



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 21-199

**Application of a STUDENT WITH A DISABILITY, by her parents, for review of a determination of a hearing officer relating to the provision of educational services by the Board of Education of the Rye City School District**

### **Appearances:**

Barger & Gaines, attorneys for petitioners, by Jamie Mattice, Esq.

Ingerman Smith, LLP, attorneys for respondent, by Alessandra Pellegrino Pulit, Esq.

## **DECISION**

### **I. Introduction**

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioners (the parents) appeal from the decision of an impartial hearing officer (IHO) which denied their request for compensatory educational services for the 2018-19 and 2019-20 school years and to be reimbursed for the costs of the student's tuition at York Preparatory School (York Prep) for the 2020-21 school year. The appeal must be dismissed.

### **II. Overview—Administrative Procedures**

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

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

A party aggrieved by the decision of an IHO may subsequently appeal to a State Review Officer (SRO) (Educ. Law § 4404[2]; see 20 U.S.C. § 1415[g][1]; 34 CFR 300.514[b][1]; 8 NYCRR 200.5[k]). The appealing party or parties must identify the findings, conclusions, and orders of the IHO with which they disagree and indicate the relief that they would like the SRO to grant (8 NYCRR 279.4[a]). 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 in this case attended a district elementary school for first through fifth grade, and thereafter, transitioned to a district middle school for sixth grade for the 2017-18 school year (see Dist. Ex. 1 at pp. 2-3; see also Tr. pp. 432-33). The student continued to attend the same district middle school for seventh grade (2018-19 school year) and eighth grade (2019-20 school year) (see Dist. Ex. 1 at pp. 3-4; see also Tr. pp. 432-33). In seventh grade, the evidence in the hearing record reflects that the student attended classes in a general education setting and earned a level "4" score on the State examination in English language arts (ELA), which reflected the highest score available on the examination and which showed an improvement from earning a

level "3" score on the sixth grade State ELA examination (Dist. Ex. 3 at p. 1; see Tr. pp. 207-08).<sup>1</sup> Similarly, the student earned a level "3" score on the State examination in mathematics in seventh grade, which showed an improvement from earning a level "2" score on the sixth grade State mathematics examination (id. at p. 3).

At the start of eighth grade at the district middle school, during the 2019-20 school year, the parents sent an email, dated Friday, September 27, 2019, to the district superintendent, a district principal, and a district guidance counselor to inform them that the student had been cyberbullied "by her classmates" (Parent Ex. D at p. 1).<sup>2</sup> The parents indicated that, after discussing the "situation with a psychiatrist, a psychologist, and [their] lawyer [they] decided to approach the school" (id.). The parents also indicated that the student had "blocked all offenders and deleted any social media," but continued to have "a few face to face encounters" at school that week (id.). According to the parents' email, before they were willing to "discuss any details" about the incident, they requested information concerning the "school policy on handling situations like this" (id.). The parents also requested information concerning "what actions w[ould] be taken to ensure" the student's safety (id.). Finally, the parents requested that "no school official speak to [the student] about this situation unless one of [the parents], [the parents'] designated psychological professional, or [the parents'] retained attorney [was] present" (id.).

The district guidance counselor—who was one individual to receive the parents' September 2019 email concerning bullying—testified that she, together with the district principal in the principal's office, spoke with the student's father via telephone on the same day they received the email (see Tr. pp. 127-28). During that conversation, the student's father asked about the district's "protocol and about what [the district] would do with the information if he had given [them] the names and kind of what the procedure was" (Tr. p. 128). According to the guidance counselor, the student's father was "interested in, . . . , who would be spoken to and what happened after children were spoken to"—which the principal explained to him (Tr. pp. 128-29). The guidance counselor testified that the student's father did not identify the perpetrators, he did not explain why he was unwilling to identify the perpetrators, and she, herself, had no "sense of the students" bullying the student (Tr. p. 129). She did recall, however, that either the student's mother or father stated during their conversation that the student had a "fallout with a good friend, like a best friend" (Tr. pp. 129-30). The guidance counselor also testified that the student's father did not provide her with any emails or pictures, or social media to allow her to investigate the claim of cyber bullying (Tr. p. 130). Although there was "nothing more to be done," the guidance counselor offered her

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<sup>1</sup> According to the key for performance levels on the State examinations, a level "4" score reflected that "[s]tudents performing at this level excel[led] in standards for their grade"; a level "3" score reflected that "[s]tudents performing at this level [were] proficient in standards for their grade"; a level "2" score reflected that "[s]tudents performing at this level [were] partially proficient in standards for their grade"; and a level "1" score reflected that "[s]tudents performing at this level [were] well below proficient in standards for their grade" (see, e.g., Dist. Ex. 3 at p. 1).

<sup>2</sup> The student's mother testified that, after the conclusion of seventh grade during the 2018-19 school year, they began working with an educational consultant and investigating nonpublic schools for the student (see Tr. pp. 479-80; see generally Dist. Ex. 6). When asked if they began looking into nonpublic schools because they had concerns that the student had a learning disability, the student's mother testified, "[n]o," but then clarified that they "felt like [the student] learned differently and she needed smaller class sizes or . . . , just a smaller school" (Tr. pp. 480-81).

support to the student to discuss the matter "without names" and then forwarded the parents' email to the DASA coordinator (see Tr. pp. 130-31). She further testified that her offer of support "wasn't taken advantage of" and she did not investigate further (Tr. pp. 130, 132).

In addition, while the district guidance counselor could not recall a specific conversation she may have had with the DASA coordinator, she testified that they spoke "about the happenings every day," and it would not have been "uncommon" for her to mention the "nature of the conversation" with the student's father and to advise the DASA coordinator that he would be receiving an email (Tr. pp. 131-32). Notwithstanding her testimony that she could not further investigate the matter, the guidance counselor testified that she did the "only thing [she] could do," which was to observe the student and "ask the teachers to report to [her] if [the student] seemed like she was under stress or upset or anything unusual happening, and they did not" (Tr. p. 132). According to the guidance counselor, her "personal observations" of the student within the school setting remained "consistent with the previous years" (Tr. p. 133). In addition, the guidance counselor testified that she did not receive any communications regarding "complaints of bullying or difficulty with peer interactions" for the remainder of the eighth grade (2019-20 school year) and responded that she did not receive "any other communication from the parent[s] expressing concerns about bullying (Tr. p. 133).

In an email dated Wednesday, October 2, 2019, the district superintendent informed the parents that he had spoken with the district principal that morning, and the district principal had been "trying to reach" them (Parent Ex. D). In another email sent the same day, the district guidance counselor forwarded the parents' September 2019 email to a district social worker at the middle school, who fulfilled the role of the district middle school "DASA coordinator" (compare Dist. Ex. 16 at pp. 1-2, with Tr. pp. 33-34, 39, 44, and Dist. Ex. 17 at p. 1).<sup>3</sup> Thereafter, the district middle school DASA coordinator sent an email to the parents, dated Friday, October 18, 2019, to introduce himself and to offer his assistance in the matter (see Dist. Ex. 17 at p. 1). In part, the DASA coordinator noted that the district principal had "informed" him that the student had experienced "some mistreatment at the hands of one or more of her classmates," that the district had no further information "about who [was] involved in this situation," and he understood that "we've been asked not to pursue it at this time" (id.). He further indicated that, "out of concern for [the student's] well-being," he would "like to be able to help make it stop" if the behaviors were continuing (id.). The DASA coordinator informed the parents that he "w[ould] respect [their] judgment and [their] wishes," and he had not reached out to the student (id.). He concluded the email by offering himself "as a resource with years of experience handling these sorts of circumstances" and noted that the parents could reach out to him if they wanted to talk or meet (id.).

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<sup>3</sup> New York State has addressed bullying in schools through the Dignity for All Students Act (DASA), which imposes specific obligations on school districts with regard to the prevention and investigation of harassment and bullying (Educ. Law §§ 10-18). One such obligation requires school districts to "identify the principal, superintendent or the principal's or superintendent's designee as the school employee charged with receiving reports of harassment, bullying and discrimination" (Educ. Law § 13 [1][a]). The designee is typically referred to as a DASA coordinator, who must "lead or supervise the thorough investigation of all reports of harassment, bullying and discrimination, and to ensure that such investigation is completed promptly after receipt of any written reports made under this section" (Educ. Law § 13[1][d]).

At the impartial hearing, the DASA coordinator testified that the district had a "DASA policy," and he further explained how that policy was communicated to students and staff in the district middle school (Tr. pp. 45-50; see generally Dist. Ex. 18 [comprising excerpts from the district's student handbook for the 2019-20 school year reflecting the DASA policy]). He was unsure, however, how the district's DASA policy was communicated to parents, other than noting that it was available through the "district's website" (Tr. p. 50). When he received the email forwarded to him by the district guidance counselor regarding the parents' report of cyberbullying, he testified that he "absolutely" had a conversation about the email, but could not recall the substance of that conversation (Tr. pp. 62-63, 90; see generally Dist. Ex. 16). However, he further testified at the impartial hearing that, as the DASA coordinator, he was "obligated to respond both professionally and ethically to an email like this," and he needed to "resolve situations like this" (Tr. pp. 63-64). In this case, the DASA coordinator testified that "there was some sensitivity in dealing with this family" due to prior circumstances, and district personnel attempted to get the parents to "authorize a resolution or an attempt to resolve" it; however, notwithstanding their efforts, the "parents would not let [the DASA coordinator] talk with [the student] and would not offer up any more information about who was behaving in a bullying way"—therefore, his "hands were tied" but he sent the parents the email (Tr. pp. 65-66, 90-91; see generally Dist. Ex. 17). The DASA coordinator testified that he never received a response to his email (see Tr. p. 67). He also did not receive any other emails from the parents about the student for the remainder of eighth grade (2019-20 school year), or any other type of communication from the parents concerning either the report of cyberbullying in September 2019 or any other incidents of bullying during that same time period (see Tr. p. 67). According to the DASA coordinator, the student never approached him during eighth grade with additional concerns of bullying, and he received no teacher or staff reports about the student being bullied during eighth grade (see Tr. pp. 67-69).

In or around November 2019, the parents began investigating nonpublic schools for the student (see Tr. pp. 479-84; see generally Dist. Ex. 6 [documenting the parents' request for the student's report cards and transcript, as well as admissions paperwork for the Trevor Day School and the Calhoun School, dated November 2019]). Over the course of three separate days in February and March 2020, the parents privately obtained a neuropsychological evaluation of the student "due to ongoing concerns for her progress in her current school program" (see Dist. Ex. 7 at p. 1).<sup>4</sup> Based on the results of the neuropsychological evaluation and "continued concern with [the student's] academic progress," the parents referred the student to the CSE for an initial evaluation in or around April 6, 2020, and provided their consent for the district's evaluation process in or around April 20, 2020 (see Dist. Ex. 1 at p. 6).<sup>5</sup>

The student's father testified at the impartial hearing that in or around May 2020, prior to the conclusion of eighth grade during the 2019-20 school year, the student was accepted into York

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<sup>4</sup> At the impartial hearing, the student's mother testified that, either prior to, or during the process of obtaining the neuropsychological evaluation, they informed the evaluator that the student had already been "rejected from all of those schools," meaning schools such as the Trevor Day School and the Calhoun School (Tr. p. 484; see generally Dist. Ex. 6).

<sup>5</sup> The student's mother also testified that they applied to York Prep "very late," in or around June 2020, prior to the district conducting its own evaluations of the student (Tr. p. 484). The student's father testified that they applied for the student's admission to York Prep in April or May 2020 (see Tr. pp. 535-36).

Prep for the 2020-21 school year (see Tr. p. 542). He also testified that the student began medication for an attention deficit hyperactivity disorder (ADHD) either at the end of the 2019-20 school year or the "beginning of the summer" (Tr. pp. 494-95).

The evidence in the hearing record also revealed that, during eighth grade, the student continued to attend classes in a general education setting, and as documented in her final report card for eighth grade, had earned an overall, final grade point average of 84.67 (see Dist. Ex. 8; see also Tr. pp. 208-10, 432-33). The evidence further reflected that, during eighth grade, the student earned three high school credits—in Earth Science, Spanish, and Algebra—and three Regents credits for the same courses (see Dist. Exs. 8-9; see also Tr. pp. 136-37, 249).

Subsequently, the district completed a social history, undated; an educational evaluation of the student, dated July 21, 2020 (July 2020 educational evaluation); and a psychological evaluation of the student, dated July 30, 2020 (July 2020 psychological evaluation) as part of her initial evaluation (see generally Dist. Exs. 10-12).<sup>6</sup>

On August 18, 2020, a CSE convened to conduct the student's initial eligibility determination meeting (see Dist. Ex. 13 at p. 1). Finding the student eligible to receive special education as a student with an other health-impairment, the August 2020 CSE recommended the following: integrated co-teaching (ICT) services for instruction in mathematics (six times per eight-day cycle) and resource room (i.e., "educational support class"/"ESC") in a small group (5:1) (three times per eight-day cycle) for support in science and mathematics (*id.* at pp. 1, 11).<sup>7</sup> In addition, the August 2020 CSE developed annual goals to address the student's needs in the areas of study skills and mathematics (*id.* at p. 10). The August 2020 CSE also recommended the following as supplementary aids and services, programs modifications, and accommodations: preferential seating (away from ambient noise, minimal visual distractions, and near instruction), breaking down long term assignments into manageable tasks (interim checkpoints and check-ins to make sure work was completed), checking for understanding (teacher to check in to ensure the student understood directions, could initiate tasks, completed tasks, and was on target with independent work), refocusing and redirection (using subtle cues to help when off task), additional time to process information (teacher to give additional wait time to answer questions), directions repeated (for lengthy and multistep directions), and visual supports (checklists, visual aids to foster self-monitoring and multistep assignments) (*id.* at pp. 11-12). As testing accommodations, the August 2020 IEP included the following: extended time (1.5 times), directions repeated (for lengthy and multistep), checking for understanding (by teacher to ensure task initiation and assignment completion), flexible seating (to allow for accommodations, student could begin

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<sup>6</sup> Due to the ongoing COVID-19 pandemic in April 2020 when the district received the parents' referral of the student to the CSE, the district's initial evaluation of the student was delayed and there was no opportunity to conduct a classroom observation of the student prior to the August 2020 CSE meeting because students were receiving remote instruction (see Tr. pp. 263, 448). At the impartial hearing, the student's mother testified that she and her husband filled out the social history form (see Tr. p. 485; see generally Dist. Ex. 10).

