



The University of the State of New York

The State Education Department

State Review Officer

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No. 22-030

Application of the NEW YORK CITY DEPARTMENT OF EDUCATION for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:

Liz Vladeck, General Counsel, attorneys for petitioner, by Nathaniel Luken, of counsel

Law Offices of Regina Skyer and Associates, LLP, attorneys for the respondent, by Kerry McGrath, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from the decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to respondents' (the parents') daughter and ordered it to reimburse the parents for their daughter's tuition costs at The Quad Preparatory School (Quad) 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). 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

Historically the student has demonstrated above average cognitive skills with concerns noted in executive functioning skills, and she has received diagnoses of an attention deficit hyperactivity disorder (ADHD) inattentive type, anxiety, and depression (Parent Ex. P at p. 1; Dist. Ex. 5 at p. 1). During the 2019-20 school year the student attended seventh grade at a nonpublic school (Dist. Ex. 3 at p. 2). At that time, the student was eligible for special education services as a student with an orthopedic impairment due to a congenital deformity of the lower right extremity for which she was recommended to receive physical therapy (PT), as well as special education

teacher support services (SETSS) and counseling through an individualized education services program (IESP) (Dist. Ex. 5 at p. 1). In September 2019, the parent reported that the student no longer required PT (Dist. Exs. 3 at p. 2; 5 at pp. 1-2).

In September 2019, the district requested permission to conduct a three-year re-evaluation of the student (Dist. Ex. 6). As part of the re-evaluation, the district conducted a social history update, a psychoeducational evaluation, and a classroom observation (see Dist. Exs. 3; 4; 5).

The social history update dated September 23, 2019, indicated that the parent had no concerns about the student's academic skills, but that she was concerned with the student's social/emotional development regarding her difficulty maintaining peer relationships (Dist. Ex. 3 at p. 1). The parent also reported that the student was not receiving the special education services offered in the student's IESP, but that she was receiving privately obtained counseling (id. at p. 2).

The September 27, 2019 psychoeducational evaluation report indicated that the student's overall cognitive skills were in the very superior range with a full scale IQ of 138 (Dist. Ex. 5 at pp. 1, 3). Measures of the student's academic achievement indicated that she demonstrated a strength in reading comprehension and a relative weakness in math problem solving (id. at p. 3). The report indicated that an evaluation in 2015 identified concerns regarding the student's executive functioning, social awareness, and perspective taking skills (id. at p. 1). The psychoeducational report also indicated that the student had made progress in regard to her social/emotional functioning, which was an area of past concern (id.). The parent reported that the student was regularly seen by a therapist and psychiatrist, and attended a social skills group (id.).

The classroom observation dated October 2, 2019 noted that the student was in a class of 16 students and one teacher at the nonpublic school (Dist. Ex. 4 at p. 1). Although the student appeared to "be friendly and interact[] appropriately with her classmates," the observer reported that the student was "off-task, disengaged from the topic, and easily distracted by the things around her" (id. at pp. 1-2).

In November 2019, the parents obtained a private social/emotional evaluation of the student conducted by a neuropsychologist, at which time she met the criteria for autism spectrum disorder (see Tr. p. 204; Parent Ex. P at p. 1).

A CSE convened on November 25, 2019 to review the private and district evaluation reports and to develop an IESP for the student (Dist. Ex. 7 at pp. 1-6, 13). The CSE found the student eligible for special education services as a student with autism and recommended that she receive three periods per week of individual SETSS, as well as one 30-minute session of individual counseling per week and one 30-minute session per week of group counseling services (id. at pp. 1, 10).

The parent sent an email to the district dated May 12, 2020 (Parent Ex. E; see Parent Ex. Q at pp. 1-2). In the email the parent asserted that the student had "a challenging year" and that her "growing social/emotional needs now necessitate a full time special education program/placement" (Parent Ex. E). The parent indicated that she was "gathering clinical materials" from the student's providers and would submit them to the district, and she also provided the district with consent to conduct "any additional evaluation or assessment" it deemed necessary

(id.). Additionally, the parent requested a CSE review meeting to convert the student's IESP to an IEP and to make a recommendation for a full-time special education program beginning September 2020 (Parent Ex. E).¹ The district responded with a May 12, 2020 email indicating that "the appropriate CSE team" would contact the parent soon (Parent Ex. Q at p. 1).

The parents obtained a letter dated May 17, 2020 from the speech-language pathologist who conducted the student's weekly social group sessions, a letter dated May 25, 2020 from the nonpublic school psychologist, an updated report from the neuropsychologist dated May 28, 2020, and a letter from the student's psychiatrist dated June 1, 2020 (Tr. p. 258; Parent Exs. D; M; N; P).

On May 29, 2020, the parents signed a contract with Quad for the student's attendance during the 2020-21 school year (see Parent Ex. F). The contract indicated that should the parents accept a public school placement by September 10, 2020, they would receive a refund for the tuition payment made prior to that date and be relieved of their obligations to make further payments (id. at p. 3).

On June 5, 2020, the parent emailed the district (Parent Ex. Q at p. 1). In the email the parent indicated that she had attached "additional evaluations and letters" from the student's clinicians for the CSE to review (id.).²

On July 23, 2020, the CSE convened to develop an IEP for the 2020-21 school year (see Dist. Ex. 1 at p. 17).³ Beginning in September 2020, the CSE recommended that the student receive integrated co-teaching (ICT) services in math, English language arts (ELA), social studies and science (id. at p. 13). Additionally, the CSE recommended one 30-minute session of group counseling per week and one 30-minute session of individual counseling per week (id.).

The prior written notice dated August 5, 2020 indicated that the July 2020 CSE reviewed the September 16, 2019 psychoeducational evaluation, the September 23, 2019 social history update, and the October 2, 2019 classroom observation (Dist. Ex. 2 at p. 1).⁴ According to the prior written notice, the CSE had considered general education, related services only, and SETSS, but rejected each option because the student needed a more intensive adult to student ratio and more intensive specialized instruction to address her educational and social/emotional needs (id.). The August 5, 2020 school location letter identified the particular public school site that the student was assigned to attend for the 2020-21 school year (Dist. Ex. 2 at p. 5).

¹ As noted above, the parent testified that the student did not receive any of the IESP services during the 2019-20 school year (Tr. pp. 329-31, 354).

² The parent testified that she sent Parent Exhibits D, M, and N to the CSE, and that she might have sent Parent Exhibit P to the CSE (Tr. pp. 337-38).

³ The meeting notice for this CSE meeting was dated July 17, 2020 (see Dist. Ex. 8).

⁴ The hearing record does not contain a psychoeducational evaluation report dated September 16, 2019, but does contain one dated September 27, 2019 (see Dist. Ex. 5 at p. 1).

