



The University of the State of New York

The State Education Department

State Review Officer

www.sro.nysed.gov

No. 19-007

Application of the BOARD OF EDUCATION OF THE PLEASANTVILLE UNION FREE SCHOOL DISTRICT for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:

Shaw, Perelson, May & Lambert, LLP, attorneys for petitioner, by Garrett L. Silveira, Esq.

Littman Krooks, LLP, attorneys for respondents, by Marion M. Walsh, 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 a free appropriate public education (FAPE) to respondents' (the parents') daughter and ordered it to reimburse the parents for their daughter's tuition costs at the Riverview School (Riverview) for the 2016-17 and 2017-18 school years. The appeal must be sustained.

II. Overview—Administrative Procedures

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

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

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

III. Facts and Procedural History

Due to developmental delays, the student received services through the Early Intervention Program and the Committee on Preschool Education (CPSE) (Parent Ex. A at pp. 2-3). At five and a half years old, she transitioned to the CSE where she was found eligible for special education as a student with an other health impairment (id. at p. 3). The student attended a district elementary school for kindergarten; however, she "struggled to remain on task during independent work and demonstrated highly variable inattention" (id.). She was provided with the support of an aide to assist with attending (id.). In first grade the student began receiving daily resource room instruction; in second and third grades she received group counseling sessions and "[i]ntegrated [r]ecess" to support the development of social skills (id.). In addition to the support of a 1:1 aide,

resource room services, counseling, and integrated recess the student received speech-language, occupational, and physical therapies throughout elementary school (*id.*). For both middle school and high school the student received support through the district's individual support program (ISP) (*id.*). In tenth grade (2015-16 school year), the parent reported that the student was "back sliding," seemed lost in class, and demonstrated significant struggles with adaptive living skills, completing homework, and inattention (Dist. Ex. 9 at p. 3).

On January 29, 2016, the student's mother completed a residential profile form and wrote a parent statement that was submitted to Riverview (Parent Ex. Y at pp. 1-4). By letter dated April 21, 2016, the student's mother was notified of the student's acceptance at Riverview for summer 2016 and the 2016-17 academic school year (Parent Ex. Z at pp. 1-2). Around this same time the parents sought and obtained a private psychoeducational evaluation for the purpose of "gaug[ing] [the student's] current level of intellectual, academic, and emotional functioning for diagnostic impressions, personality dynamics, and educational recommendations" (Parent Ex. I at p. 3). In a report dated May 7, 2016, the parents' private psychologist opined that the student required a residential placement to address her academic and organizational needs as well as foster her activities of daily living (ADL) skills and independence (Parent Ex. I at pp. 20-22).

By letter dated May 9, 2016, the parents provided a copy of the private psychologist's May 7, 2016 evaluation to the district and requested that it reconsider the student's transition plan and services at her May 17, 2016 CSE meeting and "provide a completely different focus and level of intensity" (Parent Ex. I at p. 1). According to the letter, the parents believed that the CSE needed to "conduct a search for an appropriate residential program for [the student] with 24/7 conditioning that c[ould] help her make up transition/adaptive living skills and acquire some independence" (*id.*). The parents cited the recommendations in the private psychologist's evaluation as justification for a residential placement for the student (*id.*). In closing, the parents reserved their right to unilaterally place the student and seek reimbursement and compensatory services if the district did not recommend an appropriate residential program and services to address the student's "significant needs" (*id.* at p. 2).

A CSE convened on May 17, 2016 to conduct a program review and the student's annual review (Dist. Ex. 5 at p. 1). For the 2016-17 school year, the May 2016 CSE recommended that the student continue in the ISP, which consisted of a 15:1 special class for English (modified English) one time daily for 40 minutes; a 15:1 special class for social studies one time daily for 40 minutes (modified social studies); a 12:1+(3:1) special class for ISP study skills one time daily for 40 minutes; a 12:1+(3:1) special class for ISP study skills one time daily on alternate days for 40 minutes; consultant teacher services (direct ISP) for math one time daily for 40 minutes; consultant teacher services (direct and indirect ISP) in science class one time daily for 40 minutes; consultant teacher services (direct and indirect ISP) for vocational skills two times daily for 40 minutes; and consultant teacher skills (direct and indirect ISP) for physical education one time on alternate days for 40 minutes (direct and indirect ISP) (*id.* at p. 10). The CSE also recommended the following related services: one 30-minute session per week of small group speech-language therapy, one 30-minute session per week of small group social skills training, and one 60-minute session per week of individual family training in home and/or school (*id.* at pp. 10-11). The CSE recommended that the student receive a 12-month program; specifically, that during July/August she attend a 12:1+1 special class for six hours daily (*id.* at p. 12). The May 2016 CSE also

recommended that the student receive modifications, accommodations, supports for school personnel, a shared (3:1) teaching assistant, a shared (3:1) aide, access to assistive technology devices, and a coordinated set of transition activities (id. at pp. 11-14).