<sup>7</sup> The student's eligibility for special education and related services as a student with an other health-impairment is not in dispute (see 34 CFR 300.8[c][9]; 8 NYCRR 200.1[zz][10]).

assessment in one location and complete it in another setting; use of testing center), and refocusing and redirection (providing subtle cues when off task) (*id.* at pp. 12-13).<sup>8, 9</sup>

By letter dated August 28, 2020, the parents notified the district of their intentions to unilaterally place the student at York Prep for the 2020-21 school year (ninth grade) and to seek reimbursement for the costs of the student's tuition (*see* Parent Ex. K [noting further that the parents had not yet received the IEP developed at the August 2020 CSE meeting]).

According to the evidence in the hearing record, the parents "placed the student" at York Prep on or about September 10, 2020 (*see* Dist. Ex. 1 at p. 10; *see also* Parent Ex. M; Dist. Exs. 14-15). Shortly thereafter, in a letter dated September 16, 2020, the parents, again, notified the district of their intentions to unilaterally place the student at York Prep for the 2020-21 school year and to seek reimbursement for the costs of the student's tuition (*see* Parent Ex. M). In this letter, the parents acknowledged receipt of the August 2020 IEP, and having reviewed it, indicated that the program was not appropriate to meet the student's individual needs (*id.*).

The student attended York Prep for the 2020-21 school year (*see generally* Parent Exs. N-O).

#### **A. Due Process Complaint Notice**

By due process complaint notice dated January 28, 2021, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2018-19 (seventh grade), 2019-20 (eighth grade), and 2020-21 (ninth grade) school years (*see* Dist. Ex. 1 at pp. 1, 10-11). With respect to the August 2020 IEP, the parents asserted that the CSE failed to recommend counseling for the student and "goals to address [the student's] social/emotional and behavior deficits" (*id.* at p. 9). In addition, the parents noted that the August 2020 IEP failed to include "specific goals to address [the student's] vast significant deficits in attention and executive functioning, which include[d] but [were] not limited to, flexibility, self-monitoring, generalization of skills, organization, and planning" (*id.*). The parents further alleged that the August 2020 IEP failed to "provide additional support in [the student's] core academic areas, except for math" (*id.*). More generally, the parents alleged that the district failed to "promptly refer [the student] to the

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<sup>8</sup> As reported in the August 2020 IEP, the student was "recently" diagnosed as having an ADHD, inattentive type, as a result of the neuropsychological evaluation obtained by her parents (Dist. Ex. 13 at p. 4). The August 2020 IEP documented that, although the student had never previously received special education services, she had received "counseling outside of the school" related to a family situation in elementary school (*id.*). As further documented in the IEP, the student "recently began engaging in teletherapy once weekly to help manage her anxiety symptoms" (*id.*). The August 2020 IEP noted that the parents were "working with a psychiatrist regarding medication treatment for [the student's] ADHD symptoms," but she had not been "medicated at the time of [the district's July 2020 psychological] evaluation" (*id.*). In the area of social development, the August 2020 IEP reflected that the student was currently receiving "outside therapy," and the parents "agreed to sign permission" for the student's "outside counselor to communicate with school staff" (*id.* at p. 9). The IEP further reflected that the student's "social development [was] going to be monitored [at school] and d[id] not, at th[at] time, warrant special education support" (*id.*). According to the IEP, the parents were "in agreement with the plan to monitor [the student's] social-emotional development in school" (*id.*).

<sup>9</sup> The student's father testified at the impartial hearing that they retained the services of an attorney in "late August" after the August 2020 CSE meeting (Tr. p. 537).

CSE for a full and complete evaluation to determine eligibility for special education and related services" (*id.* at pp. 10). The parents also generally contended that the district violated its child-find obligations by failing to find the student eligible for special education and related services until "August 18, 2020" (*id.*). As a result, the parents alleged that the district failed to offer the student a FAPE for the 2018-19, 2019-20, and 2020-21 school years, and relatedly, failed to offer or provide the student with an "appropriate program, placement, services, and accommodations" during the same three school years (*id.* at pp. 10-11).

To remedy these alleged violations, the parents requested an order directing the district to reimburse them for the costs of the student's attendance at York Prep for the 2020-21 school year, including but not limited to, "tuition, transportation, and anything else related to [the student's] program" at York Prep (Dist. Ex. 1 at p. 11). In addition, the parents requested an order directing the district to provide compensatory educational services, "including, but not limited to, the costs of private tutoring, behavior therapy, and therapeutic interventions, provided at [the parents'] expense" (*id.*). The parents also requested an order directing the district to "fund [the student's] program at York Prep[] . . . for the 2020-21 school years and for so long as the program remain[ed] appropriate" (*id.*). Finally, the parents requested an order directing the district to reimburse them for the costs of the privately obtained neuropsychological evaluation and for the costs of privately obtained counseling services "during 2020" (*id.*).<sup>10</sup>

## **B. Impartial Hearing Officer Decision**

On May 11, 2021, the parties proceeded to an impartial hearing, which concluded on May 26, 2021, after five days of proceedings (*see* Tr. pp. 1-799).<sup>11</sup> In a decision dated August 26, 2021, the IHO ultimately found that the district complied with its child-find obligations and that the August 2020 IEP offered the student a FAPE (*see* IHO Decision at pp. 1, 64). As a result of these determinations, the IHO did not examine whether the student's unilateral placement at York Prep for the 2020-21 school year was appropriate or whether equitable considerations weighed in favor of the parents' requested relief (*id.* at p. 64).

In finding that the district complied with its child-find violations, the IHO determined that, based on the "vast majority" of the evidence, the district had the student "on its radar, but found no disability" (IHO Decision at pp. 14-19, 35-40). According to the IHO, the student had received "[s]ome help" in academic subjects where needed; the assistance "proved sufficient"; and the student was "considered by staff, teachers, and parents to be proficient, if mostly average, in academics with no social or learning difficulties" (*id.* at p. 40). As a result, the IHO found that the

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<sup>10</sup> In a letter dated April 27, 2021, the district responded to the allegations in the parents' due process complaint notice (*see* Dist. Ex. 2 at p. 1). Overall, the district denied the allegations, and objected to "all allegations" that arose prior to January 28, 2019, as barred by the statute of limitations, and sought to strike such allegations from the due process complaint notice as prejudicial (*id.*). In addition, the district argued that York Prep was not an appropriate unilateral placement for the student—who had met or exceeded grade-level standards in seventh and eighth grades in general education settings—and therefore, York Prep was too restrictive (*id.* at pp. 1-2).

<sup>11</sup> The IHO conducted a prehearing conference with the parties' attorneys on March 11, 2021 to schedule the impartial hearing dates (*see* Mar. 11, 2021 Tr. pp. 1-21).

district had "no reason to suspect a disability" until receipt of the neuropsychological evaluation report provided in 2020, at which point, the student was referred to the CSE (id.).

In discussing the parents' child-find allegation, the IHO pointed, in part, to testimonial evidence from district witnesses about the weekly team meetings held at the district (see IHO Decision at pp. 35-37). According to the evidence, the district's team meetings provided an opportunity to "'talk about issues or concerns that they may have or to discuss a child that might be struggling in their class' or with assignments or who have excessive absences and other issues" (id. at p. 37). The IHO also noted that, if a student's "struggles persist[ed], the team c[ould] refer students to the Child Study Team (CST)," which consisted of the district's guidance counselor, school nurse, school psychologist, assistant principal, and social worker (id.). Based on the evidence, the IHO indicated that the CST met weekly for two to three hours "to discuss students presenting issues (social, emotional, or academic) and discuss potential interventions" (id. at pp. 37-38). Interventions could include communicating with parents, recommending general education supports, implementing response to intervention (RtI) for academic support or counseling, or referring a student to the CSE (id. at p. 38). In this case, the evidence reflected that the student had "received intervention services through Math Lab and Literacy Lab and her academic performance improved" (id.). The student's performance on State ELA and mathematics assessments in seventh grade indicated that the student was "proficient at the standards for her grade," and the IHO noted that she was "demonstrating competency [in the classroom as well] without any special education services" (id.). According to the district guidance counselor's testimony, she had "no academic concerns" about the student in seventh grade, as she was "doing average to above average work with the exception of the third quarter in math" (id.). The IHO noted that the student's seventh grade teachers, similarly, had not "expressed [any] academic concerns, nor, notably, did the parents" (id.).

With respect to eighth grade, the evidence reflected that although the student had "some difficulty" in mathematics, it was an "accelerated class" (IHO Decision at p. 38). The IHO noted that the student achieved an "84.67" overall final average in eighth grade, and there was "no basis for a referral for academic reasons" (id.). The evidence also reflected that, during eighth grade, the student "appeared to be socially connected and liked," and neither her teachers, nor her parents, raised any concerns, socially or emotionally (id. at pp. 38-39).

The IHO also found support for his conclusion that the district complied with its child-find obligation from the private evaluator who conducted the neuropsychological evaluation of the student (see IHO Decision at p. 39). The IHO indicated that, at the impartial hearing, the private evaluator testified that the student had a "real ability to fly under the radar as her deficits [were] not easily observed even by her parents" (id.). According to the IHO, she also testified that the student was "'described to be an emotionally well regulated, composed child, who behave[d] according to expectations and work[ed] really ha[r]d to please others'" (id.). The evaluator's testimony revealed that the student had experienced a "'typical development and met milestones appropriately and that the [p]arents had noticed academics had become more of a challenge for [the student] only recently before the evaluation" (id.). Notably, the IHO found that the parents, themselves, "did not suspect a learning disability until late January or February 2020" even though they argued that the student had "performed poorly in [eighth] grade and that her grades were below what they had been historically" (id.).

Given the abovementioned evidence, the IHO found that the district complied with its child-find obligations and specifically had no reason to suspect that the student had a disability until receipt of the neuropsychological evaluation report in 2020 (see IHO Decision at p. 40).<sup>12</sup>

Turning to the question of whether the August 2020 IEP offered the student a FAPE for the 2020-21 school year, the IHO set forth the legal standard and began describing the district's case in support of that inquiry, which included brief descriptions of some of the salient points found in the evaluative information relied upon by the August 2020 CSE (see IHO Decision at pp. 45-52). Generally, the IHO found that the district's evaluations of the student produced results "similar" to those obtained through the parents' privately obtained neuropsychological evaluation of the student (id. at p. 51). The IHO noted that the parents had not presented any evidence to demonstrate that the "CSE lacked sufficient information to develop an IEP and there was no disagreement on eligibility" (id. at p. 52).

Next, the IHO described the recommendations in the August 2020 IEP, first through the lens of the district's evidence and then through the lens of the parents' contentions (see IHO Decision at pp. 52-59). In stating the district's position, the IHO initially noted the recommendations in the IEP for ICT services for instruction in mathematics together with resource room services (id. at p. 52). Here, the IHO indicated that the ICT services offered the student "access to instruction in math by a general education teacher in a small group setting" and specifically "targeted deficits in math fluency," as well as providing the accommodations to "support executive functioning needs" (id. at pp. 55-56).

As to the recommendation for resource room, the IHO indicated that it provided the student with "additional support for math and science," and the teacher would have worked on the student's "organizational skills, IEP goals, time management, test preparation, and reviewing and previewing work from the content areas classes" (IHO Decision at p. 55). The IHO also indicated that the resource room teacher would have provided the student with "direct instruction in executive functioning skills" (id.). According to the IHO, the district director of pupil personnel services (director) testified about the development of a resource room curriculum, which was done in conjunction with the district assistant superintendent for curriculum and instruction (id.). The director testified that, with this curriculum, "teachers address[ed] self-awareness skills, planning and organizing assignments, time management, study skills and developing study guides" (id.). The director also testified that students were "taught to generalize the skills to other classes" (id.). In light of this evidence, the IHO indicated that the parents' argument that the recommended program was "reactive and did not teach executive functioning skills" had been rebutted (id.). In addition, the IHO noted that, the private evaluator could not testify that the student "would not make progress in the recommended program," and she had testified that the student "would be able to follow the curriculum but [that] the deficit area would not improve without direct instruction" (id.). In further support of the recommendation for resource room, the IHO pointed to the district special education teacher's testimony, which reflected that it would have addressed the student's

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<sup>12</sup> The IHO next addressed in the decision whether the district properly responded to the parents' allegation that the student had been bullied, and concluded that the district met its obligations (see IHO Decision at pp. 40-45).

concerns with "self-monitoring, working memory, time management organization and planning" (id. at p. 56).

As to the student's other core academic classes, such as ELA and social studies, the IHO noted that the student would have received that instruction in a general education setting, together with the provision of the "numerous program and testing accommodations and modifications" in the IEP (IHO Decision at p. 56).

According to the IHO, the parents "did not express any disagreements with the program recommendations or request a special class setting o[r] other placement" (IHO Decision at p. 56). He also noted that the "recommended program me[t] the requirements of [the least restrictive environment]" (id.). Given the student's success in eighth grade in a general education setting, the IHO indicated that the recommended program would have "provide[d] extra supports to help [the student] with her deficits," allowed access to the common core curriculum, and permitted the student to "receive an education alongside nondisabled peers" from State certified teachers (id.).