On August 25, 2020, the parents sent the district a 10-day notice of their intent to unilaterally place the student at Quad for the 2020-21 school year and seek funding from the district for that placement (Parent Ex. B at p. 1).

A. Due Process Complaint Notice

By due process complaint notice dated January 7, 2021, the parents asserted that the district failed to offer the student a free appropriate public education (FAPE) for the 2020-21 school year (Parent Ex. A at pp. 1-2).

The parents argued that the IEP developed by the July 2020 CSE was in "contrast to the evidence presented from [the student's] teachers, parents, and" neuropsychologist (Parent Ex. A at p. 2). The July 2020 CSE recommended "a large" ICT "class" despite the parents' concern that "the class size was too large and would not provide the support [the student] required" given her social, emotional, and attentional issues (*id.*). Also, that the recommended program "failed to provide a setting suitably structured and supportive to meet [the student's] needs" (*id.*). The parents contended that the July 2020 IEP present levels of performance did not adequately describe the student's "strengths and weakness," results of evaluations, or their concerns (*id.*). Further, the annual goals were vague and failed to address "every area of" the student's deficits (*id.*).⁵

The parents contended that the public school the student was assigned to attend for the 2020-21 school year was not appropriate (Parent Ex. A at p. 3). First, the parents stated that they were told that it "was not possible" to visit the assigned school after receiving the school location letter in August 2020 (*id.*). The information they were able to obtain indicated that the student would be in a zoom classroom of 25 students, which the parents argued was "entirely inappropriate" for the student (*id.*). The parents asserted that the student would not be able to participate in such a large classroom setting virtually nor would the proposed school be appropriate for in-person learning as it was "too large," requiring the student to navigate large groups and crowded hallways (*id.*). Based on the information learned, the parents determined that the "ICT placement" "would not provide the small, specialized program [the student] required to address her disabilities" (*id.*). The parents argued that the district proposed program "failed to provide a setting suitably structured and supportive to meet" the student's needs and was not the least restrictive environment for the student (*id.*). According to the parents, the proposed district program "did not include adequate supports to address the student's management needs or achieve the recommended annual goals" (*id.*).

The parents requested funding for the student's unilateral placement at the Quad School for the 2020-21 school year with transportation costs for the student to and from school (Parent Ex. A at p. 3). The parents asserts that the unilateral placement at the Quad School was appropriate for the student and that they cooperated with the CSE (*id.*).

⁵ The parents made arguments regarding remote instruction (Parent Ex. A at p. 2). Specifically, the parents asserted that the CSE failed to address the student's needs or provide adequate support for the during periods the student would receive remote instruction (*id.*). The parents argued that the student "struggled to work independently during remote instruction and required an individualized remote learning plan for 2020-2021" (*id.*).

B. Impartial Hearing Officer Decision

An IHO was appointed and the parties proceeded to an impartial hearing on April 26, 2021 which concluded on December 17, 2021 (Tr. pp. 1-370).⁶

In a decision dated February 17, 2022, the IHO credited the views of the parents' witnesses and the May 2020 neuropsychological evaluation and as a result, concluded that the district failed to offer the student a FAPE for the 2020-21 school year (IHO Decision at pp. 9-13). Specifically, the IHO found that the district's July 2020 IEP failed to note the student's "inability to function in the smaller class size" at her nonpublic school and her "inability to function in an overwhelming environment" (*id.* at p. 10). As such, the IHO found that the district based its recommendation for ICT services "on outdated material" (*id.*).⁷ Further, the IHO indicated that the district school psychologist testified that the ICT recommendation was based on the student present levels of performance but determined that the school failed to consider the student's recent issues identified by the nonpublic school and May 2020 neuropsychological evaluation (*id.*). Moreover, the IHO noted that the district school psychologist was unaware as to why the parents were requesting an IEP (rather than an IESP) and why the student's former "private school was no longer effective" (*id.*).

The IHO noted that district school psychologist indicated that the CSE had a pre-conference to go over all of the student's record; based on that meeting, he testified that the CSE was on the same page for what recommendation was best for the student (IHO Decision at pp. 9-10). The IHO found based on this, that the recommendation for ICT services was made prior to the CSE meeting with the student's parents (*id.* at p. 10). The IHO held that the district's "failure to review [the] Parent's updated materials undermined any recommendation the CSE made before the IEP meeting" (*id.* at p. 11). The IHO credited the parents' witnesses and evaluations to find that the recommendation of ICT services was not appropriate for the student (*id.* at pp. 11-12).⁸

Further, the IHO determined that the IEP failed to note any behavioral issues despite the student's clear behavioral issues at the nonpublic school (IHO Decision at p. 10). The IHO noted that no functional behavioral assessment (FBA) was conducted nor was a behavioral intervention plan (BIP) developed (*id.*). The IHO found that the annual goals in the IEP "did not adequately address the Student's social-emotional issues" that were identified in the May 2020 neuropsychological evaluation (*id.*).

⁶ Of the ten hearing dates, April 26, 2021 was a pre-hearing conference (Tr. pp. 1-6). There were four status update hearings from May 20, 2021 to August 5, 2021 (Tr. pp. 7-32). There were four substantive hearings from September 28, 2021 to December 17, 2021 (Tr. pp. 33-155, 161-370). On November 15, 2021, the district was unable to attend the scheduled hearing, the IHO held the hearing as a status update to extend the compliance date (Tr. pp. 156-60).

⁷ The IHO noted that although the districts school psychologist testified that he did not review or receive the parent's updated materials prior to the IEP meeting, the record demonstrated that the parent provided these materials to the CSE on June 5, 2020 (IHO Decision at p. 9).

⁸ The IHO also noted that despite the school psychologist's testimony that a more restrictive environment was considered, there was no indication of this in either the IEP or the prior written notice (IHO Decision at p. 12).

Next, the IHO turned to whether the unilateral placement at Quad was appropriate for the student (IHO Decision at pp. 13-15). Crediting the parent's witnesses, the IHO held that Quad was an appropriate placement for the student (id. at pp. 14-15).⁹ As to equitable considerations, the IHO held that parents gave the district the 10-day notice of unilateral placement on August 25, 2020 and that the student was not enrolled at the unilateral placement until September 15, 2020, and as such, the 10-day notice was timely (id. at p. 15). The IHO held that the parents cooperated with the district, provided updated materials, and made efforts to contact the public school (id.). There was no evidence that the parents prejudiced the district (id.). As such, the IHO found that the equities favor the parents' request for reimbursement (id. at p. 16). The IHO granted the parents' request for tuition reimbursement, and ordered the district to reimburse the parents for all tuition and fees at the unilateral placement for the 2020-21 school year (id. at pp. 15-16).