On June 1, 2016, the parents executed a reservation and enrollment agreement with Riverview and paid a non-refundable deposit (Parent Ex. AA at pp. 1-6). By letter dated August 18, 2016, the parents advised the district that they were rejecting the IEP and placement recommended by the May 17, 2016 CSE on the grounds that it was not appropriate to meet the student's needs (Parent Ex. N at p. 1). The parents stated that they did not believe that the IEP offered the student sufficient and appropriate support and did not offer an accurate depiction of the student's present levels of performance or appropriate goals (id.). The parents opined that the student's "self-confidence across academic and social domains ha[d] plummeted" (id.). In addition, the parents asserted that the academic and social supports in the district's ISP "could not compensate for the discouraging fact that the academic demands of a Regents-based curriculum [we]re beyond [the student's] abilities as demonstrated by her very low Regents scores . . ." (id.). Among several reasons, the parents stated that "[t]he ISP program, by its very nature as a school day program, cannot address [the student's] needs" related to ADLs nor could it meet the student's socialization needs due to the lack of students with similar profiles (id. at p. 2). The parents asserted that due to her significant demonstrated difficulties the student required a residential placement to address her ADL deficits and prepare her for transition to adulthood and adult services (id.). The parents then advised the district that they had enrolled the student in Riverview for the 2016-17 school year and anticipated that they would be seeking tuition reimbursement from the district due to its failure to offer the student a FAPE (id.).

In response to the parents' August 18, 2016 letter, the CSE reconvened on August 31, 2016 to address the concerns raised by the parents by reviewing their letter and the proposed IEP "point-by-point" (Dist. Ex. 4 at p. 1). Based on the CSE's discussion, the committee agreed to add goals addressing functional math, self-advocacy in the community, self-regulation, and flexibility with regard to changes in routines, and a conversational goal in speech (id. at p. 2). The parents' attorney stated that the student's goals needed to be implemented in a seamless environment, such as a residential setting, and asserted that the approach taken by the district was too piecemeal (id.). The student's then-special education teacher described the student's program and explained that the student would be participating in an internship and would receive social skills training three times per week – once as part of a vocational class, once as part of a pull-out group and once as part of a speech-language group (id.). In addition, social skills would be reinforced in the student's program throughout the day (id.). The student's mother opined that the district's program could not replicate the "24/7 work done in a residential placement" (id.). The CSE chairperson explained that the district's program was appropriate, considering the student's needs and goals, and that residential placement would be too restrictive (Dist. Ex. 4 at pp. 2-3). She reiterated that the student was on the Career Development and Occupational Studies Commencement Credential (CDOS) track, and a candidate for the lab school at the community college and that it would be beneficial for the student to remain in district and build relationships in the community (id. at p. 3). At the conclusion of the meeting, the CSE recommended that the student continue in the ISP at the district's high school and the student's mother and attorney voiced their disagreement with that recommendation (id. at p. 3).