With regard to the annual goals, the IHO indicated that, although the private evaluator "claimed that the goals did not address all of the deficit areas and d[id]n't explain how the goals w[ould] be taught, she acknowledged that the stated goals targeted the deficit areas including the executive functioning deficits" (IHO Decision at p. 52). According to the IHO, the private evaluator also acknowledged that the student's "deficits c[ould] be addressed through program modifications and the program modifications on the IEP support[ed] [the student's] executive functioning deficits" (id.).

In addition, the IHO noted that courts, routinely, found that even the complete absence of annual goals did not result in a failure to offer a FAPE (see IHO Decision at p. 53). The IHO also noted that the district school psychologist testified about the appropriateness of the self-advocacy goal in the August 2020 IEP, which addressed the student feeling uncomfortable "speaking with teachers" (id.). According to the IHO, the "study skill goal was to employ self-monitoring and self-advocacy strategies targeting the student[']s executive functioning deficits so she could learn to be aware of her regulation" (id.). And finally, with respect to the annual goals for mathematics, the IHO noted that one goal "target[ed] [the student's] weakness in math fluency," while additional goals targeted the student's executive functioning weaknesses, by targeting the student's ability to "use multiple methods to solve a math problem and to check answers to make sure they [were] reasonable" (id.). The IHO further noted that the parents had the "opportunity to participate in the development of the goals and made no objections nor requests for additional goals" (id.).

Next, the IHO briefly reviewed and considered the program modifications in the August 2020 IEP, and how they addressed the student's needs in attention, organizational skills, handing in assignments, understanding and completing multistep directions, self-monitoring, and weak processing skills (see IHO Decision at pp. 53-55). The district special education teacher also testified that "visual supports and checklists help[ed] with self-monitoring and multiple exposures to content w[ould] help with working memory" (id. at p. 55).

Finally, the IHO found the parents' contention that the August 2020 IEP was not appropriate because it lacked a recommendation for counseling was not persuasive, especially where, as here, the parents "agreed at the CSE to forego school board counseling [sic]" because

the student was participating in "private counseling outside the school" (IHO Decision at p. 56). According to the IHO, the August 2020 IEP documented the fact that the student was receiving counseling outside of school, that the parents agreed "with the plan to monitor her social development in school," and the parents did not "contradict the IEP" and "never disputed those representations" (id. at p. 57). In addition, the IHO pointed to the social development portion of the IEP to demonstrate that the parents "expressed few concerns about [the student] noting she d[id] not dislike school or have excessive absences" (id.). As noted by the district school psychologist, during "casual conversation," the student reported "positive" peer relationships at that time and that, throughout the evaluation, the student was "positive and in line with her observed mood" (id.). The IHO indicated that although the parents "believed [the student] was under reporting the concerns, [d]istrict staff could still work with the outside therapist to monitor those concerns" (id.). Furthermore, the private evaluator "admitted that monitoring in school could be an appropriate starting point to address her social emotional issues" (id.). According to the IHO, the private evaluator described the student as a "'composed, polite, well-regulated young person, who was very cooperative and compliant," and who "impressed" the private evaluator as "'quite hardworking and also reserved"' (id.). As a final point, the IHO noted that the student did not exhibit a "lot of stressors on the outside and the parents' responses on [measures assessing the student's social/emotional functioning] did not indicate any concerns in the risk or clinically significant range" (id.).

Turning next to review the evidence related to the parents' contentions about the August 2020 IEP, the IHO first pointed to testimony from the private evaluator, who testified that the "IEP was not appropriate to address [the student's] needs" because the ICT services for instruction in mathematics and the pull-out resource room services would "be isolating and 'reactive to struggles that [the student] might have as a learner'" (IHO Decision at pp. 57-58). According to the IHO, the private evaluator also testified that the "supports offered in the IEP would force [the student] to advocate for herself, which [the student] ha[d] not been successful doing" (id. at p. 58). The private evaluator further testified that the student required "'significant skills development in . . . overarching executive functioning,'" and the August 2020 IEP did "not reflect this necessary support" (id.). The IHO also noted that, according to the parents, the district's "own witnesses could not support the appropriateness of the IEP" (id.). On this point, the IHO indicated that although the district school psychologist testified that the IEP was appropriate, she also testified that "she would not be able to develop an IEP without reviewing a student's educational file" or "without reviewing teacher reports" (id. at pp. 58-59). In this case, the school psychologist had reviewed neither (id. at p. 59).

The IHO next noted that the August 2020 IEP did not include a recommendation for counseling services, despite reports of "significant emotional distress" in both the neuropsychological evaluation and the district evaluations, such as struggling with her "relationships with school personnel and feeling misunderstood and unsupported" (IHO Decision at p. 58). According to the IHO's review of the evidence, the student "struggled with her relationships with school personnel and fe[lt] misunderstood and unsupported," and thus, in-school counseling "would be an appropriate support" for the student (id.).

With respect to the annual goals, the IHO pointed again to the private evaluator's testimony that "they d[id] not address [the student's] struggles with self-monitoring and self-advocacy, nor d[id] they address all areas of study skills with which she need[ed] assistance" (IHO Decision at

p. 58). The private evaluator testified that the IEP did not "provide for individualized attention" to support the student's struggles with self-advocacy and the student "would be forced to self-advocate" (*id.* at p. 59). According to the IHO, the private evaluator also testified that the student's IEP did not "offer the integrated approach [the student] required," characterizing it as "more reactive than proactive," and that the student's executive functioning deficits required "proactive support to keep her structured and organized," which the IEP did not offer (*id.* at p. 58). The IHO further noted that the private evaluator testified that the recommended special education programs and service were "not appropriate because they were 'not designed to build [the student's] skills in areas that she need[ed] to grow'" (*id.*). In addition, the private evaluator opined that the student would "continue to fall behind as demands increased because her executive functioning strategies would not be addressed" (*id.*).

Turning specifically to social/emotional annual goals, the IHO indicated that the district school psychologist testified that she "would not add" such goals to the student's IEP (IHO Decision at p. 59). The witness explained her reasoning, noting that she would also consider "conversations with teachers, the student, and the parents," as well as considering how the student "present[ed] throughout the school day" in order to reach that determination—noting further that she "did not have such information about [the student]" (*id.*). According to the IHO, the parents "question[ed]" how the district school psychologist could offer testimony "as to the appropriateness of the IEP" when the witness did not "have all of the information necessary to develop an appropriate IEP," and when, in particular, the recommendations in the August 2020 IEP did were "not in line" with the district's "own evaluations" (*id.*). For example, the IHO considered the parents' argument that although the district evaluations documented the student's "executive functioning and attention deficits, the IEP d[id] not provide a program to address those needs" and failed to provide "support for [the student's] executive function skill deficits as academic challenges continue[d] to increase" (*id.*).

After reviewing the evidence for each party's position, the IHO concluded that the district complied with the procedural requirements of the IDEA (*see* IHO Decision at p. 60). The IHO indicated that the district referred the student to the CSE and relied on both district and privately obtained evaluations to prepare the IEP (*id.*). The IHO also concluded that the August 2020 IEP—which included ICT services, together with resource room services, modifications, and accommodations—was "reasonably calculated to enable [the student] to receive educational benefits" (*id.*). The IHO also noted that the student had "received various interventions, accommodations and modifications" prior to being found eligible for special education, which "enable[d] her to improve her academic performance" (*id.*). The IHO found that while legal precedent did not "articulate any specific level of educational benefits to be provided," a district was not required to "maximize the potential of disabled children" (*id.*). According to the IHO, the "IDEA was meant to 'open the door' of public education rather than to guarantee any particular level of education once inside" and thus, a "hypercritical review of the IEP [was] therefore not sustainable" (*id.*).

With respect to the parents' contentions that the district school psychologist should not have been allowed to testify about the appropriateness of the August 2020 IEP—especially when she was "not involved in the preparation of the IEP"—the IHO was not persuaded, and instead, found that the school psychologist was "acquainted with the elements of an IEP" (IHO Decision at p. 60). With regard to the annual goals, the IHO found that, as stated previously, courts had

found IEPs to be "sufficient" without any annual goals, therefore, even if "every goal [was not] explicitly stated," this argument failed (*id.* at p. 61). The IHO ultimately concluded that there were no "substantial procedural violations" that would result in a finding that the district failed to offer the student a FAPE (*id.*). The IHO noted that, "as indicated in Andrew, [the student] received FAPE by receiving instruction in the regular classroom enabling [her] to achieve passing marks and advance from grade to grade"; the IHO also found that the "IEP proposed would produce progress and not regression and an opportunity [for] more than 'trivial advancement'" (*id.*).<sup>13</sup> According to the IHO, the recommended program was consistent with Andrew, as it afforded the student the opportunity to "receive education in the regular classroom whenever possible" (*id.*). As a final point, the IHO also noted that, consistent with Andrew, deference was owed to the district "based on the application of expertise and judgment by the school authorities who [were] expected to be able to offer cogent and responsible explanations of their decisions," and that in this case, the "amount and variety of the testimony" of district witnesses demonstrated that a "lot of evaluation and structuring of the IEP took place, and FAPE had been provided" (*id.*).

Having found that the district offered the student a FAPE, the IHO turned to the questions of whether the parents' unilateral placement of the student at York Prep was appropriate and whether equitable considerations weighed in favor of their requested relief (*see* IHO Decision at pp. 62-64). However, the IHO did not address these questions, but instead, concluded that neither must be examined as the district did not violate its child-find obligations and offered the student a FAPE for the 2018-19, 2019-20, and 2020-21 school years; consequently, the IHO dismissed the parents' due process complaint notice (*id.* at p. 64).

## V. Appeal for State-Level Review

The parents appeal, arguing that the IHO erred by finding that the district complied with its child-find obligations.<sup>14</sup> With respect to the 2020-21 school year, the parents argue that the

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<sup>13</sup> The IHO was referring to the decision in Andrew F. v. Douglas County School District RE-1, 580 U.S. \_\_\_, 137 S. Ct. 988, 999 (2017).

<sup>14</sup> In the decision, the IHO also found that, based on the absence of evidence in the hearing record, the district properly responded to the parents' allegations of bullying (*see* IHO Decision at pp. 40-45, 64). The IHO determined that when the district received information concerning claims of bullying, district "personnel in charge of that issue immediately got involved," and "for whatever reasons, [the parents] declined to go forward and there were no more official claims of bullying" (*id.* at p. 45). The parents do not appeal from the IHO's findings with respect to the district actions taken in response to the bullying allegations, and therefore, these determinations have become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; *see M.Z. v. New York City Dep't of Educ.*, 2013 WL 1314992, at \*6-\*7, \*10 [S.D.N.Y. Mar. 21, 2013]). As a reminder, while DASA specifically indicates that it does not "preclude or limit any right or cause of action provided under any local, state or federal ordinance, law or regulation including but not limited to any remedies or rights available under the [IDEA]" (Educ. Law § 17 [2]), neither DASA nor its implementing State regulations confer jurisdiction to an administrative hearing officer appointed under the IDEA to determine that a public school district or its personnel have violated DASA. In addition, there is no authority in the IDEA, DASA, or any corresponding statutes or regulations stating that a district's failure to comply with DASA would be a determining factor in whether a student had received a FAPE (*see Motta v. Eldred Cent. Sch. Dist.*, 141 A.D.3d 819, 820 [3d Dep't 2016] [holding that the Dignity for All Students Act does not create a private right of action]; Benacquista v. Spratt, 2016 WL 6803156, at \*8-\*9 [N.D.N.Y. Nov. 17, 2016]; C.T. v. Valley Stream Union Free Sch. Dist., 2016 WL 4368191, \*13 [E.D.N.Y. Aug. 16, 2016]). DASA imposes specific obligations on school

IHO failed to consider evidence, which indicated that the August 2020 IEP was not appropriate for the student "in light of her very significant ADHD inattentive type, executive functioning struggles, and anxiety." In addition, the parents contend that the August 2020 IEP was not calculated to confer a "meaningful benefit," and was not appropriate to address the student's needs. In support of their contention that the IHO erred by ignoring or failing to consider evidence in his determination that the August 2020 IEP offered the student a FAPE for the 2020-21 school year, the parents point to testimonial evidence, which indicated that the recommendations for ICT services for mathematics instruction and resource room "pull-out services would be isolating and 'reactive to struggles that [the student] might have as a learner.'" In addition, the parents argue that the August 2020 IEP failed to reflect the support necessary to address the student's need for "significant skill development in . . . overarching executive functioning." The parents argue that the August 2020 IEP failed to include counseling services, and noted that the annual goals in the IEP did not address the student's difficulties with self-monitoring or self-advocacy, or all areas of study skills. The parents also contend that the August 2020 IEP failed to offer the "integrated approach" the student required and, as reflected in testimony, did not proactively address the student's needs arising from her executive functioning deficits.