IV. Appeal for State-Level Review

The district appeals. The district contends that it offered the student a FAPE for the 2020-21 school year and that it timely offered the student a placement which would have been able to implement the July 2020 IEP. The district argues that the recommendation of a ICT services was the least restrictive environment for the student as the student was high functioning and a "restrictive program in a specialized school would not suit her." The district further asserts that the recommendation of ICT with counseling "would enable [the student] to work on improving her social skills with typically developing peers, while having the special education supports necessary to support her struggles with social interactions and executive functioning."

Moreover, the district argues that the July 2020 CSE used sufficient evaluative information to make its recommendations. The district notes that it used a 2019 district psychoeducational evaluation, a November 2019 private neuropsychological evaluation, a 2019 classroom observation, and the November 2019 IESP.¹⁰ The district contends that the 2020 evaluation referenced by the IHO was not an evaluation, but an updated recommendation, which was completed after the doctor spoke with the parent and that this updated recommendation did not make any recommendation regarding specific class sizes.

The district asserts that the IHO erred by finding that the IEP goals were insufficient regarding the student's social/emotional needs. The district argues that the IEP contained goals to address the student's social/emotional needs, specifically pointing to a note taking goal to help address the student's anxiety. Additionally, the district contends that the IHO finding regarding the student's goals was conclusory and not supported by the record.

The district argues that the IHO erred by finding that a classroom with ICT services was too large. Notably, the district asserts that neither of the parents' witnesses identified a specific class size that would have been appropriate for the student. The district argues that its recommended program was similar to the nonpublic school class size before the student's social/emotional issues were exacerbated. The district classroom with ICT services would have had 18 to 22 students with two teachers and the evidence suggests that the "student would have

⁹ The IHO held that the student made academic progress at Quad School (IHO Decision at p. 15).

¹⁰ It is noted that a 2019 neuropsychological evaluation was not entered into the hearing record.

actually performed better in the [district's] ICT program." According to the district, the in-person and remote learning ICT services at the assigned public school had smaller teacher-to-student ratios than the nonpublic school. Additionally, the district argues that the nonpublic school did not offer the student consistent counseling and that the district's recommended programming would have provided the student with "regularly scheduled Counseling sessions" which would have assisted "the Student with any" social/emotional "issues that the Student was experiencing."

Next, the district contends that IHO's FAPE determination was incorrect because the issues of an FBA or BIP were not before the IHO, and therefore, it was an error for the IHO to raise these claims sua sponte by making a determination that the district failed to conduct an FBA and develop a BIP. In the alternative, if the SRO were to determine that the issues of an FBA or BIP were properly before the IHO, the district argues that there was no evidence that the district was required to conduct an FBA or that student required a BIP. Notably, the IHO indicated that there were "clear behavioral issues" yet failed to cite any specifics from the hearing record. The district asserts that the student's present levels of performance and management needs "sufficiently outlined" the degree of student's social/emotional challenges.

The district asserts that the CSE's recommendations were not predetermined and the IHO erred in such a finding. Although the hearing record shows that the CSE met prior to the CSE meeting and "were generally on the same page as to what would be the best recommendation for the Student" there was no evidence that the CSE was unwilling to listen to the parents or that the parents were not given an opportunity to make objections and/or suggestions. The district argues that the parents and the nonpublic school representative were able voice their concerns and provide input for the IEP.

Finally, the district argues that any findings of procedural violations do not rise to the level of a denial of a FAPE. The district alleges that despite the IHO's finding of procedural violations in the creation of the student's IEP, the IEP was nevertheless reasonably calculated for the student to receive educational benefit and the parents were active participants in the decision-making process. As such, the district contends that to the extent any procedural violations or irregularities were supported by evidence, they did not individually or cumulatively result in a denial of FAPE to the student.

The parents, in their answer, counter that the IHO correctly found that the student was denied a FAPE for the 2020-21 school year. The parents argue that the district failed to evaluate the student, failed to consider the independent evaluative information they provided, failed to develop present levels of performance and goals that reflected the student's needs, and failed make the appropriate class recommendation.

The parents contend that the IHO properly held that Quad was appropriate for the student and that equitable considerations favored tuition reimbursement. Further, the parents noted that the IHO held that the parent submitted the additional evaluations to the CSE. The parents argue that the district failed to appeal these issues and as such, those findings should be deemed final, unappealed determinations.

Next, the parents assert that the IHO's determination that the district denied the student a FAPE should be upheld because the CSE did not consider all of the evaluative information, namely

the 2020 evaluative information that the parent had provided to the district. Since the district did not review those evaluations, the parents assert that the hearing record supports the IHO's finding that the CSE based its decisions on outdated information. The parents allege that present levels of performance and goals did not address the student's current difficulties at the time of the CSE meeting. The parents argue that the IHO correctly held that the CSE's recommended programming of ICT services was "entirely inappropriate" for the student.

Regarding the issue of the student's behavioral needs, the parents argue that the issue was properly before the IHO as the district witness was asked questions about a BIP on cross-examination without objection from the district.

Finally, the parents contend that the IHO properly found that the CSE had predetermined its recommendations. The parents assert that the district's failure to review any updated information undermines any recommendations made. The parents argue the procedural violations found by the IHO impeded the student's right to a FAPE.

V. Applicable Standards

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

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

procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245).

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

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).¹¹

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

¹¹ 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" (Andrew F., 137 S. Ct. at 1000).

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. Scope of Review

First, I will address which issues are properly before me in this appeal. The IDEA and its implementing regulations provide that a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its original due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.508[d][3][i], 300.511[d]; 8 NYCRR 200.5[i][7][i][a]; [j][1][ii]), or the original due process complaint is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.507[d][3][ii]; 8 NYCRR 200.5[i][7][b]).

Here, the IHO held that the unilateral placement at Quad was appropriate for the student and that equitable considerations favored tuition reimbursement (IHO Decision at pp. 13-16). The district has not appealed either of these determinations. Further, as discussed in more detail below, the district also did not allege that the IHO's findings of facts that describe how the parent sent evaluative materials to the district—including information from the social group speech-language pathologist, the neuropsychologist, and the psychiatrist—were made in error (IHO Decision at p. 6; see Parent Exs. M; N; P; Q at p. 1). As such, these findings have become final and binding on the parties and will not be further reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]).

B. CSE Process

1. Parental Input and Consideration of Evaluative Information

Turning next to the district's challenges to the IHO's determination that the district failed to offer the student a FAPE, the IHO found that the CSE failed to review the student's more recent "evaluative information," which the parents had emailed to the CSE (IHO Decision at pp. 6, 10-11). The IHO also found that the district school psychologist/representative testified that the ICT services recommendation was determined at a preconference prior to the CSE meeting and that the "failure to review [the parents'] updated materials undermined any recommendation the CSE made before or during the IEP meeting" (id. at pp. 10-11). On appeal, the district argues that it had

"sufficient evaluative material" from 2019 "to make a proper recommendation" for the student, and that the IHO erred in finding that the CSE failed to consider the neuropsychologist's May 28, 2020 "updated evaluation" because that document was, according to the district, merely an "updated recommendation" rather than an evaluation of the student. The parents disagree and request that the IHO's findings on this issue be upheld.

