at <http://www.p12.nysed.gov/specialed/publications/2020-memos/nysed-covid-19-provision-of-services-to-swd-during-statewide-school-closure-3-27-20.pdf>). Additionally, "educators may still meet their legal obligations by providing children with disabilities equally effective alternate access to the curriculum or services provided to other students" and that "if online or virtual learning is part of a school closure recommendation, the school district would not be required to amend students' IEPs as online or virtual learning would be considered an alternate mode of instructional delivery" (*id.* at pp. 3, 5).

Based on the above, the hearing record does not support finding that the remote learning plan, as proposed by the district, would have materially or substantially deviated from the student's IEP such that it would rise to the level of a denial of a FAPE. Furthermore, the parents argue that the district failed to demonstrate that the "peer groupings" in either the 15:2 special class or the general education class with the support of ICT services were appropriate for the student (Answer at ¶ 18).

In reviewing the parents' allegations related to the composition of the proposed class, neither the IDEA nor federal regulations require students who attend a special class setting to be grouped in any particular manner. The United States Department of Education has opined that a student must be assigned to a class based upon his or her "educational needs as described in his or her IEP" and not on "a categorical placement," such as one based on the student's disability category (Letter to Fascell, 18 IDELR 218 [OSEP 1991]). While unaddressed by federal law and regulations, State regulations set forth some requirements that school districts must follow for grouping students with disabilities. In particular, State regulations provide that in many instances the age range of students in a special education class in a public school who are less than 16 years old shall not exceed 36 months (8 NYCRR 200.6[h][5]). State regulations also require that in special classes, students must be suitably grouped for instructional purposes with other students having similar individual needs (8 NYCRR 200.1[ww][3][ii]; 200.6[a][3], [h][3]; see Walczak, 142 F.3d at 133 [approving an IEP that placed a student in a classroom with students of different intellectual, social, and behavioral needs, where sufficient similarities existed]).²⁶ State regulations further provide that determinations regarding the size and composition of a special class shall be based on the similarity of the individual needs of the students according to levels of academic or educational achievement and learning characteristics, levels of social development, levels of physical development, and the management needs of the students in the classroom (see 8 NYCRR 200.6[h][2]; see also 8 NYCRR 200.1[ww][3][i][a]-[d]). SROs have often referred to

²⁶ To be clear, there is no requirement in the IDEA or State regulation requiring that grouping be conducted in accordance with a student's chronological grade.

grouping in the areas of academic or educational achievement, social development, physical development, and management needs collectively as "functional grouping" to distinguish that set of requirements from grouping in accordance with age ranges (see, e.g., Application of a Student with a Disability, Appeal No. 17-026).

The district submitted a class profile of the students in both the proposed special class and the general education class with ICT services that the student would have attended for the 2020-21 school year (Dist. Ex. 3). The parents do not allege that the students presented in the class profile did not fit within a similar range of functional grouping as the student; rather, the parents assert that the class profile should not be accepted as evidence of an appropriate grouping because it was not produced prior to the hearing (Answer with Cross-Appeal ¶18). However, while the district must implement a student's IEP consistent with the grouping requirements of State regulation, contrary to the IHO's finding, the Second Circuit has held that the IDEA does "not expressly require school districts to provide parents with class profiles" (Cerra, 427 F.3d at 194; see N.K., 961 F. Supp. 2d at 590 [noting that a district is not required to provide parents with "details about the specific group of children with which their child will be placed"]; E.A.M. v New York City Dep't of Educ., 2012 WL 4571794, at *11 [S.D.N.Y. Sept. 29, 2012]). Here, concerns about the likelihood that the student would be appropriately grouped with other students are speculative given that the student never attended the assigned public school site (M.C. v. New York City Dep't of Educ., 2015 WL 4464102, at *7 [S.D.N.Y. July 15, 2015]; R.B. v. New York City Dep't of Educ., 15 F. Supp. 3d 421, 436 [S.D.N.Y. 2014], aff'd, 603 Fed. App'x 36 [2d Cir. Mar. 19, 2015]; B.K. v. New York City Dep't of Educ., 12 F. Supp. 3d 343, 371 [E.D.N.Y. 2014]; N.K., 961 F. Supp. 2d at 590; see J.L. v. City Sch. Dist. of New York, 2013 WL 625064, at *11 [S.D.N.Y. Feb. 20, 2013] [noting that the "IDEA affords the parents no right to participate in the selection of . . . their child's classmates"]). Indeed, claims regarding grouping are inherently speculative as the district cannot guarantee the composition of the class that the student would have attended (M.S. v. New York City Dep't of Educ., 2 F. Supp. 3d 311, 332 n.10 [E.D.N.Y. 2013]; cf. R.E., 694 F.3d at 187, 192 [noting that at the time of the placement decision, a parent cannot have any guarantee that a specific teacher will be available to implement an IEP]). Accordingly, the parents' arguments related to functional grouping are without merit.