In addition, the parents argue that the IHO failed to consider that the "special education programs and services recommended in the IEP were not appropriate because they were '[n]ot designed to build [the student's] skills in areas that she need[ed] to grow.'" The parents also argue that the August 2020 IEP failed to align with the district's own evaluations of the student, noting specifically that the IEP did not provide a "program" to address the student's executive functioning and attention deficits." In addition, the parents argue that the August 2020 CSE failed to address

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districts with regard to the prevention and investigation of harassment and bullying (Educ. Law §§ 10-18). The law defines bullying as "the creation of a hostile environment by conduct or by threats, intimidation or abuse" that, among other things, interferes with a student's educational performance, mental, emotional, or physical well-being, causes a student to fear for his or her physical safety, or causes physical or emotional harm (Educ. Law § 11[7]). As the Court of Appeals has explained, DASA relies upon "the creation and implementation of school board policies to reduce bullying in schools through the appropriate training of personnel, mandatory instruction for students on civility and tolerance, and reporting requirements (see Education Law § 13). The Act did not criminalize bullying behaviors; instead, it incorporated educational penalties such as suspension from school" (People v. Marquan M., 24 N.Y.3d 1, 4 [2014]). These matters must be left to the procedures in the school district's State-mandated DASA policies, the exhaustion of any district-level appeal processes, and any subsequent appeal to the Commissioner of Education pursuant to Section 310 of the Education Law, who has routinely resolved disputes alleging violations of DASA, which in some cases implicate the rights of multiple students (Appeal of Students with Disabilities, 59 Ed Dept Rep, Decision No. 17,805 [addressing allegations that students with disabilities were excluded from a club]; Appeal of R.L., 59 Ed Dept Rep, Decision No. 17,758 [addressing a DASA dispute over the separation of a victim and an offender and the need to join necessary parties]; Appeal of a Student with a Disability, 59 Ed Dept Rep, Decision No. 17,845 [adjudicating a school district's compliance with its DASA procedures]; Appeal of Y.O., 59 Ed Dept Rep, 17,842 [noting that not all altercations or disagreements between students rise to the level of bullying or harassment under DASA]; Appeal of M.F., 59 Ed Dept Rep, Decision No. 17,704; Appeal of A.G., 58 Ed Dept Rep, Decision No. 17,618; Appeal of R.E., 56 Ed Dept Rep, Decision No. 17,003 [finding that there is no explicit provision in DASA which requires an appeal at the local level or exhaustion; however, there is also nothing in DASA which prevents a school district from promulgating a policy that requires exhaustion]).

the student's executive functioning needs, and failed to discuss the "educational support class or the resource room."<sup>15</sup>

Next, the parents argue that the student's unilateral placement at York Prep was appropriate, and that equitable considerations weigh in favor of their requested relief. As relief, the parents seek to reverse the IHO's decision finding that the district complied with its child-find obligations during the 2018-19 and 2019-20 school years and offered the student a FAPE for the 2020-21 school year. With respect to the 2018-19 and 2019-20 school years, the parents request findings that the district failed to offer the student a FAPE as a result of its failure to comply with its child-find obligations and request compensatory educational services including, but not limited to, the "costs of private tutoring, behavior therapy, and therapeutic interventions," provided at their expense.<sup>16</sup> With regard to the 2020-21 school year, the parents request reimbursement for the costs of the student's attendance at York Prep, and further request reimbursement "for so long as the program remains appropriate." And finally, the parents seek to be reimbursed for the costs of the neuropsychological evaluation of the student, as well as counseling services the student received during 2020.

In an answer, the district generally argues to uphold the IHO's decision in its entirety.<sup>17</sup>

## 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

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<sup>15</sup> To the extent that the parents now argue on appeal that the August 2020 CSE failed to discuss the recommendation for resource room or educational support class," this issue was not raised in the parents' due process complaint notice and therefore, was not addressed by the IHO in the decision (see generally Dist. Ex. 1; IHO Decision). Consequently, because the parents may not raise an issue with the August 2020 CSE process for the first time on appeal, it will not be further addressed herein.

<sup>16</sup> Although the parents request compensatory educational services as relief for the district's alleged failure to offer the student a FAPE for the 2018-19 and 2019-20 school years, the actual relief sought is monetary in nature—that is, the "costs of private tutoring, behavior therapy, and therapeutic interventions," provided at the parents' expense—and therefore, would be analyzed under the Burlington/Carter standards used for a tuition reimbursement case. In this instance, even if the district failed to offer the student a FAPE for the 2018-19 and 2019-20 school years, the hearing record contains no evidence that the student received any of the listed services or that the parents incurred any expenses to provide the student with any of the listed services (see generally Tr. pp. 1-799; Parent Exs. B; D-E; K-P; Dist. Exs. 1-19; IHO Exs. I-II). With respect to the parents' request to be reimbursed for the costs of the privately obtained neuropsychological evaluation of the student, the hearing record is similarly bereft of evidence concerning the costs of such evaluation (see generally Tr. pp. 1-799; Parent Exs. B; D-E; K-P; Dist. Exs. 1-19; IHO Exs. I-II).

<sup>17</sup> The parents submitted a reply in response to the district's answer (see generally Reply). State regulation limits the scope of a reply to "any claims raised for review by the answer . . . that were not addressed in the request for review, to any procedural defenses interposed in an answer . . . or to any additional documentary evidence served with the answer" (8 NYCRR 279.6[a]). In this instance, the district's answer did not raise any claims for review, interpose any procedural defenses, or include any additional evidence for consideration on appeal; accordingly, the parents' "Reply in Support of Petitioner's Appeal" will be disregarded.

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., 580 U.S. \_\_\_, 137 S. Ct. at 999). 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]).<sup>18</sup>

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

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

## **VI. Discussion**

### **A. Child Find**

In support of their contention that the IHO erred by finding that the district complied with its child-find obligations, the parents point to evidence in the hearing record, which allegedly reflects that the student "struggled with her seventh (7th) grade final exams in English and math" and performed poorly in Earth Science during the 2019-20 school year (eighth grade). The parents

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<sup>18</sup> 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).

also argue that, although the student struggled with English and mathematics, the district failed to provide the student with any additional supports and failed to help the student with her social or emotional issues. According to the parents, despite this knowledge, the district neither referred the student to the CSE for an evaluation nor informed them of their right to do so.

The district generally denies the parents' allegations, noting that the parents do not specify a time frame when the district should have referred the student to the CSE for an evaluation but instead, "merely allege the [d]istrict should have done it sooner." In addition, the district contends that the parents testified that "they had no basis to suspect a disability prior to the actual referral to the CSE," and the private evaluator's testimony reflected that the student "did not present with any concerns and was a child who could fly under the radar as she appeared to be holding it together." The district also notes that the student was passing high school classes in middle school "with no special education services." Consequently, the district had no reason to suspect that she was a student with a disability or that she required special education to make progress.

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

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

rational justification for deciding not to evaluate" the student (Mr. P v. W. Hartford Bd. of Educ., 885 F.3d 735, 750 [2d Cir. 2018], quoting Bd. of Educ. of Fayette County, Ky. v. L.M., 478 F.3d 307, 313 [6th Cir. 2007]; see A.P., 572 F. Supp. 2d at 225). States are encouraged to develop "effective teaching strategies and positive behavioral interventions to prevent over-identification and to assist students without an automatic default to special education" (Los Angeles Unified Sch. Dist. v. D.L., 548 F. Supp. 2d 815, 819 [C.D. Cal. 2008], citing 20 U.S.C. § 1400[c][5]). Additionally, a school district must initiate a referral and promptly request parental consent to evaluate a student to determine if the student needs special education services and programs if a student has not made adequate progress after an appropriate period of time when provided instruction in a school district's response to intervention program (8 NYCRR 200.4[a]), see also 8 NYCRR 100.2[ii]).

Here, the parents' arguments on appeal do not warrant overturning the IHO's finding that the district complied with its child-find obligations for the 2018-19 and 2019-20 school years.<sup>19</sup> As explained herein, the hearing record fails to contain any evidence that the student exhibited signs of a disability that the district ignored or that gave the district reason to suspect that the student had a disability and required special education to address that disability.

In this case, the evidence in the hearing record reflects that the district middle school held weekly child study team (CST) meetings, attended by the "guidance staff, the psychologist, the nurse, the assistant principal, the principal, and [the social worker]"—and which, from "time to time," included other members (Tr. pp. 34, 50-51).<sup>20</sup> The district social worker, who was a CST member during the 2018-19 and 2019-20 school years, testified that the CST discussed "situations involving students who [were] at risk or experiencing difficulty" and who "might be in need of intervention" (Tr. pp. 51, 56, ). The CST's discussions about such students proceeded "grade by grade," with the aim of "troubleshoot[ing] interventions and mak[ing] decisions about next steps" for those students (Tr. p. 51). He explained "at risk" as a student's "behavior that would lead to truancy" or engaging in "illegal activities," as well as "failing or not matriculating"—and generally,

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<sup>19</sup> State regulation requires that a request for review shall, in part, "identify the findings, conclusions, and orders to which exceptions are taken, or the failure or refusal to make a finding" (8 NYCRR 279.4[a]). Tethered closely to this requirement is the State regulation mandating that a request for review set forth a "clear and concise statement of the issues presented for review and the grounds for reversal or modification to be advanced, with each issue numbered and set forth separately, and identifying the precise rulings, failures to rule, or refusals to rule presented for review" (8 NYCRR 279.8[c][2]). While the parents identify the IHO's ultimate conclusion from which they disagree, the parents do not grapple with IHO's determinations but instead, point to, and reargue, the same facts made to the IHO as the basis for the appeal without asserting how the IHO erred. In this instance, the district did not raise concerns about the form and content of the parents' pleading, however, the parents' attorney is cautioned that "while a singular failure to comply with the practice requirement of Part 279 may not warrant an SRO exercising his or her discretion to dismiss a request for review or reject a memorandum of law (8 NYCRR 279.8[a]; 279.13; see Application of a Student with a Disability, Appeal No. 16-040), an SRO may be more inclined to do so after a party's repeated failure to comply with the practice requirements" (Application of a Student with a Disability, Appeal No. 19-021). In addition, the parents' memorandum of law submitted in support of the request for review provides no further elaboration or explanation of the IHO's error with regard to child-find, as it merely repeats and reargues the same information from the request for review (compare Parent Mem. of Law at pp. 16-17, with Req. for Rev. at ¶ 1).

<sup>20</sup> The district social worker who attended CST meetings was the same individual who fulfilled the role of DASA coordinator at the district middle school (see Tr. pp. 33-34, 39, 50-51).

students who might be "struggling in one way or another," either socially, emotionally, or academically or ha[d] a "family issue" (Tr. pp. 52-53). He testified that, usually, "guidance staff" brought a student to the CST's attention, but either he or an administrator could also bring a student to the CST's attention (Tr. p. 53). Once brought to the CST's attention, the CST would brainstorm and troubleshoot a range of available interventions that included speaking to the student or the student's parents, gathering more information to "be more effective," or implementing response to intervention (RtI) when a "student need[ed] more academic or more emotional support" (Tr. pp. 53-55). In addition, the social worker explained that the CST could also determine whether a student needed to be referred to the CSE, but "this [was] a conversation more appropriately had with guidance" (see Tr. pp. 55-56). He, however, as a social worker was more attuned to, and focused on, a student's "social/emotional well-being," so while he could recognize that a student might not be "flourishing in their current setting," if it was an "academic issue, he could be a "part of that conversation, but [he was] not the referrer by and large" (Tr. p. 56).

Being familiar with the student in this case, the district social worker testified that she was never referred to the CST during seventh grade in the 2018-19 school year (see Tr. p. 57). He further testified that, during the 2018-19 school year, no teachers approached him or expressed concerns to him about this student, "either academically or socially" (Tr. p. 57). In addition, the parents did not express any concerns to him—regarding the student's academic or social functioning at school—during the 2018-19 school year (see Tr. p. 58). When asked to review the student's seventh grade final report card, the social worker testified that, overall, she earned a "mix of grades" in her core courses, but generally achieved average to above average grades in social studies, science, and English, and "average and below" grades in mathematics (Tr. p. 60; see generally Dist. Ex. 4). He noted that the student struggled a bit in mathematics (see Tr. pp. 60-61). Upon review of the student's State assessment scores in ELA and mathematics for seventh grade, the social worker characterized the student's performance as "better" than in sixth grade and "definitely meet[ing] [grade level] expectations" (Tr. pp. 59-60; see generally Dist. Ex. 3). Based on the student's State assessment scores, her report card grades, and "knowing that she was not referred" to the CST with "either academic or social/emotional concerns," the social worker testified he found there was not necessarily any basis for the student to have been referred to the CSE (Tr. p. 61). He explained further that "an average grade [was] an average grade," it was "not failing," and it was "not necessarily an indication of trouble" (Tr. p. 61). The social worker also pointed to the teacher comments in the student's report card, which were "all positive" and noted "good work" and "great effort" and "showing good improvement" (Tr. p. 61). According to the social worker, just because the student might not have been an "A student," not every student was an "A student" and that did not "mean that everybody who's not an A student ha[d] a learning disability" (Tr. p. 61).

With respect to his participation on the CST during the 2019-20 school year, the district social worker testified that he became aware of "complaints of bullying" involving this student, and described his own involvement in that matter (Tr. pp. 62-67; see generally Dist. Exs. 16-17). He also testified that, other than receiving the September 2019 email from the parents, he did not receive any other complaints or information regarding this alleged bullying incident or any other incidents of bullying from the parents for the remainder of the 2019-20 school year (eighth grade) (see Tr. p. 67). In addition, the social worker testified that neither the student nor any teachers approached him, or expressed any concerns to him, about bullying during the 2019-20 school year (see Tr. pp. 67-69). Having observed the student in the hallways at school during eighth grade,

the social worker testified that his "general impressions of [the student] [was] that she was socially connected to other kids, that she seemed like a really nice student, that she seemed liked by other students," and that she was "quiet" and "friendly" (Tr. pp. 69-70).

Next, a review of the evidence in the hearing record reflects that, in addition to the district holding weekly CST meetings, the district also held weekly "team meetings" attended by the student's core teachers for English, social studies, mathematics, and science, as well as a district guidance counselor (Tr. pp. 106-07, 110, 395, 408-09). In this case, the district guidance counselor who attended the student's team meetings also attended the weekly CST meetings (see Tr. pp. 107, 122-23).<sup>21</sup> With respect to the weekly CST meetings, the guidance counselor testified that the group met for two to three hours to discuss students concerning a variety of issues, including, but not limited to attendance; mental health issues related to divorce, death, or family sickness; or difficulties in one or more subjects (see Tr. pp. 110-11). Generally, the CST would want to determine whether a student was "struggling . . . in an isolated subject area or if it [was] across all levels," as well as understanding the "setting" and "where [the student was] having difficulty" (Tr. p. 111). As next steps available to the CST, the guidance counselor testified that the CST could reach out to parents or have teachers reach out to them, discuss what if any general education supports could be provided, and "sometimes" make referrals (Tr. p. 111). With respect to making referrals, the guidance counselor testified that if a student had been struggling "continually" for "two to three years"—having allowed the student to "acclimate to the middle school" during that timeframe or to work through a "difficult time in their life" during those two to three years—the CST thereafter "might use data to figure out what's going on with the [student], put supports in place and at some point [] may refer that [student] to be evaluated either through 504 Committee or the [CSE] if we don't see progress with general ed[ucation] supports" (Tr. pp. 111-12).