The IDEA sets forth procedural safeguards that include providing parents an opportunity "to participate in meetings with respect to the identification, evaluation, and educational placement of the child" (20 U.S.C. § 1415[b][1]). Federal and State regulations governing parental participation require that school districts take steps to ensure that parents are present at their child's IEP meetings or are afforded the opportunity to participate (34 CFR 300.322; 8 NYCRR 200.5[d]). Although school districts must provide an opportunity for parents to participate in the development of their child's IEP, mere parental disagreement with a school district's proposed IEP and placement recommendation does not amount to a denial of meaningful participation (see T.F. v. New York City Dep't of Educ., 2015 WL 5610769, at *5 [S.D.N.Y. Sept. 23, 2015]; A.P. v. New York City Dep't of Educ., 2015 WL 4597545, at *8, *10 [S.D.N.Y. July 30, 2015]; E.F. v. New York City Dep't of Educ., 2013 WL 4495676 at *17 [E.D.N.Y. Aug. 19, 2013] [stating that "as long as the parents are listened to," the right to participate in the development of the IEP is not impeded, "even if the [district] ultimately decides not to follow the parents' suggestions"]; P.K. v. Bedford Cent. Sch. Dist., 569 F. Supp. 2d 371, 383 [S.D.N.Y. 2008] [noting that "[a] professional disagreement is not an IDEA violation"]; Sch. for Language & Commc'n Dev. v. New York State Dep't of Educ., 2006 WL 2792754, at *7 [E.D.N.Y. Sept. 26, 2006] [finding that "[m]eaningful participation does not require deferral to parent choice"]). When determining whether a district complied with the IDEA's procedural requirements, the inquiry focuses on whether the parents "had an adequate opportunity to participate in the development" of their child's IEP (Cerra, 427 F.3d at 192). Moreover, "the IDEA only requires that the parents have an opportunity to participate in the drafting process" (D.D-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at *11 [E.D.N.Y. Sept. 2, 2011], *aff'd*, 506 Fed. App'x 80 [2d Cir. Dec. 26, 2012], quoting A.E. v. Westport Bd. of Educ., 463 F. Supp. 2d 208, 216 [D. Conn. 2006]; see T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 420 [2d Cir. 2009] [noting that the IDEA gives parents the right to participate in the development of their child's IEP, not a veto power over those aspects of the IEP with which they do not agree]).

An initial evaluation of a student must include a physical examination, a psychological evaluation, a social history, a classroom observation of the student, and any other "appropriate assessments or evaluations" as necessary to determine factors contributing to the student's disability (8 NYCRR 200.4[b][1]). A CSE may direct that additional evaluations or assessments be conducted in order to appropriately assess the student in all areas related to the suspected disabilities (8 NYCRR 200.4[b][3]). Any evaluation of a student with a disability must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parent, that may assist in determining, among other things the content of the student's IEP (20 U.S.C. § 1414[b][2][A], [B]; 34 CFR 300.304[b][1][ii]; see Letter to Clarke, 48 IDELR 77 [OSEP 2007]). In particular, a district must rely on technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors (20 U.S.C. § 1414[b][2][C]; 34 CFR 300.304[b][3]; 8 NYCRR 200.4[b][6][x]). Whether it is an initial evaluation or a reevaluation of a student, a district must ensure that a student is appropriately

assessed in all areas related to the suspected disability, including, where appropriate, social and emotional status (20 U.S.C. § 1414[b][3][B]; 34 CFR 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]). An evaluation of a student must be sufficiently comprehensive to identify all of the student's special education and related services needs, whether or not commonly linked to the disability category in which the student has been classified (34 CFR 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]; see Application of the Dep't of Educ., Appeal No. 07-018).

In developing the recommendations for a student's IEP, the CSE must consider the results of the initial or most recent evaluation; the student's strengths; the concerns of the parents for enhancing the education of their child; the academic, developmental and functional needs of the student, including, as appropriate, the student's performance on any general State or district-wide assessments as well as any special factors as set forth in federal and State regulations (34 CFR 300.324[a]; 8 NYCRR 200.4[d][2]).

Here, the evidence in the hearing record does not support the district's claims that it had sufficient evaluative information or parental input in order to make an appropriate recommendation for the student. Rather, the evidence shows that the district failed to review the evaluative materials the parent sent to the district on June 5, 2020, which, as discussed below, describe a change in her special education needs over the course of the 2019-20 school year (see Parent Exs. D; M; N; P; Q at p. 1). Although the district attempts to assert that the updated information was not necessary to make an appropriate recommendation for the student, review of the hearing record supports the IHO's finding that the CSE's failure to consider the updated evaluative information "undermined" its recommendation and resulted in a denial of a FAPE (IHO Decision at p. 13).

First, I note that the evidence in the hearing record does not contradict the IHO's finding that the parent sent evaluative information dated May and June 2020 to the district prior the July 2020 CSE meeting. The parent presented a copy of the email she sent to the district on June 5, 2020 indicating that she had attached "additional evaluations and letters" from the student's clinicians (Parent Ex. Q at p. 1).¹² This email was sent to the district's special education office (*id.*). The parent testified that she attached the May 25, 2020 letter from the nonpublic school psychologist, the May 17, 2020 letter from the student's social skills speech-language pathologist, and the June 1, 2020 letter from the student's psychiatrist to the June 2020 email (Tr. pp. 337; see Parent Exs. D; M; N). The parent initially stated that she had also attached a "letter" from the neuropsychologist (Tr. p. 337), then indicated she might have also attached to the email Parent Exhibit P, the May 28, 2020 document prepared by the neuropsychologist, which the parent described as "the updated neuropsych report" (Tr. pp. 337-38).¹³

In his direct testimony by affidavit, the district school psychologist, who also served at the July 2020 CSE meeting as the district representative/CSE chairperson, stated that to develop the student's July 2020 IEP, he reviewed the September 27, 2019 district psychoeducational evaluation

¹² This email also shows evidence that a "docs.zip" or compressed file attachment was sent (Parent Ex. Q at p. 1).

¹³ Although the parent characterized the information about the student that the neuropsychologist provided as both a "letter" and an "updated neuropsych report," there is nothing in the hearing record to indicate that these are two separate documents (see Tr. pp. 337-38; Parent Ex. P).

report, a November 24, 2019 privately obtained neuropsychological evaluation report, the October 2, 2019 classroom observation, the November 25, 2019 IESP, and "all previous IEPs, dating back to 2012" (Tr. p. 111; Dist. Ex. 10 ¶ 6).¹⁴ According to the district representative, the CSE "briefly" reviewed those documents and that "what's in the IEP is pretty much what we discussed" (Tr. pp. 120-22, 124).