On March 10, 2017, the student's mother completed a reservation and enrollment agreement for Riverview for the 2017-18 school year (Parent Ex. CC at pp. 1-4). A CSE convened on May 31, 2017 for a reevaluation and the student's annual review (Dist. Ex. 6 at p. 1). For the 2017-18 school year, the May 2017 CSE recommended that the student continue in the ISP, which consisted of consultant teacher services (direct and indirect ISP) English language arts (ELA) one time daily for 40 minutes; consultant teacher services (direct and indirect ISP) for social studies one time daily for 40 minutes; a 12:1+(3:1) special class for ISP study skills one time on alternate days for 40 minutes; a 12:1+(3:1) special class for ISP for math one time daily for 40 minutes; consultant teacher services (direct and indirect ISP) in science class one time daily for 40 minutes; a 12:1+(3:1) special class for ISP vocational skills two times daily for 40 minutes; consultant teacher services (direct and indirect ISP) for physical education one time on alternate days for 40 minutes (direct and indirect ISP); and 5:1 resource room services one time daily for 40 minutes (id. at p. 18). The CSE also recommended the following related services: one 30-minute session per week of small group speech-language therapy, one 30-minute session per week of small group counseling, one 30-minute session per week of individual counseling, and one 60-minute session per week of individual family training in home and/or school (id.). The CSE recommended that the student receive a 12-month program; specifically, that during July/August she attend a 12:1+2 special class for six hours daily (id. at pp. 1, 20). The May 2017 CSE also recommended that the student receive modifications, accommodations, supports for school personnel, a shared (3:1) teaching assistant, a shared (3:1) aide, access to assistive technology devices, and a coordinated set of transition activities (id. at pp. 18-22).

On June 8, 2017, the reservation and enrollment agreement was accepted and countersigned by Riverview (Parent Ex. CC at p. 4). By letter dated August 9, 2017, the student's mother advised the district that the parents were rejecting the recommended program for the 2017-18 school year and unilaterally enrolling the student at Riverview and seeking tuition reimbursement (Parent Ex. V at pp. 1-2).

On August 29, 2017, the CSE reconvened to review the student's May 2017 IEP; the district's director of educational services "explained that the intention of the meeting was to address the concerns that the parent outlined in her letter dated August 9, 2017 rejecting the IEP" (Dist. Ex. 7 at p. 1). According to the meeting information summary, the parent stated that she rejected the IEP because the district "could not provide her with 24-hour support for the student in the home to address functional and social/emotional needs" (id.). Further, the parent discussed the social benefits of Riverview and stated that the district's high school special education program was not meeting those social needs based on her perception of the ISP student profiles from previous years (id. at pp. 1-2). The district's director of educational services stated that the student had an appropriate program in her home district "with community internships and peers, building functional skills that the student will need for adulthood" and that the program continued to be "the least restrictive and most efficient for equipping the student to be a functional and effective adult in her home community" (id. at p. 2).

A. Due Process Complaint Notice

By due process complaint notice dated September 1, 2017, the parents alleged that the CSE for both the 2016-17 and 2017-18 school years deprived them of participation in the development

of the student's IEPs by failing to consider whether the student required a residential placement (Dist. Ex. 1 at pp. 8-10, 11-12, 14, 15). The parents also contended that the CSE for the 2017-18 school year was required to include the participation of a representative from the county pursuant to State regulation, because the student had attended a residential placement for the 2016-17 school year and was "at risk" of requiring residential placement for the 2017-18 school year (id.). Substantively, the parents alleged that the 2016-17 IEP failed to provide direct counseling to address the student's significant social emotional needs; and that consultant teacher services recommended for the 2016-17 and 2017-18 school years were inappropriate and not supportive enough for the student because she could not function or absorb the material in the general education class (id. at pp. 14-15). Overall, the parents contended that the district failed to recommend an appropriately ambitious program that addressed the student's educational and transition needs (id. at p. 15).

The parents further argued that Riverview was an appropriate placement for the student (Dist. Ex. 1 at pp. 15-16). The parents describe Riverview as a State-approved residential and day school for students ages 12 through 22, with complex language and learning challenges, and assert that the school provided 24-hour support for the student, as well as a small, supportive educational environment (id.). According to the parents, at Riverview the student continued to make "significant progress in all areas with particular improvements . . . in her social pragmatics, independence, confidence and daily living skills" (id. at p. 16). The parents contended that the student was "socially engaged and integrated and had developed meaningful friendships" (id.). The parents further alleged that the student achieved excellent grades for the 2016-17 school year in academic classes tailored to her unique needs and targeted to her level (id.).

With regard to equitable considerations, the parents alleged that they have cooperated with the district for many years and have been supportive and engaged (Dist. Ex. 1 at pp. 15-16). They promptly returned all consents for evaluations and have cooperated with everything that the CSE requested (id.). Additionally, the parents argued that they have shared all information and private evaluative reports with the district promptly and consistently, and they authorized Riverview to share information with the district (id.). The parents further contended that they gave timely notice of their intention to unilaterally enroll the student at Riverview and seek tuition reimbursement (id.). The parents also argued that they attended and cooperated with both CSE program reviews, which were held in response to the parents' letters rejecting the 2016-17 and 2017-18 recommendations (id.).