In this case, the district guidance counselor first became involved with the student's education through "her fifth grade teacher," because the guidance counselor was assigned to the student's incoming sixth grade class (Tr. pp. 112-13). The guidance counselor met with the fifth grade teacher to talk about the student's learning profile and "any social/emotional issues that [she] may need to know" (Tr. p. 113). The student's fifth grade teacher shared with the guidance counselor that the student needed "supports in literacy and also in mathematics when she matriculated from fifth grade to sixth grade" (Tr. pp. 113-14). The guidance counselor recalled that the student received a "math lab in the spring semester" of sixth grade and "literacy lab" during sixth grade, and that each was a "half a year" if a student received both supports (Tr. pp. 114-16). While the guidance counselor could not recall whether the student continued to receive math and literacy labs in seventh grade, she testified that if the student did not receive it, it meant either the student was not recommended for it or the parents declined it (Tr. pp. 116-17). Reviewing the student's seventh grade report card, the guidance counselor noted that it did not appear that the student received "any academic intervention service class" such as math lab or literacy lab (Tr. p. 117; see generally Dist. Ex. 4).<sup>22</sup> Turning to the student's scores on the seventh grade State

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<sup>21</sup> The district guidance counselor testified that, as part of her responsibilities at the middle school, she would receive and follow one entire grade of students from "sixth to eighth grade until they matriculate to ninth grade" (Tr. pp. 106-07).

<sup>22</sup> The district guidance counselor testified that if a student completed "at least a quarter" of the math lab, it would be reported on the student's report card and would be denoted as "math lab" (Tr. pp. 142-43). She also testified

assessments in ELA and math, the guidance counselor testified that there was "usually a cutoff that w[ould] indicate whether or not the [student] should be recommended for a support class"—based on the "scaled score" and not the "level" (Tr. pp. 119-20; see generally Dist. Ex. 3). Although she could not recall the scaled score used to determine the cutoff during that time frame, the guidance counselor testified that the student would not have been eligible for support classes given that she had earned a "level four" on the State ELA assessment and a "level three" on the State math assessment (Tr. p. 120). However, she clarified that a "level three" on the math assessment was "not a hard no" to the support class, because if a parent called and asked for additional support, the district would discuss it and determine whether it "would fit in the [student's] schedule" (Tr. pp. 120-21). Based on the student's State assessment scores, the guidance counselor testified that the student "did very nicely" and "scored well on that day in those areas"; the student's "grades from seventh grade t[old her] that [the student] was learning, that she was doing average to above average work with the exception of the quarter three math, which [was] where she earned a 67" (Tr. pp. 121-22).

When asked if she ever referred this student to the CST's attention in seventh grade during the 2018-19 school year, the guidance counselor recalled speaking to both the CST and the student's team of teachers regarding a family issue that had previously occurred (see Tr. p. 122). However, whether a student was recommended for a math lab or a literacy lab was "not something that [she] would necessarily bring to a [CST]" (Tr. p. 122). With respect to the student's team meetings, the guidance counselor explained that that the team's initial "discussion and communication [focused] around the profile of the [students] that [were] coming up from fifth grade," and thereafter, the team met weekly to "talk about issues or concerns that they may have or to discuss a [student] that might be struggling in their class" (Tr. p. 123). She did not recall any of the student's team teachers "raising any academic concerns as part of those meetings" or expressing "any social/emotional concerns" about this student during seventh grade (Tr. pp. 123-24). In addition, the guidance counselor, herself, performed "social/emotional check[s]" by "walking through the cafeteria" and putting her eyes on students to "just see if there's anything that st[oo]d out," like a student "sitting alone," and would ask the team teachers if they noticed "anything" that she would need to know about a student (Tr. p. 124). She had no "concerns about [the student's] social or emotional abilities in the school setting," and further testified that she observed the student "around other [students]," and she was "always . . . kind of shyly smiling" when greeted (Tr. p. 124). The guidance counselor did not receive any reports from teachers, staff members, the student, or her parents during seventh grade regarding bullying or the student having difficulty with her peers (see Tr. pp. 125-26).

Turning to eighth grade during the 2019-20 school year, the district guidance counselor testified about her involvement with the student and her parents with respect to the parents' September 2019 email reporting that the student had been cyberbullied (see Tr. pp. 126-33; see generally Dist. Ex. 16). She also testified that her observations of the student in eighth grade were

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that if neither math lab nor literacy lab was reflected on the student's report card, then the student had not completed the quarter for either math lab or literacy lab (Tr. pp. 142-43). If "literacy lab" was not reflected on the student's report card, then it meant that "[e]ither [the student] didn't take it at all or [she] took it and [she was] dropped from the class before the grades went in the history, meaning before the ten-week marking period was over" (Tr. pp. 143-44). Parents could also pull students out of math or literacy lab—because it was a general education class—and a "parent decision" (Tr. p. 144).

"consistent with the previous years," and she did not receive any other complaints of bullying or the student having difficulty with peer interactions for the remainder of the 2019-20 school year (Tr. pp. 133-34). Reviewing the student's eighth grade report card, the guidance counselor testified that the student "did pretty well," but "earth science was a struggle for her" (Tr. p. 134; see generally Dist. Ex. 8). She recalled having a meeting with the parents and the Earth Science teacher "about her difficulties" in the class (Tr. pp. 134, 138-39). According to the guidance counselor, Earth Science—as a high school Regents course—was "not a mandatory class" in eighth grade, but students had the choice to take it "to get it out of the way before high school" (Tr. pp. 135-36). The guidance counselor described the Earth Science class as "five days a week, plus two labs," with some "independent learning" and that it was a "tenth grade reading course" (Tr. p. 135). In addition, the student had taken and received one high school credit each for "common core algebra" and "Spanish"—as a result, the student entered "ninth grade with three high school credits" (Tr. p. 136). A review of the student's high school transcript revealed that the student had "earned three credits during her middle school years": one for Algebra, one for Earth Science, a half-credit for seventh grade Spanish, and a half-credit for eighth grade Spanish (Tr. p. 137; see generally Dist. Ex. 9). Overall, the guidance counselor thought the student was a "typical middle school student," who may have "struggled a little bit throughout middle school, but nothing that raised red flags for [her]" (Tr. pp. 137-38).

During cross-examination, the district guidance counselor noted that, based on her seventh grade final report card, although the student appeared to struggle with final exams in mathematics and English, she passed everything (see Tr. p. 150; see generally Dist. Ex. 4). The guidance counselor testified that that was "not uncommon in middle school" because students were "not used to cumulative exams" (Tr. pp. 150-51). When asked whether any discussions took place with the parents or the CST about providing the student with "additional support" for mathematics in seventh grade in light of the grades she had earned—i.e., first quarter, 75; second quarter, 72; third quarter, 67; fourth quarter, 77; and on the final exam, 65 (for an overall final average of 72 in mathematics)—the guidance counselor testified that she could not recall any, but noted that it was "not uncommon to add a support" at any time during the school year if the scheduling allowed it and if the parents agreed (Tr. pp. 164-66).

The district guidance counselor was also asked during cross-examination what would cause her to refer a student to the CSE (see Tr. p. 167). In response, the guidance counselor testified that she would make a referral if a student was "failing usually more than one class, two or more classes, core classes consistently, and if they have had supplemental supports such as a literacy lab, the learning center, or a math lab continuously and not making any progress in terms of passing at that point" (Tr. p. 167). Absent these circumstances, the guidance counselor might also refer a student to the CSE if a "social/emotional or behavior" was interfering with the student's learning, if the student sought out support staff frequently and were missing class as a result, if a student was "overly emotional" in school, missing a lot of school, or school refusal (Tr. pp. 168-69).

Next, the evidence in the hearing record included testimony from the student's eighth grade mathematics teacher during the 2019-20 school year (see Tr. pp. 395-428). Initially, he described the student's eighth grade mathematics class—"algebra one"—as an "accelerated class," which incorporated the "New York State common core eighth grade curriculum, algebra one curriculum, and the 11th grade algebra two curriculum" (Tr. pp. 398-99). When the student took the mathematics class, it was composed of one teacher and approximately 20 students, and the class

met once a day for 40 minutes (Tr. pp. 402-03). The teacher testified that, in class, the student "struggled a little bit" and "was about [in] the 70s as far as her assessments" (Tr. p. 404). He described the student as "pretty attentive in class," and "[a]lways on task, always taking down the notes" (Tr. pp. 404-05). According to the teacher, the student was a "bit shy about asking for help, but would ask" when students were working independently in class (Tr. p. 404). Because the student sat up front in the middle of the classroom, the teacher easily observed her work, which allowed him to note that she was attentive and on task (see Tr. p. 405). Socially, the teacher did not observe anything that "struck" him as "unusual or anything like that" and he did not recall the student having any difficulty finding a partner in the class to work with when doing group work (Tr. pp. 405-06). He also did not recall observing any signs of "anxiety or depression," or anything else that caused him to "be concerned about her emotional functioning in class" (Tr. p. 406).

Next, the student's eighth grade mathematics teacher described the weekly team meetings held at the district middle school (see Tr. p. 408). The teacher recalled the team discussing the student on one occasion in or around November 2019 because they "had a lot of requests to write recommendations" for "private school" from the student's mathematics and English teachers (Tr. pp. 408, 423). The "team" consisted of core teachers—i.e., mathematics, English, social studies, and science—and they "talk[ed] about students," curriculum, and any issues that arose (Tr. p. 409). According to the teacher, none of the team teachers ever expressed any academic or emotional concerns about this student during the 2019-20 school year (Tr. p. 409). However, if a student was the topic of a discussion regarding academic or emotional concerns, the team would discern whether the student's difficulties were in just one class or across the board, and then "devise a way to get the student to perform a little better," by asking the student to attend a "mandatory X period," meet with the teacher after school, or direct the student to the class teacher—but it "depend[ed] on the issue" (Tr. pp. 409-10). If the team suspected a student had a learning disability or "significant academic deficits," the team would "notify the guidance counselor" and the student would "go to the [CST]," and occasionally, the team may recommend that a student be evaluated, which would require passing the student on to the guidance counselor (Tr. pp. 410-11). During cross-examination, the teacher testified that the team would also discuss a student who was "struggling extensively," had an attendance issue or chronic lateness, or may not be handing in assignments (Tr. pp. 423-24). During the 2019-20 school year, the teacher did not recall discussing the student with the guidance counselor and he did not recall discussing the student being bullied (Tr. p. 424).

Overall, and based on his observations of the student while taking his mathematics class in eighth grade, the teacher testified that he believed she was "able to access the curriculum and demonstrate[d] an understanding of the curriculum" (Tr. p. 411). He also testified that he did not agree with the recommendation in the neuropsychological evaluation report that the student required a small class in a small school to make educational progress, because the student was "attentive enough" in his class, and although she may have worked a "little bit slower than the average in the class," she was still "getting the curriculum" in this accelerated class (Tr. pp. 411-12, 416-17).

In addition to the foregoing evidence, the private evaluator who conducted the March 2020 neuropsychological evaluation of the student testified at the impartial hearing (see Tr. pp. 557-685; see generally Dist. Ex. 7). After reviewing and explaining the testing results obtained from the student's evaluation—and identifying the student's strengths and weaknesses gleaned therefrom—the private evaluator turned to testing results related to the student's and parents'

responses on rating scales to assess the executive functioning skills (see Tr. pp. 569-92, 596-98). Notably, when discussing the different ratings offered by the student and her parents, the private evaluator testified that the "rating forms illustrate[d] something about [the student] that's really important" (Tr. p. 595). More specifically, the private evaluator testified that the student's "presentation to an outside observer often appear[ed] that she's functioning well, that she's managing well, that she's feeling well emotionally, that her—the outside view of her skills and how she function[ed] as a student, her study skills, her concentration skills, her emotional functioning all may appear to be going well, and her internal experience [was] quite different" (Tr. p. 595). Consequently, although the student might be "struggling quite a lot inside emotionally," and "with managing herself or feeling like she c[ould] pay attention or regulate her concentration or organization," the student had a "real ability . . . to fly under the radar" (Tr. pp. 595-96). The private evaluator further described the student as "very reserved" and who kept a lot of "her struggles inside . . . that wasn't really easily observed by her parents, who [were] certainly very interested and concerned" (Tr. p. 596).

Both parents also testified at the impartial hearing that they decided to obtain a neuropsychological evaluation of the student after meeting in January 2020 with the student's Earth Science teacher and the district guidance counselor (see Tr. pp. 449, 518). The student's mother testified that, after that meeting, she "had taken a development life span class and learned about ADHD inattentive type" and "just put two and two together" to draw the conclusion that "this sounded so much like [the student] and there might be something she's struggling with," so they pursued the evaluation (Tr. p. 449). The student's father similarly testified that, after the "late January" meeting, they had a "number of conversations and [his wife] brought up the fact that in one of her classes, ADHD inattentive type had been" brought up as a subject and "it seemed [that] based on the description of what that was and some of [his wife's] professor's experiences, those were kind of in line with what [they] were seeing with [the student]" (Tr. p. 518). During cross-examination, the student's father clarified that the January 2020 meeting "started a process" that led up to evaluating the student (Tr. p. 532). According to the student's father, they "just started thinking a little bit about what might be going on" with the student, and his wife "was in the middle of taking a developmental psychology class" (Tr. pp. 532-33). He further testified that "something . . . her professor said in the class resonated with her" as similar to "what was going on with [the student] in terms of kind of being present but not there"—which was also similar to "some things that [they] heard the science teacher say about what was going on with [the student]" (Tr. p. 533).