Further, the district representative testified that the first time he saw the June 1, 2020 letter from the psychiatrist was when he received the parents' disclosure in 2021, and the parents did not provide that letter to him prior to the July 2020 CSE meeting, nor did they give the letter to him during the meeting (Tr. pp. 101-02; see Parent Ex. N). The district representative further confirmed that prior to the July 2020 CSE meeting he had not received the May 17, 2020 letter from the social skills speech-language pathologist and it "was not one of the documents that [the CSE] had available to us" (Tr. p. 110; see Parent Ex. M). There is no indication from the district representative that he had seen or that the CSE reviewed the May 25, 2020 letter from the nonpublic school psychologist or the May 28, 2020 document prepared by the neuropsychologist (see Tr. pp. 100-45; Dist. Ex. 10). However, he also conceded that it was "always best to have as much information as possible when making a recommendation" and that having the psychiatrist's letter "would have been beneficial" (Tr. pp. 101-02).

At no point during the hearing or in the request for review did the district contend that the parent did not send the evaluative materials to the district as she asserted. Nor did the district appeal the IHO's finding of fact that the parent sent documents prepared by the neuropsychologist, psychologist, and social skills speech-language pathologist to the district (see IHO Decision at p. 6). Notably, the district in its request for review does not try to assert that these documents were not available, but instead argues that the document prepared by the neuropsychologist "was not an evaluation, but an updated recommendation for the [s]tudent," arguing that "[n]o new testing was done" (Req. for Rev. ¶15; see Parent Ex. P). That argument, even if accurate, does not overcome the flaw in the district's case, which was among the principal findings by the IHO, namely that the relevance of the older information that was properly before the CSE should have been reexamined by the CSE in light of newer input provided by the parents regarding the student's most recent progress and school experiences. On the one hand, a student need not be re-evaluated each and every time an IEP is modified by a CSE, yet on the other hand, an annual review of a student's IEP is not a mere formality in which only the information from the last re-evaluation or a formal evaluation can be considered. Federal regulations provide that

Each public agency must ensure that, subject to paragraphs (b)(2) and (b)(3) of this section, the IEP Team—

- (i) Reviews the child's IEP periodically, but not less than annually, to determine whether the annual goals for the child are being achieved; and
- (ii) Revises the IEP, as appropriate, to address—
 - (A) Any lack of expected progress toward the annual goals described in § 300.320(a)(2), and in the general education curriculum, if appropriate;

¹⁴ The hearing record does not include the November 2019 private neuropsychological evaluation report or IEPs dating back to 2012 (Parent Exs. A-2; Dist. Exs. 1-11).

- (B) The results of any reevaluation conducted under § 300.303;
- (C) Information about the child provided to, or by, the parents, as described under § 300.305(a)(2);
- (D) The child's anticipated needs; or
- (E) Other matters.

(34 CFR 300.324[b][1] [emphasis added]). The new information provided to the district's special education office by the parents for distribution to the members of and consideration by the CSE is precisely the process that should be followed; otherwise, Congress would not have bothered with an annual review requirement at all (see 20 U.S.C. § 1414[d][4][A]). Therefore, the evidence in the hearing record does not afford a basis to overturn the IHO's determination that the district received these documents prior to the July 2020 CSE meeting and I see no reason to reverse the IHO's finding of fact on this issue. The evidence is sufficient to support that district had the May and June 2020 documents from the student's clinicians and should have transmitted that information to the CSE; for reasons not apparent in the hearing record, the CSE did not receive it from other district employees and/or received it but did not know that there was the more, up-to-date information regarding the student's current needs. This flaw is chargeable to the district, not the parents. As further described below, it cannot be said that this defect had no effect upon the parents' participation in the CSE process.

In his direct testimony by affidavit, the district representative stated that the July 2020 IEP was appropriate "because it contained [the student's] most recent present levels of performance [], with her social emotional, behavioral and academic needs" (Dist. Ex. 10 ¶ 8). The district representative further stated that the July 2020 IEP present levels of performance were developed at the CSE meeting and were "an accurate, up-to-date, representation" of the student's present level of functioning and academic achievements (Tr. p. 122; Dist. Ex. 10 ¶ 10). He noted that the psychoeducational evaluation and neuropsychological evaluation were completed less than one year prior to the July 2020 CSE meeting as well as the social history update, and recent classroom observation (id.). The district representative opined that this combined information, "provided a clear understanding" of the student's "current academic and functional levels" (id.).

Specifically, the district representative testified that the information for the social development section of the July 2020 IEP was gathered by reviewing the student's previous IESP, the psychoeducational evaluation report, and the "documents that were given to [the CSE] previously," and that the student's social interactions and social needs were discussed at the meeting and accurately represented in the IEP (Tr. pp. 122-126; see Dist. Ex. 1 at p. 4). The parent answered "[n]o, I don't believe so" when asked if there was any discussion about the clinicians' letters at the July 2020 CSE meeting (Tr. pp. 343-44; see Parent Exs. D; M; N). The parent also testified that she informed the CSE that the student "was having significant difficulty with peer relationships, making friends, that she was isolating herself, that she was feeling depressed and anxious and having to leave the classroom, to go to the nurse's office," including that the parent had to pick the student up "frequently from school before the end of school" (Tr. p. 339). She further testified that she reported to the CSE that the student found it "increasingly difficult to navigate the hallways of school and the cafeteria" and that her "performance in school [was] declining as a result" of having to leave the classroom so often (Tr. pp. 339-40). The more recent description of the student's school performance provided by the parent and the documents she

submitted is not reflected in the July 2020 IEP present levels of performance (compare Tr. pp. 339-40 and Parent Exs. D; M; N; P, with Dist. Ex. 1 at pp. 1-4).