As relief, the parents requested reimbursement for tuition and other expenses at Riverview, including ancillary services, a student activity fee, books, tuition insurance, finance charges, and travel costs for both the 2016-17 and 2017-18 school years (Dist. Ex. 1 at p. 18).

The district responded to the parents' due process complaint notice on September 11, 2017 (Dist. Ex. 2 at p. 1). The district asserted that any claims related to matters preceding September 1, 2015 were barred by the statute of limitations and further asserted that the programs developed by the CSEs for the 2015-16, 2016-17, and 2017-18 school years were appropriate (id. at pp. 2-4).

B. Impartial Hearing Officer Decision

A pre-hearing conference was held on an unspecified date (see Tr. p. 4).¹ The impartial hearing convened on November 6, 2017, and concluded on June 1, 2018, after 12 hearing dates (Tr. pp. 1-2480). In a decision dated December 10, 2018, the IHO found that the CSEs committed a procedural violation by predetermining the student's recommended program for the 2016-17 and 2017-18 school years, which denied the parents the right to meaningfully participate in the development of the student's IEP and as a result the student was denied a FAPE (id. at pp. 12-14).

Specifically, the IHO found that the recommended ISP was the only program considered during the May 2016 CSE meeting and that the parents' role in the CSE process was significantly impeded (IHO Decision at p. 12). The IHO further found "that the context of the District position was not to intentionally preclude the Parents' participation"; however, the district staff's "pride" in the district's ISP caused a "a failure to account for the Parents' position" (id. at pp. 12-13). The IHO also noted that "District personnel were simply very confident in their belief that the ISP placement was a very good program and that the Student was progressing in the Least Restrictive Environment" (id. at p. 13).

For the following school year, the IHO determined that "[t]his mindset of the District carried into the 2017/2018 school year as well" (IHO Decision at p. 13). The IHO found that the May 2017 CSE was unpersuaded by reports of the student's substantial progress during the 2016-17 school year and that the "problem was more than a disagreement over the appropriate placement" (id.). The IHO further determined that "the parents were effectively 'minimized'" and their position was not recognized by the CSE (id.). Relying on the testimony of the private psychologist and the student's mother, the IHO found that the parent was dismissed by the CSE and the recommendations of the parents' private psychologist were treated as invalid (id.). Noting the parents' history of avid participation in the student's education, including attendance at CSE meetings as well as frequent communication with the district providers, the IHO nevertheless determined that the parents' role in the CSE had been "stifled and substantially impaired" (id. at pp. 13-14).

The IHO then moved on to the appropriateness of the parents' unilateral placement of the student at Riverview without addressing any of the parents' other claims regarding the appropriateness of the CSE recommended programs for the 2016-17 or 2017-18 school years (IHO Decision at p. 14).

With regard to the parents' unilateral placement, the IHO found Riverview to be "a fit" for the student on several levels (IHO Decision at p. 15). The IHO noted that while Riverview was located out-of-State, it was an approved nonpublic school (id.). The IHO found that the student had exhibited progress for two years, had achieved many academic goals, and received good grades (id.). Socially, the IHO found that the student had formed friendships and maintained contact with friends while at home (id. at pp. 15-16). The student also participated in clubs, sports, and a cooking class (id. at p. 16). The IHO also noted testimony by the student's mother that the student

¹ The hearing record does not include a transcript or written summary of the prehearing conference as required by State regulation (8 NYCRR 200.5 [j][3][xi]).

had shown improvement in conversational skills (*id.*). The student's advisor and the parents' private psychologist also reported social/emotional progress as well as improvement in the student's daily living skills following her attendance at Riverview (*id.*). Based on those findings, the IHO then determined that the parents' unilateral placement at Riverview was appropriate (*id.*).

Lastly, the IHO found that the parents had cooperated with the district and that there was no equitable basis upon which to reduce or deny tuition reimbursement (IHO Decision at p. 17). The IHO then determined that equitable considerations favored the parent (*id.*).

As relief, the IHO ordered the district to reimburse the parents for payments made to Riverview for the 2016-17 and 2017-18 school years upon proof of payment, and directly fund any unpaid tuition, including transportation and ancillary costs of the student's attendance (IHO Decision at p. 17).