C. Unilateral Placement

The district contends that the IHO erred in finding that Norman Howard was an appropriate unilateral placement for the student for the 2020-21 school year. The district argues that Norman Howard was a "segregated" school that "exclusively educates students with disabilities" and that the student did not make "meaningful progress" at the school (Req. for Rev. at ¶ 51).²⁷ For the

²⁷ As for the district's argument that Norman Howard was too restrictive, it is well settled that although the restrictiveness of a parent's unilateral placement may be considered as a factor in determining whether parents are entitled to an award of tuition reimbursement (M.S. v. Bd. of Educ. of the City Sch. Dist. of Yonkers, 231 F.3d 96, 105 [2d Cir. 2000]; Walczak, 142 F.3d at 122; see Rafferty v. Cranston Pub. Sch. Comm., 315 F.3d 21, 26-27 [1st Cir. 2002]), parents are not as strictly held to the standard of placement in the LRE as are school districts (C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 830, 836-37 [2d Cir. 2014] [noting "while the restrictiveness of a private placement is a factor, by no means is it dispositive" and furthermore, "[i]nflexibly requiring that the parents secure a private school that is nonrestrictive, or at least as nonrestrictive as the FAPE-denying public school, would undermine the right of unilateral withdrawal the Supreme Court recognized in Burlington"]; see Carter, 510 U.S. at 14-15; M.S., 231 F.3d at 105 [stating that parents "may not be subject to the

reasons set forth below, the evidence in the hearing records supports the IHO's finding that Norman Howard provided the student with instruction and services specially designed to meet his unique needs and, therefore, was an appropriate unilateral placement for the student for the 2020-21 school year (IHO Decision at p. 19). 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

same mainstreaming requirements as a school board"]) and "the totality of the circumstances" must be considered in determining the appropriateness of the unilateral placement (Frank G. v. Bd. of Educ. of Hyde Park, 459 F.3d 356, 364 [2d Cir. 2006]). Accordingly, the aspect of the district's argument related to the restrictiveness of Norman Howard is without merit.

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).

With respect to reviewing the hearing record for evidence of specially designed instruction, the district argues that the related services the student received from the district of location as part of the May 2020 IESP should not be considered in evaluating the appropriateness of the unilateral placement. While the student attended Norman Howard, the student also received related services as recommended in the May 2020 IESP developed by the district of location, including two 45-minute sessions per week of small group speech-language therapy, one 30-minute session per week of small group counseling services, and one 60-minute OT consultation per quarter (Joint Ex. 24 at pp. 1, 10-11). The hearing record shows that the student received counseling and speech-language therapy at Norman Howard during the 2020-21 school year (see Parent Exs. F; I; Joint Ex. 24). While the district is correct in that the student received related services as recommended in the May 2020 IESP, the providers of those related services appear to be associated with Norman Howard (see Tr. pp. 655, 728; Parent Exs. F; I). Additionally, even if the providers were not associated with Norman Howard, parents may obtain outside services for a student in addition to a private school placement as part of a unilateral placement (see C.L., 744 F.3d at 838-39 [finding the unilateral placement appropriate because, among other reasons, parents need not show that a "private placement furnishes every special service necessary" and the parents had privately secured the required related services that the unilateral placement did not provide], quoting Frank G., 459 F.3d at 365). Certainly, if the student only received specialized instruction through the IESP services, it would be difficult for the parents to prove that placement of the student at Norman Howard addressed his special education needs (see Application of the Bd. of Educ., Appeal No. 10-049); however, that is not the case here.