In addition, when creating an IEP for the 2020-21, it would have been appropriate to consider the student's progress under the IESP developed for the 2019-20 school year, but the hearing record included un rebutted evidence that during the 2019-20 school year, despite the parent's attempts to locate services and the district's obligation to provide them, the student did not receive the SETSS or counseling services required by her IESP, and there was no evidence that the July 2020 CSE was aware of that fact or otherwise discussed the state of affairs at that juncture (see Tr. pp. 330-31, 340).¹⁵ It is questionable how the CSE could have reviewed the student's programming needs in an annual review for the student without discussing how she progressed or failed to progress without the IESP services.¹⁶ Moreover, the parent's May 12, 2020 and June 5, 2020 emails put the district on notice of the parent's position that the student's needs had changed and that full time special education programming was necessary (Parent Ex. E). Further, the district's representative could not recall any substantive discussion that was had about the student's current needs at the July 2020 CSE meeting, nor could he recall the parent's concerns or the concerns of the nonpublic school psychologist (Tr. pp. 132). Additionally, the district representative testified that he did not know why the parent requested an IEP rather than an IESP (Tr. pp. 131-32). Review of the July 2020 IEP shows that it fails to include most if not all of these parental concerns, and notably the social development portion of the IEP, the student's area of

¹⁵ Under State law, parents of a student with a disability who have privately enrolled their child in a nonpublic school may seek to obtain educational "services" for their child by filing a request for such services in the district of location where the nonpublic school is located on or before the first day of June preceding the school year for which the request for services is made (Educ. Law § 3602-c[2]). "Boards of education of all school districts of the state shall furnish services to students who are residents of this state and who attend nonpublic schools located in such school districts, upon the written request of the parent" (Educ. Law § 3602-c[2][a]). In such circumstances, the district of location's CSE must review the request for services and "develop an [IESP] for the student based on the student's individual needs in the same manner and with the same contents as an [IEP]" (Educ. Law § 3602-c[2][b][1]). The CSE must "assure that special education programs and services are made available to students with disabilities attending nonpublic schools located within the school district on an equitable basis, as compared to special education programs and services provided to other students with disabilities attending public or nonpublic schools located within the school district (*id.*). State guidance explains that providing services on an "equitable basis" means that "special education services are provided to parentally placed nonpublic school students with disabilities in the same manner as compared to other students with disabilities attending public or nonpublic schools located within the school district" ("Chapter 378 of the Laws of 2007—Guidance on Parentally Placed Nonpublic Elementary and Secondary School Students with Disabilities Pursuant to the Individuals with Disabilities Education Act (IDEA) 2004 and New York State (NYS) Education Law Section 3602-c," Attachment 1 at p. 11, VESID Mem. [Sept. 2007], available at <http://www.p12.nysed.gov/specialed/publications/policy/nonpublic907.pdf>). The guidance document further provides that "parentally placed nonpublic students must be provided services based on need and the same range of services provided by the district of location to its public school students must be made available to nonpublic students, taking into account the student's placement in the nonpublic school program" (*id.*).

¹⁶ Any failure to implement the student's IESP services during the 2019-20 school year is not itself a basis for the denial of a FAPE in this proceeding since the parents did not include such a claim in their due process complaint notice. However, the facts related to the most recent services were relevant to the IEP planning process for the 2020-21 school year. In the request for review, the district argues that the proposed placement would have been appropriate because it had a more intensive student-to-teacher ratio than the student's nonpublic school (Req. for Rev. at p. 7). This argument is of questionable relevance as it appears that the CSE may have simply assumed that the student had been receiving services.

greatest parental concern at the time of the July 2020 CSE meeting, was nearly identical to the November 2019 IESP (compare Dist. Ex. 1 at p. 4 with Dist. Ex. 7 at p. 5). As such, the district's failure to discuss at the CSE meeting or include the information from the letters provided by the parent and the recent concerns of the parent in the IEP demonstrates that while the parent and the nonpublic school psychologist submitted concerns to the CSE about the student's deteriorating ability to function in school due to her escalating social/emotional needs, the IEP did not adequately reflect these concerns. Without any consideration of the new information submitted to the district by the parents during summer 2020, the CSE admittedly relied on the otherwise available evaluative information from 2019, some of which had been rendered stale and should have been supplemented by the more recent input concerning the student's declining ability to function in her then-current setting before the CSE made a recommendation for services. Accordingly, the concerns of the parent and nonpublic school psychologist effectively went unconsidered, which significantly impeded the parents' participation in the development of the student's IEP. Indeed, there was seemingly no explicit acknowledgment by the district personnel that the CSE being asked to create an IEP for the student instead of an IESP or discussion of the circumstances relevant to that change. As discussed below, the information the parent provided to the district on June 5, 2020 described significant changes to the student's social/emotional status since the November 2019 IESP was developed and absent any consideration of such information by the CSE, the resultant IEP did not accurately reflect the student's current social/emotional needs.

In a letter dated May 17, 2020, the speech-language pathologist who had worked with the student since fall 2017 in a small, weekly social group indicated that the student's keen perceptive mind, and her succinct, unfiltered statements "often startl[e] her peers with their veracity" (Parent Ex. M). According to the speech-language pathologist, the student struggled greatly with consistent participation in her small social group, as she dropped in and out of interaction and her attention wavered (id.). The letter noted that the student made references that were frequently baffling to her peers as she neglected to explain context, that the student did not code switch, and spoke to adults, peers, and teachers with identical word choice and politeness markers (id.). In addition, the speech-language pathologist explained that although the student genuinely cared for the peers in the social group and was extremely grateful for any act of kindness directed at her, she lacked understanding of how a truthful statement could be received negatively and consequently damage her social standing (id.). Further, the speech-language pathologist noted that the student did not understand how her affect was communicated and that these expressive and pragmatic language qualities impinged the student's access to education in her general education setting (id.). The speech-language pathologist stated that the student's attention wavered, she often required extra time to formulate her ideas, she was socially marginalized, and she did not see the repercussions of her statements (id.). Additionally, the speech-language pathologist explained that "[a] therapeutic educational environment [was] critical" at that point in the student's education; that her language deficits prevented her from consistently participating in a general education classroom, and that the student had "the qualities necessary to soar academically" but her current educational environment prohibited her growth (id.).

The school psychologist from the nonpublic school the student had attended since first grade and including the 2019-20 school year prepared a letter dated May 25, 2020, in which she indicated that in a mainstream setting, the student "misse[d] consistent feedback from trained teachers throughout her day and across subjects, while being constantly bombarded by stimulation that [left] her feeling overwhelmed, uncomfortable, and frustrated" (Parent Ex. D). In addition,

the letter indicated that the student was struggling in a classroom of 15 students and one teacher, which resulted in her feeling overstimulated to a point where she was unable to participate and learn, she engaged in negative coping strategies, and her self-esteem suffered (id.). The school psychologist stated that the student was removing herself on a daily basis from classrooms and other settings such as gym and music classes so that she could "recalibrate her equilibrium" and that it was "difficult for her to recover from these all-too-frequent moments" leaving her to miss multiple learning opportunities each day (id.). The letter explained that the student wanted to make friends and share her intellectual gifts with others, but required targeted, consistent attention and instruction to reach her potential (id.). The school psychologist opined that the student "require[d] and would profoundly benefit from a specialized therapeutic school setting" for twice exceptional students (id.).