IV. Appeal for State-Level Review

The district appeals from the IHO's determinations that the district did not provide the student with a FAPE for the 2016-17 and 2017-18 school years, that the parents' unilateral placement of the student at Riverview was appropriate, and that equitable considerations supported an award of tuition reimbursement.

The district argues that the IHO erred both as a matter of fact and as a matter of law by determining that the district had violated the parents' procedural rights. The district asserts that the IHO improperly determined that the May 2016 and May 2017 CSEs predetermined the student's recommended program and thereby denied the parents the right to meaningfully participate in the development of the student's 2016-17 and 2017-18 IEPs. The district asserts that the CSE considered the parents' concerns, but disagreed that the student required a residential placement. The district contends that predetermination may not be found where a CSE considers a parent's concerns but rejects the parent's request for a specific change in placement.

With regard to the 2016-17 school year, the district contends that the May 2016 CSE discussed the parents' private psychologist's recommendation for a more restrictive setting, and also addressed parental concerns in support of such a recommendation through increased parent counseling and training. The district also asserts that the CSE reconvened in August 2016 for a program review in response to the parents' letter notifying the district of their intent to unilaterally place the student. The district alleges that the August 2016 CSE reconsidered the parents' request for residential placement, and further addressed the parents' concerns by adding additional goals to the August 2016 IEP.

Concerning the 2017-18 school year, the district argues that the May 2017 CSE discussed and considered the parents' request for residential placement, but ultimately rejected a residential placement as too restrictive. The district further contends that upon receipt of the parents' letter indicating their rejection of the May 2017 CSE's recommendations, the CSE reconvened in August 2017 to reconsider the appropriateness of a residential placement. The CSE continued to disagree with the parents' request, however the August 2017 CSE changed the student's goals to address parental concerns.

The district also alleges that the IHO erred by finding the parents' unilateral placement at Riverview appropriate, asserting that a residential placement is too restrictive for the student. The district asserts that the student was making progress in the district in the areas of parental concern and that the student did not require removal from public school to a residential placement.

With regard to equitable considerations, the district contends that the IHO erred by finding in favor of the parents. The district argues that the parents never intended to cooperate with the CSE and solely wanted a residential placement for the student. The district further alleges that the parents had been happy with the student's program in the public school and without explanation requested residential placement and obtained a private evaluation in support of such a recommendation.

For relief, the district requests that the IHO's decision be reversed in its entirety. The district also requests a finding that the student was offered a FAPE for the 2016-17 and 2017-18 school years. Additionally, the district acknowledges that the IHO did not make any substantive findings relative to the appropriateness of any of the IEPs included in the hearing record. Nevertheless, the district requests that in light of the length of time that it took for the IHO to render his decision, that this matter not be remanded for further proceedings.

In an answer, the parents respond to the district's claims with admissions and denials and argue that the request for review should be dismissed and the IHO's decision should be affirmed in its entirety. Initially, the parents assert that the request for review should be dismissed for improper service because the student's father was not personally served or alternately served in a timely manner. The parents also contend that the request for review should be dismissed because the district failed to file an accurate certified record on appeal with its request for review.

The parents further allege that the IHO correctly determined that the district denied the parents' right to meaningfully participate in the development of the May 2016 and May 2017 IEPs and that the IHO correctly found that the district had predetermined its recommendations for both school years. The parents also argue that the district failed to consider any programs other than its recommendation, did not have an open mind, and refused to consider the parents' position. In support of the assertion that the May 2016 CSE denied the parents' right to participate in the decision making process, the parents contend that the May 2016 CSE did not adequately address the student's needs, recognize her need for round-the-clock programming, and failed to consider direct counseling. The parents assert that consultant teacher services in the community were unstructured, and the recommended related services were not appropriate. Concerning the reconvene of the CSE in August 2016, the parents allege that the CSE failed to consider the parents' requests and position regarding residential placement, failed to review updated documents, the student's progress toward goals, or review the student's report cards. The parents further allege that the May 2017 CSE and August 2017 CSE also failed to consider the parents' requests and position.

The parents also argue that the IHO properly found their unilateral placement of the student at Riverview was appropriate and that equitable considerations favored their requested relief.

V. Applicable Standards

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

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

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). "The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created" (Endrew F., 137 S. Ct. at 1001). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132,

quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see 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]).²

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).