The director of education at Norman Howard testified that Norman Howard was a State-approved nonpublic school that served approximately 106 students in grades five through twelve (Tr. pp. 591-92). She reported that staff at the school were "duly certified" in special education and their content area (Tr. p. 594). The student's classes "followed New York State standards" and the student's grades were based on "his performance in those classes" (Tr. p. 714). According to the director, Norman Howard was a "Regents diploma granting institution" (Tr. p. 592). She indicated that the school had two speech-language pathologists and two social workers who delivered mandated services and that other related services, such as occupational and physical therapy, were provided by the students' home districts (Tr. pp. 592, 693-94). Students participated in reading and writing classes on a daily basis and were placed at their developmental level for math (Tr. pp. 592-93).

According to the director of education, the school was a "small program" where the ratio of the classes was 12:1+1 (Tr. pp. 596, 640-41).²⁸ She noted that because the program was small, staff were able to "integrate strategies" across the school as well as across grades and content areas (Tr. p. 596). The student had classes in reading, writing, math, ELA, science and social studies

²⁸ The director initially testified that "we're a 12:1, so none of our classes are larger than that. They're mostly smaller" but on cross examination indicated that the ratio of the classes was 12:1+1 meaning 12 students, one teacher, and one teaching assistant (Tr. pp. 596, 640-41).

each day, as well as the advisory period (Tr. pp. 646-47). The director of education testified that the student did "not want to look different" or "singled out" and at Norman Howard the student did not need to have extra services piled on because so much of what he needed was "integrated into the program," which allowed the student to feel that he was a part of the school community (Tr. pp. 625-26). The director of education reported that the ratio for reading classes at Norman Howard was either 1:1, 2:1, but never more than 3:1 for decoding classes and the reading comprehension classes ranged from two to five students (Tr. p. 603). The director explained that the small group size helped with "the intensity of instruction" (Tr. pp. 603-04). Additionally, the director of education explained that executive functioning support was "built into classroom routines" and the school had an advisory period at the end of the day for additional help with homework, planning and studying (Tr. pp. 604, 622). In terms of technology, the director reported that all students had Chromebooks with software "including speech to text, text to speech" (Tr. p. 595).

The director of education at Norman Howard testified that the student made progress during the 2020-21 school year (Tr. p. 616).²⁹ She testified that the student's needs were met at Norman Howard because it was a "small, quiet, consistent environment" with "explicit instruction" in strategies and social thinking (Tr. p. 620). The director of education described the instruction as a combination of scaffolding and expecting students to meet grade level standards (Tr. p. 620). She reported that the student's needs were met through the visuals provided by thinking maps, "very" explicit instruction in writing, and working on word analysis skills and reading comprehension in reading class (Tr. pp. 620-21). She noted that there were two students, including the student, in his reading class (Tr. p. 621). The director of education characterized the student's processing speed as "significantly low" and stated that the student required extra time to "process and produce" (Tr. p. 621). She indicated that he was provided with wait time to respond, extra time to complete tasks, and a preview of questions that may be asked (Tr. pp. 621-22). The student's first and second quarter report card from Norman Howard demonstrated that the student made consistent and strong effort in his classes and his grades ranged from an 89-100 with a grade point average (GPA) after the first two quarters of 95.67 which made him a high honor roll student (Parent Ex. K at pp. 1-2).

The student's counselor at Norman Howard, who had worked with him since he started at the school in fifth grade, testified that the 2020-21 school year was more difficult for the student than the prior school year because of the "increased expectation of independence" and the student's awareness of how he differed from his peers and tendency to engage in "more self-judgment" (Tr. pp. 664, 674). She reported that when the student misinterpreted something, sometimes he could not move beyond his thought about the thing and would persevere until an adult intervened (Tr. p. 660). She indicated that the length of time it would take the student to re-regulate was not predictable and noted that it had taken a very long time for the student to build enough trust to be able to regulate with some guidance (Tr. pp. 660-61; see Parent Ex. F). The counselor's report dated November 3, 2020 indicated that the student participated in weekly counseling with a focus

²⁹ 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"]).

on social thinking and positive coping skills to help him reduce "the ever present anxiety that he experience[d] throughout his day" (Parent Ex. F). The report indicated that the student continued to demonstrate consistent progress in regard to managing low-level anxiety in the school setting and noted that with adult support and direction he was able to apply a positive strategy, "such as 'reframing' negative thoughts," with more frequency (Parent Ex. F). However, the report noted that the student continued to require adult intervention and support to in order to apply strategies preventively (Parent Ex. F). According to the report, the student "applie[d] consistent effort toward maintaining good grades" despite the fact that "[t]here [wa]s never an absence of anxiety" (*id.*).