In a document dated May 28, 2020, the neuropsychologist who had conducted a neuropsychological evaluation in 2016 and a social/emotional evaluation in 2019 with the student prepared a document describing an "update" interview conducted on May 12, 2020 (Parent Ex. P at p. 1). The neuropsychologist stated that the student demonstrated academic talents and functioned at an exceptionally high cognitive level, exhibited no difficulty with the content of work presented to her from any subject area, and excelled academically with organizational support from the school learning specialist; however, she demonstrated frequent meltdowns in class and was completely socially disengaged from her peers (id.). In the update, the neuropsychologist reported that the student presented with difficulties in the social/emotional realm, specifically, that she was an extremely rigid person who possessed a specific perspective and ideas about how to do things to such an extreme degree that it interfered with her functioning (id.). In addition, the neuropsychologist indicated that the student became easily stuck and upset if a situation or an assignment required her to be flexible or that she approach something in a different way, resulting in fits of frustration that required one-on-one teacher support (id.). Further, the neuropsychologist explained that the student met with the school psychologist or school nurse on a nearly daily basis to help calm down and process an experience that confused or overwhelmed her, and that these ongoing experiences of frustration and confusion led to periods of depression that had increased (id.). According to the neuropsychologist, the student's ability to tolerate the size and noisy environment of her school was decreasing and she was increasingly sensitive to the noise level and "hustle-and-bustle" of the hallways, stimulation that increased her anxiety (id.). The neurologist stated that even with the support of medication to address her mood, weekly psychotherapy and weekly social skills group, the student continued to have these episodes (id.).

In addition, the neuropsychologist indicated that although the student's self-isolation had persisted for years, it was beginning to take a more obvious emotional toll on the student's mood and level of irritability, and even though the student had attended the private school since kindergarten, she had no friends and typically was off on her own (Parent Ex. P at p. 2). According to the neuropsychologist, the student avoided interactions with others, even when they might have been necessary to clarify assignments or work on projects with peers (id.). The neuropsychologist explained that the student's pragmatic skills to engage in interactions were quite weak in terms of eye contact and even facing the person she was speaking to, and she struggled to understand others' perspectives and avoided interactions because she did not want others to be upset with her (id.). In addition, the neuropsychologist noted that the student reported that she used avoidance as a way of managing her social anxiety, a cycle that only increased her anxiety because she did not possess basic skills to interact with peers (id.). The neuropsychologist indicated that the student's social

limitations as of May 2020, and her being in seventh grade were concerning because she was ill equipped to navigate interactions around learning and engage in necessary functions in the community (*id.*). After reviewing prior recommendations for the student's nonpublic school to implement social supports and the student's current social functioning and emotional state, the neuropsychologist concluded that "a revised recommendation" was clearly necessary (*id.*). The neuropsychologist recommended that the student attend "a specialized school setting" that included "a small, calm classroom special education classroom that serves twice exceptional students" with "an imbedded social skills curriculum" (*id.*).^{17, 18}

By letter dated June 1, 2020, the psychiatrist who had been caring for the student since March 2016 indicated that the parents and student had "thoroughly engaged in intensive treatment to address her underlying concerns," and that she had "responded quite well to treatment," including medication, individual, family and group therapy (Parent Ex. N; *see* Tr. p. 258). In the letter the psychiatrist explained that the student's school supports and treatment team had been in frequent contact and collaborated as to how best to support the student emotionally and academically; and that it was at this intersection of emotional support for a gifted child within an educational setting that there had been persistent challenges (Parent Ex. N). Further, the psychiatrist indicated that despite small class sizes of approximately 15 students per teacher and multiple in-school supports within the counseling, nursing and administrative staff, the student continued to struggle to meet her academic potential at the nonpublic school (*id.*). In addition, the psychiatrist noted that the student's emotional and social development had not progressed within her academic setting despite intensive efforts by the treatment team, school staff and family (*id.*). According to the psychiatrist, the student had very few friends and was frequently overwhelmed by sensory stimuli within various school settings, which impacted her ability to be educated on a daily basis (*id.*). The psychiatrist recommended a change in the student's educational environment, and provided the "medical opinion that [the student] would benefit from a specialized educational setting to meet her social, emotional and educational needs" with "educational staff with

¹⁷ Guidance regarding what are sometimes referred to a "twice exceptional" or gifted students from the United States Department of Education's Office of Special Education Programs (OSEP) reiterates that the IDEA is silent on the topic of gifted students, and "gifted" is not a qualifying disability requiring special education and related services (*see Letter to Anonymous*, 55 IDELR 172 [OSEP 2010]). Thus, intellectually gifted students are not considered disabled solely on the basis of intellectual giftedness.

¹⁸ In New York, policymakers have opted to use the term "gifted" and have not, to date, employed the term "twice exceptional" (*see, e.g.*, 8 NYCRR Part 142). While twice-exceptional, or gifted students with a disability—such as the student in this case— can present a challenge when teachers have a range of student learning rates within the same classroom, there is no per se federal requirement for gifted education. The decisions regarding any gifted programming are made at the state and local level. New York State, unlike some other states, has not developed explicit standards for gifted programming in statute or regulation. Instead, the legislature made some funding available to "encourage the development of programs to ensure that gifted students reach their full potential, [but] it does not specify or mandate that any particular type of program be implemented. The decision as to the type of program to be implemented (provided the program comports with the Commissioner's guidelines) and its operation and management, is vested in the discretion of the governing boards of local school districts" (*Bennett v. City Sch. Dist. of New Rochelle*, 114 A.D.2d 58, 63 [2nd Dep't 1985]). What is clear is that a student may not be excluded from eligibility for special education merely because the student also has academic strengths (*see Letter to Anonymous*, 55 IDELR 172 [OSEP 2010]). In this case, the recommendation for twice exceptional or gifted programming was not fleshed out or argued by the parties. However, it is noted that the district would not be required to create or develop new programming to address twice exceptional/gifted students (*see Application of a Bd. Of Educ.*, Appeal No. 21-219).

specialized training to educate children on the autism spectrum," and "training to recognize and intervene" with children with anxiety, organizational, sensory and attention-based vulnerabilities (*id.*). The psychiatrist also stated that the student was "a gifted child, and that academic rigor should also be considered such that she [would] still be challenged in meaningful ways" (*id.*).