Therefore, based on the foregoing evidence, and consistent with the IHO's determinations, the district met its child-find obligations for this student during seventh (2018-19 school year) and eighth grade (2019-20 school year). As noted above, a district's child-find duty is triggered when there is "reason to suspect a disability and reason to suspect that special education services may be needed to address that disability" (J.S., 826 F. Supp. 2d at 660; New Paltz Cent. Sch. Dist., 307 F. Supp. 2d at 400 n.13, quoting Dep't of Educ., State of Hawaii v. Cari Rae S., 158 F. Supp. 2d 1190, 1194 [D. Haw. 2001]). In addition, school officials must have "overlooked clear signs of disability" and been "negligent in failing to order testing," or have "no rational justification for deciding not to evaluate" the student (Mr. P., 885 F.3d at 750, quoting Bd. of Educ. of Fayette County, Ky., 478 F.3d at 313; see A.P., 572 F. Supp. 2d at 225).

Here, the evidence reflects that the district held both weekly CST meetings, as well as team meetings comprised of the student's core teachers, during the 2018-19 and 2019-20 school years,

and the student did not come to the attention of either group for academic or social/emotional concerns. In addition, the evidence demonstrates that the parents, themselves, did not bring the student to the district's attention during seventh or eighth grade—aside from the cyberbullying incident in September 2019—for academic or social/emotional concerns. Perhaps even more significant is the fact that the parents, themselves, did not suspect that the student may have had a learning disability until after the meeting with the student's Earth Science teacher in January 2020, which ultimately led them to seek a private evaluation of the student. Based on the neuropsychological evaluation, the private evaluator noted that the student internalized any struggles she may have had, and characterized her as flying under the radar. Therefore, although the student was found eligible for special education in August 2020, the hearing record does not contain any evidence that the district had reason to suspect that the student required special education to address a disability or that the district overlooked clear signs of a disability prior to that time. And while the parents correctly noted that the student may have encountered some academic difficulties in seventh and eighth grade, the evidence also reflects that the student's difficulties appeared to be limited to mathematics and Earth Science, and the "IDEA's child find provisions do not require districts to evaluate as potentially 'disabled' any child who is having academic difficulties" (J.S., 826 F. Supp. 2d 635, 663, citing A.P., 572 F. Supp. 2d at 225).

## **B. August 2020 IEP**

Overall, the crux of the parents' appeal with respect to the August 2020 IEP focuses on the student's needs in the areas of executive functioning and attention, and therefore, the analysis below addresses whether the special education program recommended for the student supported these deficits and enabled the student to make progress.<sup>23</sup>

### **1. Annual Goals**

With respect to the annual goals in the August 2020 IEP, the parents contend, without explanation, that they did not address the student's "struggles with self-monitoring and self-advocacy, nor d[id] they address all areas of study skills with which [the student] need[ed] assistance."

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

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<sup>23</sup> To be clear, the parents do not argue on appeal that the present levels of performance in the August 2020 IEP were insufficient or failed to accurately describe or identify the student's areas of need, that the CSE failed to rely on sufficient evaluative information, that the evaluative information relied on by the CSE failed to identify the student's areas of need, or that the August 2020 IEP accurately reflected the evaluative information (see Req. for Rev. ¶¶ 2-3).

ending with the next scheduled review by the committee (8 NYCRR 200.4[d][2][iii][b]; see 20 U.S.C. § 1414[d][1][A][i][III]; 34 CFR 300.320[a][3]).

In this case, the August 2020 IEP included four annual goals to address the student's identified needs in the areas of study skills and mathematics (see Dist. Ex. 13 at p. 10). The annual goal for study skills targeted the student's ability to "employ self-monitoring and self-advocacy strategies to communicate with teachers when in need of academic support" (id.; see Dist. Ex. 13 at p. 7 [noting that the student needed to work on "self-monitoring skills and properly checking over her work before handing it in," as well as working on her ability to "advocate for herself when she [was] struggling and need[ed] support"]).

At the impartial hearing, the district special education teacher who attended the August 2020 CSE meeting testified that the CSE reviewed and discussed each annual goal in the August 2020 IEP (see Tr. pp. 214-17; Dist. Ex. 13 at pp. 1, 10). According to the special education teacher, the student's teachers had reported that she was "still struggling a little bit about self-monitoring and advocating for herself when she struggle[d]" (Tr. p. 212). However, the student's teachers also noted that when they "checked in with her or put her in an environment that was free from distractions, that really helped her become successful" (Tr. p. 212). Therefore, with respect to the study skills annual goal, the special education explained that "this [was] part of [the student's] executive functioning skills . . . she need[ed] to work on" (Tr. p. 214). She also explained that it was very important for the student to "advocate or speak up when she need[ed] help and not wait for someone to come to her" (Tr. p. 214). She also testified that the August 2020 CSE discussed the annual goals at the meeting and the parents had the opportunity to participate in the development of the annual goals; she further testified that no one objected to the annual goals at the meeting and no one offered any additional annual goals that the CSE declined to include in the IEP (see Tr. p. 217).

The district school psychologist who testified at the impartial hearing specifically noted that the study skills annual goal was appropriate and was in direct alignment with the student's own self-report that she felt uncomfortable speaking with teachers, and therefore, the CSE properly supported the student in learning to advocate for herself (see Tr. p. 329).

At the impartial hearing, the private evaluator testified that although the annual goals in the August 2020 IEP "highlight[ed] specific skill areas that [the student] need[ed] support in," the annual goals only addressed a "very small number of skill areas" and were "very isolated to, . . . only a handful of her deficits" (Tr. p. 612). She also testified that while the student did need help with self-monitoring and self-advocacy skills to support her executive functioning difficulties, the annual goals in the August 2020 IEP did not address "other areas of study skills and executive functioning skills" (Tr. pp. 612). More specifically, the private evaluator explained that the annual goals failed to "described the steps [the student] may need to take in order to become more proficient in self-monitoring or self-advocacy" (Tr. pp. 612). During cross-examination, however, the private evaluator agreed that the study skills annual goal was appropriate because it targeted the student's deficits in self-monitoring and self-advocacy (see Tr. pp. 672-73). She explained that her concern about the study skills annual goal was that the student needed "support in the foundational skills related to mental control in order to progress with self-monitoring and self-advocacy," such as "her basic executive functioning, her attention regulation, and multitasking" (Tr. pp. 673-74). As a result, the private evaluator testified that she did not "see any of the other

concerns being addressed in order for [the student] to reach those goals," but then admitted that an IEP need not include an annual goal that "matche[d] every deficit or need" and that the student's "deficits in other areas" may be addressed in the IEP through program modifications (Tr. pp. 674-75). Thereafter, when asked to review some of the program modifications recommended for the student in the August 2020 IEP, the private evaluator agreed that those modifications addressed and supported the student's executive functioning and attention skills (see Tr. pp. 675-77; Dist. Ex. 13 at pp. 11-12).

In addition, the evidence in the hearing record demonstrates that the August 2020 IEP included three annual goals for mathematics (see Dist. Ex. 13 at p. 10). The district special education teacher testified that, at the August 2020 CSE meeting, the student's teachers reported that "math could be a little bit of a struggle for [the student], but she was hard working," "put in the effort," and "worked hard to produce grade level written responses" (Tr. p. 212). At the impartial hearing, both the district special education teacher and the district school psychologist testified that the second annual goal—targeting the student's ability to check over her work when presented with multistep problems—supported the student's ability to self-monitor her work, which was a part of executive functioning (see Tr. pp. 215-16, 329-30; Dist. Ex. 13 at p. 10).

Therefore, in light of the overall evidence in the hearing record, and contrary to the parents' contentions, the annual goals in the August 2020 IEP addressed the student's executive functioning and attention skills. In addition, the IDEA does not require that a district create a specific number of goals for each of a student's deficits, and the failure to create a specific annual goal does not necessarily rise to the level of a denial of FAPE; rather, a determination must be made as to whether the IEP, as a whole, contained sufficient goals to address the student's areas of need (J.L. v. New York City Dep't of Educ., 2013 WL 625064, at \*13 [S.D.N.Y. Feb. 20, 2013]; see C.M. v. New York City Dep't of Educ., 2017 WL 607579, at \*20-\*21 [S.D.N.Y. Feb. 14, 2017]). Thus, even if, as the private evaluator testified, the annual goals did not address all of the student's study skills needs or specify steps needed to reach the annual goals, this argument alone, would not result in a finding that the annual goals failed to address the student's executive functioning needs, and the parents' argument must be dismissed.

## **2. ICT Services and Resource Room**

In support of their contention that the IHO erred by ignoring or failing to consider evidence in his determination that the August 2020 IEP offered the student a FAPE for the 2020-21 school year, the parents point to testimonial evidence, which indicated that the recommendations for ICT services for mathematics instruction and resource room "pull-out services would be isolating and 'reactive to struggles that [the student] might have as a learner.'" The parents also argue that the August 2020 IEP failed to align with the district's own evaluations of the student, noting specifically that the IEP did not provide a "program" to address the student's executive functioning and attention deficits."

More generally, the parents argue that the August 2020 IEP failed to reflect the support necessary to address the student's need for "'significant skill development in . . . overarching executive functioning.'" The parents also contend that the August 2020 IEP failed to offer the "integrated approach" the student required and, as reflected in testimony, did not proactively address the student's needs arising from her executive functioning deficits. In addition, the parents

argue that the IHO failed to consider that the "special education programs and services recommended in the IEP were not appropriate because they were "[n]ot designed to build [the student's] skills in areas that she need[ed] to grow."

State regulation describes ICT services within the continuum of services as the "provision of specially designed instruction and academic instruction provided to a group of students with disabilities and nondisabled students" (8 NYCRR 200.6[g]). According to State regulation, ICT services minimally require the assignment of a special education teacher and a regular education teacher (8 NYCRR 200.6[g]2).

State regulation defines resource room as a "special education program for a student with a disability registered in either a special class or regular class who is in need of specialized supplementary instruction in an individual or small group setting for a portion of the school day" (8 NYCRR 200.1[rr]). Resource room programs "shall be for the purpose of supplementing the regular or special classroom instruction of students with disabilities who are in need of such supplemental programs" (8 NYCRR 200.6[f]).

At the impartial hearing, the district special education teacher, who administered the educational evaluation to the student and who attended the August 2020 CSE meeting, testified that, to prepare for the student's educational evaluation, she reviewed the social history and the neuropsychological evaluation obtained by the parents (see Tr. pp. 188-89; see generally Dist. Exs. 7, 12). Overall, the special education teacher assessed the student's abilities in reading, writing, and broad mathematics (see Tr. pp. 189-90; Dist. Ex. 11 at pp. 1-3). In reading, the student's scores fell within the average range, and the special education teacher clarified that the student could read grade-level reading words and comprehend at grade-level as well (see Tr. p. 195; Dist. Ex. 11 at pp. 1-2). She also testified that the student, while performing at grade-level in reading fluency, worked at a "slower pace compared to some of her peers" (Tr. p. 195; Dist. Ex. 11 at p. 2). Based on the student's scores, the special education teacher testified that the student "should be able to be successful in the general education class" (Tr. p. 195).

With respect to mathematics, the district special education teacher testified that this was an area of strength for the student, and overall, the student's scores fell in the average range (see Tr. pp. 195-96; Dist. Ex. 11 at p. 2). Based on the testing results, the student demonstrated her "biggest strength" in applied problems, which assessed the student's ability to "analyze and solve math problems that were presented orally to her" (Tr. p. 196; Dist. Ex. 11 at p. 2). The special education teacher testified that the student was "really focused" and "comfortable asking for questions to be repeated," and the student's "answers were pretty logical and on task" (Tr. p. 196). She also testified that even when the student answered incorrectly, "she was heading in the right direction" and used "a lot of different skills to figure out how to get the right answer" (id.). With regard to the math fluency subtest, the special education teacher testified that the student was "focused," "paid attention," and "made sure she understood what [the teacher] was asking" (Tr. p. 197). Here, the student performed in the low average range because, although she "made zero errors," the student's "slower pace and lack of automaticity" affected her score (Tr. p. 197; Dist. Ex. 11 at p. 2). According to the special education teacher, it was important to note the student's slower pace because it demonstrated that the student was "capable of answering grade level material, but she might, again, need more time to solve the problem or just some additional wait time when someone

calls on her to think of the answer and come to the answer" (Tr. p. 197). She further testified that, based on the student's scores, she could "meet grade level standards" (Tr. p. 198).

Next, the district special education teacher confirmed that she attended the August 2020 CSE meeting and that the CSE reviewed the parents' privately obtained neuropsychological evaluation at the meeting (see Tr. p. 201; see generally Dist. Ex. 7). In reviewing the testing results of the neuropsychological evaluation at the impartial hearing, the district special education teacher testified that the student, overall, demonstrated "pretty similar results" in reading, writing, and mathematics when compared to the testing results she obtained from the district's educational evaluation (Tr. pp. 202-06). The special education teacher also confirmed that the student's seventh grade State assessment results in mathematics and ELA, as well as her grades in her final report card for seventh grade, were consistent with her opinion that the student could meet "grade standards or even excel at them," as she had testified earlier (Tr. pp. 206-08; see generally Dist. Exs. 3-4). The special education teacher testified similarly with respect to her review of the student's eighth grade final report card, to wit, that the student demonstrated her ability to meet "all the grade level standards," consistent with her testing results, and moreover, that the student "passed" "high school level courses and regent level courses" and received "high school credit and regent credit" for those courses (Tr. pp. 208-09; see generally Dist. Ex. 8). The special education teacher noted, however, that the "only outli[er]" was the student's performance during the "last quarter of English," pointing to the teacher's comment in the report card, which indicated that the student was "inconsistent during remote learning and [the student] did not utilize all opportunities to submit her late and missing work" (Tr. p. 209; Dist. Ex. 8). At the impartial hearing, the special education teacher attributed this "outlier" as a result of the COVID-19 pandemic, which made "learning a challenge for all, both students and teachers" and which "made the students take a little bit more individual responsibility because they weren't in school all the time" (Tr. pp. 209-10).