The student's speech pathologist at Norman Howard testified that she disagreed with the goals on the August 2020 IEP because they were "skills focused" rather than being focused on "underlying competencies" (Tr. p. 759). Instead, she testified that she addressed "the underlying foundational aspects of social learning that [the student] struggle[d] with" so he could "navigate novel situations" (Tr. pp. 759-762). During the 2020-21 school year the student attended two 45-minute sessions per week of speech-language therapy in a small group setting (Parent Ex. I). In terms of the student's speech and language abilities, the speech-language pathologist at Norman Howard reported that the student "continue[d] to make slow, but steady progress in improving his social competencies, cognitive flexibility, and executive functioning" (Parent Ex. I at p. 1). She reported that the student required significant support for his anxiety and perseveration; however, the focus of speech-language therapy had been on increasing his "self-awareness" to manage the moments of his "stuck thinking" (*id.*). In addition, the speech-language pathologist stated that "the integration of social thinking concepts and vocabulary throughout all of his classes, and within the school environment at-large, provide[d] the reinforcement and repetition [the student] require[d] to retain and generalize newly developed competencies" (*id.*).

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 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; accordingly, aspects of the instruction, supports, and services provided to the student at Norman Howard were part of the school's program and therefore may have been available to all students. 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 educational assets to determine the appropriateness of Norman Howard as a unilateral placement is not necessary. The school also identified his individual needs in the areas of speech-language skills, slow processing speed, as well as deficits in executive functioning skills, and support to address these 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.

D. Equitable Considerations

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

any fraud or collusion on the part of the parent or private school]; C.L., 744 F.3d at 840 [noting that "[i]mportant to the equitable consideration is whether the parents obstructed or were uncooperative in the school district's efforts to meet its obligations under the IDEA"]).

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

The district appeals from the IHO's finding that equitable considerations weighed in favor of the parents. According to the district a number of factors equitably weigh against the parents request for relief, including that the district already funded some of the services the student received at Norman Howard through an IESP, the parents failed to inform the district of the private neuropsychological evaluation and attempted to prevent the district from reviewing the report, the parents did not adequately explain the extent of the student's needs at the CSE meetings, and the parents decided to place the student at Norman Howard prior to the CSE meeting and never intended to place the student in the district (Req. for Rev. ¶ 59-67).

With respect to the parents' actions, the IHO found that the "parents were candid with the CSE regarding their concerns and intentions, provided the CSE with information, facilitated the participation in the CSE process of the staff of the nonpublic school, and toured the [d]istrict's high school and asked pertinent questions" (IHO Decision at p. 20). To the extent that the district asserts that equitable considerations should weigh against the parents because they did not share the results of a November 2020 neuropsychological assessment with the district, the results of that assessment were shared with the district in January 2021 and the CSE convened to consider the results of the assessment in February 2021 (see Dist. Ex. 1). As the CSE meetings relevant to this proceeding were determined to be the June 2020 and August 2020 CSE meetings, and the neuropsychological report was completed after these meetings, and after the student was placed at Norman Howard for the 2020-21 school year, there is no basis for finding any action taken regarding this evaluation to impact on equitable considerations in this matter.

Finally, courts have grappled with the effect of a parent's intention to parentally place a student at a nonpublic school on the district's obligation to provide the student with an IEP and at least one court has noted that the "issue of the parents' intent [was] a question that inform[ed] the balancing of the equities rather than whether the district had an obligation to the child under the IDEA" (E.T. v. Board of Education of Pine Bush Central School District, 2012 WL 5936537

[S.D.N.Y. Nov. 26, 2012]). In *E.T.*, the court noted that equitable considerations included the delivery of adequate notice of a parent's intent to enroll a student in a nonpublic school, unreasonable actions on the part of a parent, and a commitment to enroll a student in a nonpublic school prior to a district making its proposal for FAPE (*id.*). Nevertheless, the parents' pursuit of a private placement to the exclusion of a district offer is not a basis to deny tuition reimbursement on equitable grounds (*E.M.*, 758 F.3d at 461; *C.L.*, 744 F.3d at 840 [holding that the parents' "pursuit of a private placement was not a basis for denying their [request for] tuition reimbursement, even assuming . . . that the parents never intended to keep [the student] in public school"]).