² 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).

VI. Discussion

A. Preliminary Matters

1. Initiation of Appeal-Improper Service

The parents argue that the district's request for review must be dismissed for the failure to timely effectuate service of the request for review on both parents, or alternatively, the failure to properly effectuate alternate service of the request for review on the student's father. In their answer, the parents concede that the student's mother was timely and properly served on January 16, 2019.

An appeal from an IHO's decision to an SRO must be initiated by timely personal service of a verified request for review and other supporting documents upon a respondent (8 NYCRR 279.4[a]). A request for review must be personally served within 40 days after the date of the IHO's decision to be reviewed (*id.*). If the last day for service of any pleading or paper falls on a Saturday or Sunday, service may be made on the following Monday; if the last day for such service falls on a legal holiday, service may be made on the following business day (8 NYCRR 279.11[b]). State regulation provides an SRO with the authority to dismiss sua sponte an untimely request for review (8 NYCRR 279.13; see Application of the Board of Educ., Appeal No. 17-100 [dismissing a district's appeal for failure to timely effectuate personal service on the parent]; Application of a Student with a Disability, Appeal No. 16-014 [dismissing a parent's appeal for failure to effectuate service in a timely manner]; Application of the Dep't of Educ., Appeal No. 12-120 [dismissing a district's appeal for failure to timely effectuate personal service on the parent]; Application of the Bd. of Educ., Appeal No. 12-059 [dismissing a district's appeal for failure to initiate the appeal in a timely manner with proper service]; Application of a Student with a Disability, Appeal No. 12-042 [dismissing a parent's appeal for failure to properly effectuate service in a timely manner]; Application of a Student with a Disability, Appeal No. 11-013 [dismissing a parent's appeal for failure to timely effectuate personal service upon the district]; Application of a Student with a Disability, Appeal No. 11-012 [dismissing a parents' appeal for failure to timely effectuate personal service upon the district]).

To comply with practice regulations in an appeal from an IHO's decision to an SRO, a party seeking review must timely and personally serve a notice of request for review and a request for review upon the opposing party (8 NYCRR 279.4[a]). Exceptions to the general rule requiring personal service upon a parent include the following: (1) if delivery of the request for review to the parent cannot be made after diligent attempts, the board of education may effectuate service by delivering and leaving the request for review at the parent's residence with some person of suitable age and discretion between six o'clock in the morning and nine o'clock in the evening, and mailing by certified mail the request for review to the parent's last known residence; or as otherwise directed by a State Review Officer (8 NYCRR 279.4[c][1]-[3]; Application of the Bd. of Educ., Appeal 16-090).

The parents allege that the district failed to properly initiate the appeal in accordance with the procedures prescribed in Part 279 of State regulations. The parents further contend that the district failed to ascertain whether the student's father was represented by the same counsel as the student's mother and did not request the father's address or request alternate service from counsel.

The district's affidavits of service indicate that a notice of intention to seek review was personally served upon the student's mother on January 1, 2019 at 6:40 p.m.; and that a notice of request for review, verified request for review, and memorandum of law were personally served upon the student's mother on January 16, 2019. The district's affidavit of service is consistent with the facts set forth in the parents' answer. Therefore, the student's mother was timely and properly served pursuant to State regulation. As State regulation only directs service of the request for review on the "opposing party" (8 NYCRR 279.4[a]) and "persons acting in the place of a parent may all exercise the same rights under the IDEA simultaneously," (Taylor v. Vermont Dept. of Educ., 313 F.3d 768, 779 [2d Cir. 2002]), service on the student's mother was sufficient for initiating an appeal. Additionally, the parent has not set forth any legal analysis that personal service of a request for review upon both parents individually is required. Further, the parents do not include any arguments concerning prejudice or how the failure to individually serve both parents affected their ability to fully and properly respond to the allegations in the district's request for review, especially where, as here, the parents are represented by the same attorney, requested and were granted a specific extension of time in order to prepare and serve their answer in this matter, and jointly submitted an answer together. Consequently, the parents' arguments concerning whether the district failed to timely and properly serve the student's father are dismissed.