As indicated above, the parent testified that she attached the above letters/update to her June 5, 2020 email that she sent to the CSE, a finding of fact made by the IHO that the district did not challenge on appeal. The July 2020 IEP does not include the updated information in the present levels of performance (compare Dist. Ex. 1 at pp. 1-20, with Parent Exs. D; M; N; P), which is notable because the performance about which the parent was most concerned when she requested the IESP conversion to an IEP, was the student's social/emotional performance and those present levels were not changed from what was contained in the November 2019 IESP (compare Dist. Ex. 1 at p. 4, with Dist. Ex. 7 at p. 5).¹⁹ The district's failure to consider the updated input provided by the parent prior to the CSE meeting, and the July 2020 CSE's apparent lack of awareness regarding the non-implementation of services listed in the student's IESP, significantly impeded the parents' participation in the development of the IEP and there is an insufficient basis to reverse the IHO's determination that there was a denial of a FAPE to the student.²⁰

2. Predetermination

One additional point in the IHO's reasoning warrants further discussion. Regarding the claim and finding of predetermination based upon the testimonial statement of the district's school psychologist/representative, the courts have held that under IDEA the consideration of possible recommendations for a student prior to a CSE meeting is not prohibited as long as the CSE understands that changes may occur at the CSE meeting (T.P., 554 F.3d at 253; A.P., 2015 WL 4597545, at *8-*9; see 34 CFR 300.501[b][1], [3]; 8 NYCRR 200.5[d][1], [2]). The key factor with regard to predetermination is whether the district has "an open mind as to the content of [the student's] IEP" (T.P., 554 F.3d at 253; see D.D-S., 2011 WL 3919040, at *10-*11; R.R. v. Scarsdale Union Free Sch. Dist., 615 F. Supp. 2d 283, 294 [E.D.N.Y. 2009], aff'd, 366 Fed. App'x 239 [2d Cir. Feb. 18, 2010]). Districts may "prepare reports and come with pre[-]formed opinions regarding the best course of action for the child as long as they are willing to listen to the parents and parents have the opportunity to make objections and suggestions" (DiRocco v. Bd. of Educ. of Beacon City Sch. Dist., 2013 WL 25959, at *18 [S.D.N.Y. Jan. 2, 2013] [alternation in the original], quoting M.M. v. New York City Dept. of Educ. Region 9 (Dist. 2), 583 F. Supp. 2d 498, 506; [S.D.N.Y. 2008]; see B.K. v. New York City Dept. Of Educ., 12 F. Supp. 3d 343, 358-59 [E.D.N.Y. 2014] [holding that "active and meaningful" parent participation undermines a claim of predetermination]). The district correctly argues on appeal that the fact the CSE "usually" holds a "pre-conference" prior to a CSE meeting, does not in itself, require a finding a predetermination

¹⁹ The strategies recommended by the July 2020 CSE to address the student's management needs were not changed from the November 2019 IESP management needs and do not reflect the student's social/emotional management needs at the time of the July 2020 CSE meeting (compare Dist. Ex. 1 at p. 5, with Dist. Ex. 7 at p. 6).

²⁰ The procedural violations found rise to the level of a denial of a FAPE as they impeded the student's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision-making process or caused a deprivation of educational benefits (see 20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]).

(see Req. for Rev. ¶¶ 22-23; IHO Decision at pp. 10-11). The IHO referred to the district school psychologist/representative's testimony that during the pre-conference, staff would conduct a record review, and attempt to "come to a consensus" as to what would be the "best recommendation" for the student (see Tr. pp. 119-20; IHO Decision at pp. 10-11). That evidence alone is an insufficient basis for finding predetermination. As such, the hearing record does not support a finding that the CSE's recommendations were predetermined or that the district's process for conducting a pre-meeting, was a denial of FAPE. The hearing record also does not indicate that at the July 2020 meeting, the parents were prohibited from participating or that the district personnel were not open to the concerns and suggestions of the parents. It appears that during the July CSE meeting the district may have been unaware of the updated written input previously sent by the parents regarding the recent concerns that arose during the 2019-20 school year.²¹ The parent did testify that she and the private school psychologist raised concerns regarding the student's social emotional decline, her desire to leave the classroom, and their view that an approach with ICT services would result in a larger classroom setting during the CSE meeting, but that the district personnel explained their view that a smaller special class setting in the district would not be appropriate due to her academic standing (Tr. pp. 339-340, 343).

Instead, in direct testimony by affidavit, the nonpublic school psychologist stated that she attended the July 2020 CSE meeting and explained that the student was "intellectually gifted" and exhibited executive functioning and social challenges, as well as emotional liability, and that she recommended a "clinically therapeutic setting with a small teacher-student ratio" placement (Parent Ex. S ¶¶ 6-8). In the parents' August 25, 2020 ten day notice letter, they confirmed attendance at the July 2020 CSE meeting and regarding the ICT services recommendation "expressed concern that the class size was too large and would not provide the support" the student required to address her needs (Parent Ex. B at p. 2). As discussed above, the parent testified that she informed the CSE that the student lacked peer relationships, had difficulty remaining in class, and as a result, experienced increased academic difficulties (see Tr. pp. 339-40). Therefore, the evidence in the hearing record shows that the parent and nonpublic school psychologist did participate in the July 2020 CSE meeting and suggests that the district did not lack an open mind regarding new input about the student. While the parents did not agree with the district's recommendations, mere disagreement does not suffice to demonstrate that the district predetermined the outcome of the process. Although school districts must provide an opportunity for parents to participate in the development of their child's IEP, mere parental disagreement with a school district's proposed IEP and placement recommendation does not amount to a denial of meaningful participation (see T.F. v. New York City Dep't of Educ., 2015 WL 5610769, at *5 [S.D.N.Y. Sept. 23, 2015]; A.P. v. New York City Dep't of Educ., 2015 WL 4597545, at *8, *10 [S.D.N.Y. July 30, 2015]; E.F. v. New York City Dep't of Educ., 2013 WL 4495676 at *17 [E.D.N.Y. Aug. 19, 2013]).

I find that the denial of a FAPE in this case is more likely due to bureaucratic neglect on the part of district personnel or processes regarding the routing of the parents' written input to the CSE rather than any intentional unwillingness of district personnel to consider input from the parents during the July 2020 CSE meeting. Even though I do not find that the IHO's

²¹ The parent testified that there was no discussion of the documents during the meeting (Tr. pp. 343-44), and it is surprising that neither side would bring them up during the CSE meeting.

predetermination finding was sound, it does not require reversal of the IHO's decision overall. As discussed in detail above, the July 2020 IEP nonetheless failed to identify the student's current needs due to the CSE's procedural failure to consider highly relevant written input concerning the student's social/emotional functioning that post-dated the 2019 evaluative information in crafting its recommendations for the student for the 2020-21 school year, thereby denying a FAPE to the student.

VII. Conclusion

Having determined that the evidence in the hearing record supports the IHO's determination that the district failed to offer the student a FAPE for the 2020-21 school year, the necessary inquiry is at an end. The district has not appealed the IHO's findings that the unilateral placement at Quad was appropriate and that equitable considerations weighed in favor of an award of tuition reimbursement. As such, those findings 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]).

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

THE APPEAL IS DISMISSED.

Dated: Albany, New York
May 23, 2022

JUSTYN P. BATES
STATE REVIEW OFFICER