In this instance, In May 2020, the district of location held a CSE meeting and developed an IESP for the student (Joint Ex. 24 at p. 1). According to the comments to the May 2020 IESP, the parents agreed to continue to send the student to Norman Howard for the 2020-21 school year with the related services listed on the IESP (*id.* at p. 2).

On June 25, 2020, the district held an annual review CSE meeting (*see* Joint Ex. 11). The district's CSE coordinator testified that for each year that the student attended Norman Howard, the district continued to develop an IEP in case the student returned to the district (Tr. p. 35; Joint Ex. 8 at p. 2). At the June 2020 CSE meeting there was a discussion of the student returning to the district's high school and the parents were "considering if this would work for" the student as "he could be with neighborhood kids and participate in sports" (Joint Ex. 13 at p. 1). It was determined that the parents would let the district's CSE coordinator know by mid-August if the student would return (*id.* at p. 2).

On July 7, 2020, the parents signed a form from the district of location indicating that they elected to place the student at Norman Howard for the 2020-21 school year at their own expense and sought to "discuss and arrange for special education services" with the district of location (Joint Ex. 46). The parents made a handwritten note on that form that stated there was "a possibility that we will enroll [the student] back at [the district] but things are still up in the air right now – will let you know if things change" (*id.*).

On August 10, 2020, the parents requested that the district agree to place the student at Norman Howard for the 2020-21 school year; the parents further notified the district that if the district did not agree to place the student at Norman Howard, the parents intended to place the student at Norman Howard and seek reimbursement of the costs of tuition from the district (Joint Ex. 6).

After receipt of the parents' August 10, 2020 notice, the CSE reconvened on August 20, 2020 (*see* Joint Exs. 7, 14). However, the parents continued to disagree with the district's recommended placement and the size of the district's high school and therefore, determined to keep the student at Norman Howard for the 2020-21 school year (Joint Ex. 15 at p. 2).

Considering the above, the parents followed the process of notifying the district of their intent to place the student at Norman Howard for the 2020-21 school year and to seek funding from the district for that placement (*see* Joint Ex. 6). The district then had the opportunity to reconvene the CSE in order to address the parents' concerns (*see* Joint Exs. 14; 16). Accordingly,

the hearing record supports the IHO's determination that equitable considerations do not weigh against granting the parents' requested relief.

Relatedly, it should be noted that while the district funded some of the services the student received at Norman Howard through an IESP, as noted above, the services that the student received at Norman Howard, including the IESP services, were appropriate to address the student's needs. Accordingly, the district's assertion that it would be inequitable to require the district to pay for the student's tuition at Norman Howard when it already funded some of the student's services there does not follow. Although it is relevant to the appropriateness of the unilateral placement, there is no basis for finding that the district's funding of IESP services warrants a reduction in relief on equitable grounds. However, if the district were to show that the student's tuition at Norman Howard included the cost of related services (which is not the case here as the enrollment contract was not included as a part of the hearing record), and that those services were already paid for through the May 2020 IESP, the district should not be obligated to pay for those services twice.³⁰

VII. Conclusion

Having determined that the evidence in the impartial hearing record supports the IHO's findings that the district failed to offer the student a FAPE for the 2020-21 school (albeit on a somewhat different ground than that relied upon by the IHO in making his FAPE determination), that Norman Howard was an appropriate unilateral placement for the student for the 2020-21 school year and that equitable considerations do not bar an award of tuition reimbursement to the parents, the necessary inquiry is at an end.

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

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS DISMISSED.

**Dated: Albany, New York
September 17, 2021**

**CAROL H. HAUGE
STATE REVIEW OFFICER**

³⁰ Although the district director of special education testified that the district pays for IESP services, as they are billed back to the district and the district receives a bill, no such bill was submitted into evidence and there is no further indication in the hearing record as to what services the district paid for (Tr. p. 41).