Turning to the August 2020 CSE meeting, the district special education teacher testified that the CSE meeting began by reviewing "all of [the student's] evaluations," including the neuropsychological evaluation report, teacher reports, the social history, and "any other reports in the system" (Tr. pp. 210-11). After reviewing the evaluative information, the CSE "heard comments from the parents and her teachers" and created a program for the student (Tr. p. 211; see generally Dist. Ex. 13). With respect to the parents' input at the meeting, the special education teacher pointed to the August 2020 IEP, which reflected the parents' report that the student "always needed extra time to fully master new material and that she always had difficulty with math concepts in particular" (Tr. pp. 211-12; Dist. Ex. 13 at p. 8). As further noted in the August 2020 IEP, the parents had indicated that the student "need[ed] to slow down and look over her work or [she would] make simple mistakes" (Tr. p. 212; Dist. Ex. 13 at p. 8). According to the special education teacher, "giving [the student] extra time and the fluency, again, was a similar concept" (Tr. p. 212).

The district special education teacher also testified that the student's teachers reported that "math could be a little bit of a struggle for [the student], but she was hard working," "put in the effort," and "worked hard to produce grade level written responses" (Tr. p. 212). The student's teachers also reported that she was "still struggling a little bit about self-monitoring and advocating for herself when she struggle[d]" (Tr. p. 212). However, the student's teachers also noted that when they "checked in with her or put her in an environment that was free from distractions, that really helped her become successful" (Tr. p. 212).

The district special education teacher testified that, after the August 2020 CSE found the student eligible for special education, the CSE turned its attention to developing a program to support the student in the least restrictive environment (LRE) in a general education setting (see Tr. pp. 213-14). At the impartial hearing, the special education teacher reviewed and discussed each annual goal in the August 2020 IEP (see Tr. pp. 214-17; Dist. Ex. 13 at p. 10). She also testified that the August 2020 CSE discussed the annual goals at the meeting and the parents had the opportunity to participate in the development of the annual goals; she further testified that no one objected to the annual goals at the meeting and no one offered any additional annual goals that the CSE declined to include in the IEP (see Tr. p. 217). The special education teacher similarly reviewed each individual program modification recommended in the August 2020 IEP, and explained why the CSE selected each modification, as well as that the CSE reviewed and discussed all of the recommendations (see Tr. pp. 217-20; Dist. Ex. 13 at pp. 11-12).

Turning to the special education program recommendations, the district special education teacher described the ICT services for mathematics instruction as a "classroom that ha[d] a general education and special education teacher" (Tr. pp. 220-21; see Dist. Ex. 13 at p. 11). According to the special education teacher, the two teachers in the classroom would "really allow [the student] to have some more small group support or individualized support, someone to check in with, more chances to work in partner or small group, [and] basically get extra attention and have two teachers in that class to better support her needs" (Tr. pp. 220-21; Dist. Ex. 13 at p. 11). During cross-examination by the parents' attorney, the special education teacher testified that ICT services were only recommended for math because the "parents had stated she had been struggling the most" in this area; in addition, the evaluative information reflected that math was where she had "her biggest struggles and concerns," and because even if the student had performed well on the testing, "that d[id not] always correlate to the exact classroom environment and how she did in there" (Tr. pp. 251-52).

At the impartial hearing, the district special education teacher explained that the recommendation for resource room—or the "educational support class"—provided the student with an "every-other-day class" where she would "work on organization, her learning goals, her individualized learning goals, [and] reviewing and previewing work from her content area classes" within a 5:1 student-to-teacher ratio (Tr. pp. 221-22; see Dist. Ex. 13 at p. 11). As a service provided every-other-day, the special education teacher further explained that it allowed the student to "really take independence and do it on her own and self-monitoring for a day" and then allowed her to "check in the next day with the special education teacher and make sure [she was] on task" (Tr. p. 222).

While noting that the resource room recommendation in the August 2020 IEP was specific to supporting the student in "math and science," the district special education teacher testified that, for science, social studies, and English, the student would continue to receive all of the classroom modifications and testing accommodations as support in those general education settings (Tr. pp. 222, 250-51, 254-55; Dist. Ex. 13 at pp. 11-13). She also testified that the regular education teachers "would be responsible for making sure these classroom modifications were implemented" (Tr. pp. 222-23). According to the special education teacher, the regular education teachers would receive a copy of the student's IEP, and would "need to sign off that they ha[d] received it and read it" (Tr. p. 223). Also, the regular education teachers would "consult with the special education

teacher" to discuss the "best ways to implement it and how to best help [the student] in the classroom" (Tr. p. 223).

Next, the district special education teacher was asked at the impartial hearing how the August 2020 IEP supported the student's "deficits in executive functioning or those concerns in attention and executive functioning" (Tr. p. 224).<sup>24</sup> She testified that executive functioning included "self-monitoring, working memory, time management, organization, [and] planning," and the August 2020 IEP included recommendations for visual supports, such as checklists to help with self-monitoring; "multiple exposures to the content area within her ICT class" to support her working memory, as well as reviewing and previewing of material in resource room and working on her "memory goals" in resource room; the resource room supported the student's time management and organization needs; and the breaking down of long-term assignments (Tr. p. 224). In addition, the special education teacher noted that the student's needs in math fluency would be supported by the annual goals in the August 2020 IEP, which would be targeted with the special education teacher in the resource room and the student would receive more repetition and exposure and practice in the resource room (Tr. pp. 224-25).

Referring to the parents' privately obtained neuropsychological evaluation report, and specifically, to the recommendation therein that the student "attend a small class at a special school in order to make progress," the district special education teacher disagreed with that recommendation (Tr. p. 227; see Dist. Ex. 7 at p. 5). More specifically, she disagreed because the student was "able to meet grade level standards," earned "high school credit," and "complete[d] regents classes within that general education setting" (Tr. p. 227). She further testified that it was "important that a student [was] in their [LRE]" and although the student "may need some support in that environment, in that general education class, . . . , she was succeeding and meeting grade level standards and even going above that to get high school credit and regents credit" (Tr. p. 227). When asked to explain her understanding of the LRE, the special education teacher testified that the LRE was where students with disabilities received the "maximum amount of education with their non-disabled peers" (Tr. pp. 228-29). In addition, she testified that students with disabilities would "not be moved from their regular classes unless all supplemental aids and services in the regular class can't be achieved satisfactorily" (Tr. p. 229). Therefore, in this case, if the student was not "succeeding in general education" without the "appropriate accommodations and modifications," then the student would be "move[d] to a more restrictive environment" (Tr. pp.

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<sup>24</sup> At the impartial hearing, a district school psychologist—who was also a certified school neuropsychologist—described "executive functioning" as the "ability to regulate the way we do tasks," the "ability to sustain our attention, monitor our—what we're doing, our pacing, our ability to plan and organize how we approach tasks" (Tr. pp. 275, 285). She also noted that "[t]hese are higher level metacognitive abilities that are later to develop and that we rely on to successfully complete tasks that we do" (Tr. p. 285). In addition, the district school psychologist noted that "[t]ypically, attention and executive functioning [often] go hand in hand" (Tr. p. 285). Reviewing the student's scores from an administration of the Comprehensive Executive Function Inventory (CEFI) as part of the district's psychological evaluation, the school psychologist explained that, based on the scores arising from reports from the student's father, the student—at home—did not demonstrate any executive functioning deficits; however, the scores obtained from two of the student's teachers reflected that the student showed "some executive functioning deficits" within the classroom environment (Tr. p. 293; see Dist. Ex. 12 at pp. 12-13).

229-30). But in this case, the student "was succeeding in the environment she was in or making progress in that environment" (Tr. p. 230).

The district special education teacher also testified that no one at the August 2020 CSE meeting disagreed with the programs and services recommended in the IEP, and she did not recall the parents seeking a "special class setting or more support than [was] offered in th[e] IEP" at the meeting (Tr. p. 226). The special education teacher further testified that "based on her needs and how she was doing, the classroom [the student] was in was a proper location just with the supports added to it" (Tr. p. 226). In addition, the special education teacher testified that the parents did not indicate to her that they "were looking at out-of-district placements" or "a special school for students with disabilities" (Tr. p. 226).

When asked during cross-examination why she "support[ed] [the student's] eligibility for special education related services," the district special education teacher explained that, while the student was "capable of doing really well" and was "capable [of] making [a] lot of progress," the student "needed some supports in the classroom to ensure that progress" (Tr. pp. 252-53).

At the impartial hearing, a district school psychologist reviewed the testing results from the district's July 2020 psychological evaluation report (see Tr. pp. 271-72, 275, 279-308; Dist. Ex. 12 at pp. 11-16).<sup>25</sup> Overall, the district school psychologist characterized the student's cognitive scores as falling within the average range, with processing speed identified as an area of weakness—meaning, the "ability to do things quickly and accurately" was an "area of concern" (Tr. p. 308). She also testified that the student's weak processing speed was "directly related to . . . attention and executive functioning" because processing speed was "one of those functions that [was] mediated by the frontal lobe" and the student's scores demonstrated "concerns with [the student's] ability to sustain her attention for an extended period of time on a task that was not particularly engaging" (Tr. pp. 308-09). According to the school psychologist, "there were elevated numbers of omissions errors, not commission errors," which demonstrated that, "whatever she did, she did accurately"; however, the student was "inattentive, [and] she missed opportunities to respond" (Tr. p. 309). She explained that the difference between errors of omission and errors of commission were important because "it t[old] us that she [was] capable and she c[ould] function"—"she c[ould] do things accurately," but when the student was "not attending, [she was] missing out on pieces of information" and did not offer a response (Tr. p. 309). Therefore, the district could "then do things to make sure that [she was] attending," such as different modifications in the classroom and accommodations to ensure her attention (Tr. pp. 309-10). She further confirmed that the student's executive functioning deficits manifested "more as not paying attention as opposed to being impulsive or hyperactive" (Tr. p. 310).

Next, the district school psychologist testified that, based on a review of the neuropsychological evaluation report obtained by the parents, the student demonstrated "some weaknesses, most notably in the area of attention, executive functioning," and was diagnosed as having an ADHD, inattentive type, which was "impacting on academic fluency and overall achievement at a higher level" (Tr. p. 315; see generally Dist. Ex. 7). The school psychologist also

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<sup>25</sup> The district school psychologist did not attend the August 2020 CSE meeting, but was called as a witness because the district school psychologist who had attended the CSE meeting was on maternity leave and unavailable to testify (see Tr. pp. 275, 376-77).

noted that the private evaluator "identified areas of strength as well," including reading comprehension and "using language"; areas of weakness including "abstract verbal reasoning, some listening comprehension tasks, the working memory and inattention, . . . complex attention, task monitoring, planning and organizing, [and] emotional regulation"—all of which were executive functions and consistent with the diagnosis of an ADHD, inattentive type (Tr. p. 316). The school psychologist confirmed that the private evaluator's findings about the student's cognitive ability, processing speed, working memory, and executive functioning skills were consistent with the results found in the July 2020 psychological evaluation of the student performed by the district (see Tr. pp. 317-123). With respect to the academic testing performed as part of the privately obtained neuropsychological evaluation and the July 2020 psychological evaluation, the school psychologist similarly confirmed that the student performed consistent with her cognitive ability, with a weakness in math fluency (see Tr. p. 325-27). The school psychologist explained that a lower processing speed and working memory or attention issues would be consistent with a lower score in the area of fluency (see Tr. pp. 327-28).

With respect to the recommendations in the August 2020 IEP for ICT services and resource room, the district school psychologist initially noted the "wonderful support" the student would receive through resource room (Tr. p. 333). In particular, the school psychologist testified that resource room provided "an opportunity to review everything" from all of her classes, it "guarantee[d]" that she would know what her assignments and timelines were, as well as providing an opportunity to study for tests or complete homework and to reinforce and repeat anything that remained unclear to the student (Tr. p. 333). As to the ICT services for mathematics, the school psychologist testified that it offered the student a second teacher to "facilitate and work on the goals," and to make sure that the modifications in the IEP were provided to her (Tr. p. 334).

Overall, the district school psychologist testified that the special education programs and services recommended in the August 2020 IEP were appropriate to meet the student's needs by supporting her weaknesses and providing direct support from a second adult, as well as providing modifications that were "commonly used" for student's with this "type of profile" (Tr. pp. 334-35). With respect to the private evaluator's recommendation that the student attend a "small class in a special school," the school psychologist did not agree with it because, based on the student's scores on the testing administered, she "functioned in the average range" "for the most part," and therefore, the student should be in an environment "where she was exposed to, . . . , a rigorous curriculum with her . . . typical peers, and not be removed from that environment" (Tr. p. 335). In her experience, the school psychologist would recommend a small class environment for "students who [were] significantly below—performing significantly below expectations for their grade or age, and . . . we've already tried other interventions that [were] less restrictive and they haven't met with success" (Tr. pp. 336-37).

Next, the district director of pupil personnel services and special education (director) testified at the impartial hearing (see Tr. pp. 770-71). In reviewing the August 2020 IEP, the director testified that she was familiar with the special education program recommendations in the IEP (see Tr. pp. 778-79; see generally Dist. Ex. 13). More specifically, the director testified that she, together with two special education teachers and the assistant superintendent for curriculum and instruction, developed the "curriculum for the educational support class" during the previous summer (Tr. pp. 779, 81). She also testified that, contrary to other testimony elicited at the impartial hearing that the August 2020 IEP did not "offer support or training in executive

functioning skills," the educational support class—or resource room program—provided "individual support for students on their IEP goals," and part of the curriculum developed for this program included "direct instruction around executive functioning skills" (Tr. pp. 779-80). In addition, the educational support class helped students "in generalizing those skills throughout their school day by checking in with teachers" (Tr. p. 780). She further testified that the recommended modifications and accommodations in the August 2020 IEP supported executive functioning skills throughout the day, as they would be "in place in all of [the student's] classes" (Tr. p. 780).

Speaking more directly about the development of the curriculum for the resource room, the director testified that, as one factor, they considered the purpose of resource room, which was to provide "re-teaching and preteaching of content level material" (Tr. pp. 781-82). In addition, they considered the fact that the "high school special education teachers" were addressing many of the skills students needed in order to be successful within the school day (Tr. p. 781). Another factor to consider was the "main topics" that were "most essential and that [students] needed actually direct instruction on" (Tr. p. 782). Some of the units included "growth mindset," teaching students on "specific study skills," executive functioning skills, and reading and writing "across the curriculum and content areas," and generalization of the skills (Tr. p. 782). With respect to executive functioning skills, the director testified that it had many different aspects, including "planning, self-monitoring, initiating tasks," and "developing some self-monitoring skills, self-awareness skills, and coming up with plans or strategies and skills that c[ould] support a student [who] may have weaknesses in executive functioning" (Tr. pp. 783-84). As resource room pertained to working on a student's annual goals, the director testified that some students had "goals that actually need to address executive functioning skills" and "sometimes students need[ed] help with kind of planning and organizing of their assignments, completing assignments, breaking down assignments, [and] time management" (Tr. p. 784). She further testified that this could mean students reviewing what the assignments were or looking at timelines to determine whether a schedule was needed to complete multiple assignments that were due simultaneously (see Tr. pp. 784-85).

With respect to study skills, the director testified that the resource room curriculum helped students understand "what [was] their learning style and how they c[ould] best learn new material" (Tr. p. 785). According to the director, it also included "understanding how to study, how to prepare, how when you're preparing for a unit exam how to break down the material"; she also testified that that could include "developing study guides, understanding what [was] the most salient information, [and] helping students to develop" a method for studying that worked for them (Tr. pp. 785-86).

As described above, the evidence in the hearing record supports the IHO's finding that the recommendation for ICT services for mathematics instruction—which would provide the student with support in an area that had been historically challenging for her, as well as the opportunities to receive the support and attention of two teachers and small group instruction—together with the supports offered through the resource room—which would provide the student with direct instruction for her executive functioning skills—were appropriate to meet the student's needs and enable her to make progress commensurate with her abilities.

### 3. Related Services—Counseling

The parents also argue that the August 2020 IEP failed to include a recommendation for counseling services notwithstanding the student's "reported significant emotional distress" reflected in the evaluative information and to address the student's "struggle[s] in her relationships with school personnel and feelings of being misunderstood and unsupported."

A review of the evidence in the hearing record demonstrates that the parents' responses on the Behavior Assessment System for Children-Second Edition (BASC-3), which was administered as part of the private neuropsychological evaluation, revealed no at-risk or clinically significant scores in externalizing or internalizing problems, behavioral symptoms, or adaptive skills for the student (see Dist. Ex. 7 at p. 18). The student's self-report revealed elevated scores in school problems, internalizing problems, inattention/hyperactivity, and emotional symptoms (*id.*). More specifically, the student reported clinically significant scores in her attitude toward teachers (reflecting her level of trust, comfort, and positive connection toward teachers); anxiety (i.e., reflecting her sense of worrying, tension and anxiety); sense of inadequacy (i.e., reflecting her level of dissatisfaction with abilities and performance); somatization (i.e., reflecting her level of physical or health complaints); attention problems (i.e., focus, concentration, and working memory); as well as hyperactivity (i.e., her activity level and impulsivity) (*id.* at p. 19). In addition, the student's scores were at-risk for relations with parents (i.e., reflecting the quality of her relationship with her parents) and self-reliance (i.e., her confidence in her ability to make decisions and solve problems) (*id.*).

The BASC-3 and the Multidimensional Anxiety Scale for Children, Second Edition (MASC-2) were administered as part of the district's July 2020 psychological evaluation of the student (see Dist. Ex. 12 at pp. 1, 8-9). According to the teacher responses (administered to the student's science and mathematics teachers), the student did not exhibit behaviors suggesting externalizing or internalizing problems more than the average student her age, although she fell in the slightly at-risk range for "behaviors stemming from anxiety" (*id.* at p. 8). In addition, the student's self-report "suggest[ed] some evidence of increased anxiety and worry" with respect to "feeling tense, uptight, jumpy, and/or restless," but she did not self-report a clinically significant level of social anxiety (*id.*). The parents reported elevated concerns regarding "many aspects of anxiety," including "physical symptoms" and concerns that other student's made fun of the student (*id.*). According to the evaluation report, the student did not "endorse a clinically significant level of social anxiety the way her [parents] did" (*id.*). In addition, while the parents' responses indicated an elevated level of overall anxiety on the "Generalized Anxiety Disorder Index," the student's responses did not (*id.* at pp. 8-9).

Turning to the social history completed as part of the initial evaluation, the district school psychologist noted at the impartial hearing that, per the parents' report, the student's presenting behaviors included "[s]ome distractibility, some disorganization, inattention, and fear of making mistakes, but otherwise [was] well behaved, [and] at times stubborn" (Tr. p. 312; Dist. Ex. 10 at pp. 3-4). According to the social history, the parents did not indicate "any significant academic concerns" or "any concerns about social relationships" (Tr. pp. 312-13; Dist. Ex. 10 at pp. 3-4). The school psychologist also testified that, based on the responses to the "yes/no questions" for reporting about the student's "[f]riendships and peer relationships," the student did not have "problems relating to her peers," she was "interested in friendship," was sought out for friendships,

and she did not have "difficulty making friends" (Tr. p. 313; Dist. Ex. 10 at p. 4). During cross-examination, the district school psychologist testified that, based on the neuropsychological evaluation and the July 2020 psychological evaluation, the results did not "suggest the need for social/emotional goals" (Tr. p. 353). At the impartial hearing, the school psychologist also testified that it was appropriate to monitor the student's social/emotional functioning at school, as recommended in this case, because there was a "difference between outside therapy and counseling that's provided in school" (Tr. p. 378-79). The school psychologist explained that, as here, when a student has established a rapport with a "therapist outside who's addressing an issue, it—sometimes it's best to just let that relationship continue, speak with them, have—get any relevant and important information that they would either contact us and share with us" (Tr. p. 379). In addition, the school psychologist testified that "if we were noticing something in school," they could speak with the outside therapist" (Tr. p. 379). The school psychologist noted that the August 2020 IEP appropriately reflected monitoring the student's social/emotional functioning especially in light of "some of those scores on the BASC that were just in the at-risk range" (Tr. pp. 379-80).

Turning to the August 2020 IEP, a brief review demonstrates that, consistent with the parents' allegation, the August 2020 IEP did not include a recommendation for counseling services (see generally Dist. Ex. 13). In describing the student's social development as part of the present levels of performance in the August 2020 IEP, the CSE noted that the student and her parents had reported a "history of social challenges with peers related to exclusion/unkind behavior from peers" (Dist. Ex. 13 at p. 8). The CSE also noted that the student currently reported "positive relationships with others and she did not endorse concerns over social anxiety on her recent evaluation," but that the parents thought "she may be under reporting the level of distress her social relationships c[ould] cause" (*id.*). The social development portion of the IEP also reflected that the student "suffer[ed] from symptoms of anxiety (physical manifestation), that [were] being treated by an outside therapist" (*id.*). As social concerns noted by the parents, the August 2020 IEP reflected that the student was "currently receiving outside therapy," and the parents "agreed to sign permission" for the student's "outside counselor to communicate with school staff" (*id.* at p. 9). In addition, the CSE noted that the student's "social development [was] going to be monitored here and d[id] not, at th[at] time, warrant special education support" (*id.*). Finally, the CSE indicated that the "parents [were] in agreement with the plan to monitor her social-emotional development in school" (*id.*).

At the impartial hearing, when the district special education teacher was asked if the August 2020 CSE had any discussions about "anxiety and counseling services" for the student, she recalled that the student was "seeing an outside counselor" to address the anxiety and her "ADHD needs" (Tr. pp. 225, 247). With respect to whether the August 2020 CSE discussed or considered in-school counseling for the student, the special education teacher testified "[n]othing specific with that, just that she was seeing an outside counselor" (see Tr. pp. 225-26). She also testified during cross-examination that the August 2020 CSE did not recommend annual goals in the area of social/emotional functioning because, at that time, the student was seeing an outside counselor and "that was what was discussed" (Tr. p. 262). The special education teacher was also asked at the impartial hearing whether she recalled "any discussions" at the August 2020 CSE meeting regarding "bullying or peer interaction"; she responded "[n]o," but added that she was "focused on the academic stuff" and she did not remember "anything specific" on that topic—other than that the student saw an outside counselor for "anxiety and stuff like that" (Tr. pp. 226-27, 248).

At the impartial hearing, the private evaluator testified that the student had reported significant emotional distress and felt misunderstood and unsupported by adults in the school setting (see Tr. pp. 610-11). The private evaluator also testified that the student struggled with anxiety and seeking help in school, and counseling was an appropriate intervention for these issues (see Tr. p. 611). She also testified during cross-examination, however, that she had not diagnosed the student as having an anxiety disorder at that time, but opined that the student's "anxiety and concerns with her self-confidence were a byproduct of her—the match between her difficulties and her learning environment" (Tr. pp. 657-58).

The student's mother testified at the impartial hearing that she recalled counseling being discussed at the August 2020 CSE meeting (Tr. p. 488). As noted in the August 2020 IEP, the student's mother also recalled discussing at the CSE meeting that the student was receiving outside counseling for anxiety management (see Tr. pp. 488-89; Dist. Ex. 13 at p. 2). According to the student's mother, the August 2020 CSE discussed, per the parents' report, that the student had a "history of social challenges with peers related to exclusion and unkind behaviors," which was also reflected in the IEP (Tr. pp. 489-90; see Dist. Ex. 13 at p. 8). The student's mother further acknowledged that, as noted in the August 2020 IEP, as part of a recent evaluation of the student that the student, herself, "did not endorse concerns over social anxiety" and "report[ed] positive relationships with others"—as well as the parents' own concerns stated at the CSE meeting that the student was "under reporting the level of distress her social relationships c[ould] cause" (Tr. p. 490; see Dist. Ex. 13 at p. 8). The student's mother also admitted that, although she did not recall being asked to "sign a consent to allow the district staff to communicate with [the student's] outside therapist," it did "sound like something [they] would have done" (Tr. pp. 490-91; see Dist. Ex. 13 at p. 9). Next, the student's mother testified that she did not recall the August 2020 CSE discussing that, as noted in the IEP, the district would "monitor [the student's] social development by communicating with the private therapist" (Tr. p. 491; see Dist. Ex. 13 at p. 9). She did, however, recall the August 2020 CSE indicating that "we will revisit this," but, according to the student's mother, the district never did (Tr. pp. 491-92; see Dist. Ex. 13 at p. 9). Upon receipt of the August 2020 IEP, the student's mother did not read or review it, and she did not recall whether the student's father—who had read through the IEP upon its receipt—stated to her that he had not agreed with the district's plan to monitor the student's social/emotional functioning (see Tr. pp. 492-94).

When the student's father testified at the impartial hearing, he recalled the August 2020 CSE discussing the student's outside therapy, but could not specifically recall any discussions about the district communicating or contacting the outside therapist (see Tr. pp. 540-41; Dist. Ex. 13 at p. 9). He also could not recall reading the portion of the August 2020 IEP indicating that the parents had agreed "with the plan to monitor [the student's] social/emotional development in school rather than provide a direct service" (Tr. p. 541; see Dist. Ex. 13 at p. 9). However, the student's father also testified that he did not recall "sending the district" any emails after receiving and reading that portion of the August 2020 IEP to express any disagreement or to express that they had not agreed with the district's plan to monitor the student's social/emotional functioning in school (Tr. pp. 541-42; see Dist. Ex. 13 at p. 9).

Based on the above, the evidence in the hearing record supports a finding that, consistent with the IHO's determination, the August 2020 CSE's decision not to recommend in-school counseling for the student did not result in a denial of a FAPE. Here, while the evidence indicates that the student and parents may have reported elevated scores on some measures of

social/emotional functioning, the hearing record also demonstrates that, in school, the student's teachers did not observe similar concerns or behaviors (see Dist. Exs. 7 at pp. 18-19; 12 at pp. 8-9). In addition, the parents' own reports on the social history did not indicate any significant academic concerns or concerns about social relationships, but instead reported that the student did not have "problems relating to her peers," she was "interested in friendship," was sought out for friendships, and she did not have "difficulty making friends" (Dist. Ex. 10 at pp. 3-4). Given that the August 2020 CSE was aware that the student was already receiving outside therapy, it was reasonable to continue to monitor the student's social/emotional development and functioning at school and to communicate with the outside therapist, when necessary. Consequently, the parents' view regarding a lack of counseling in the August 2020 IEP is not sufficient reason in this case to overturn the IHO's determination.

## **VII. Conclusion**

Having determined that the evidence in the hearing record establishes that the district complied with its child-find obligations during the 2018-19 and 2019-20 school years, and that the district offered the student a FAPE in the LRE for the 2020-21 school year, the necessary inquiry is at an end and there is no need to reach the issue of whether York Prep was an appropriate unilateral placement for the student (Burlington, 471 U.S. at 370).

**THE APPEAL IS DISMISSED.**

**Dated: Albany, New York  
November 5, 2021**

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**JUSTYN P. BATES  
STATE REVIEW OFFICER**