The parents further contend that the request for review should be dismissed because the district failed to file an accurate certified record on appeal with its request for review. By letter dated January 31, 2019, the district was notified of several exhibits that appeared to be omitted from the administrative hearing record submitted to the Office of State Review. By letter dated February 4, 2019, the district complied with this request. The Office of State Review endeavors to identify any deficiencies in the hearing record and in this instance requested that the district correct certain deficiencies; however, the district is reminded that it carries the responsibility to file a complete copy of the hearing record with the Office of State Review and that failure to do so could result in dismissal of a request for review (8 NYCRR 279.9 [a], [c]). In this matter, considering that the parents requested and were granted an extension of time to prepare and serve their answer by February 7, 2019, the certified record was received prior to the date by which the parents had to serve their answer, and the parents have not set forth any prejudice caused by the delay in receiving the certified record, I exercise my discretion and decline to dismiss the district's request for review on this ground.

2. Scope of Review

Initially, the parents raised a number of claims in their due process complaint notice that were not addressed by the IHO (see Dist. Ex. 1 at pp. 14-16). The parents have not cross-appealed from the IHO's failure to address those claims and have not otherwise asserted them on appeal as additional bases for upholding the IHO's determination that the district failed to offer the student a FAPE. In particular, the IHO did not address the parents' claims that the CSE for the 2017-18 school year was required to include the participation of a representative from the county, because the student had previously attended a residential placement, that the 2016-17 IEPs failed to provide direct counseling to address the student's significant social emotional needs, and that consultant teacher services recommended for the 2016-17 and 2017-18 school years were inappropriate and not supportive enough for the student (compare Dist. Ex. 1 at pp. 14-16, with IHO Decision at pp. 12-14).

The regulations governing practice before the Office of State Review require that "[a] respondent who wishes to seek review of an impartial hearing officer's decision may cross-appeal from all or a portion of the decision by setting forth the cross-appeal in an answer served within the time permitted by section 279.5 of this Part. A cross-appeal shall clearly specify the reasons for challenging the impartial hearing officer's decision, identify the findings, conclusions, and orders to which exceptions are taken, or the failure or refusal to make a finding, and shall indicate the relief sought by the respondent" (8 NYCRR 279.4[f] [emphasis added]). Furthermore, the practice regulations require that parties set forth in their pleadings "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 further specify that "any issue not identified in a party's request for review, answer, or answer with cross-appeal shall be deemed abandoned and will not be addressed by a State Review Officer" (8 NYCRR 279.8[c][2], [4]) see M.C. v. Mamaroneck Union Free Sch. Dist., 2018 WL 4997516, at *23 [S.D.N.Y. Sept. 28, 2018] [upholding dismissal of allegations set forth in an appeal to an SRO for "failure to identify the precise rulings presented for review and [failure] to cite to the pertinent portions of the record on appeal, as required in order to raise an issue" for review on appeal]; J.S. v. New York City Dep't of Educ., 2017 WL 744590, at *4 [S.D.N.Y. Feb. 24, 2017] [agreeing with an SRO that the parents' "failure to advance specific arguments in support of their conclusory challenge constituted waiver of those issues"]. Accordingly, as the only issues raised in the parents' answer relate to whether the IHO properly determined that the parents' right to meaningfully participate in the development of the student's 2016-17 and 2017-18 IEPs was denied because the May 2016 and May 2017 CSEs had predetermined their recommendations, and if so, whether the parents' unilateral placement was appropriate and equitable considerations favored reimbursement; those are the only issues that will be addressed on appeal.

B. Continuum of Services

Before addressing the merits of the district's appeal, as noted by the IHO, the hearing record indicates that the CSE did not consider placing the student in a program other than its ISP (see IHO Decision at p. 12). The parents' assert in their answer—without a cross-appeal—that the district did not consider any other program options but the district's ISP and dismissed the parents' position and the recommendations of the private psychologist.

The hearing record does not include a prior written notice for any of the IEPs at issue and the IEPs themselves are silent as to options considered other than the district's ISP (see Dist. Exs. 4-7). State and federal regulations require that a district provide parents of a student with a disability with prior written notice "a reasonable time before the school district proposes to or refuses to initiate or change the identification, evaluation, educational placement of the student or the provision of a [FAPE] to the student" (34 CFR 300.503[a]; 8 NYCRR 200.1[oo]; 200.5[a][1]). Pursuant to State and federal regulation prior written notice must include a description of the action proposed or refused by the district; an explanation of why the district proposed or refused the action; a description of the other options that the CSE considered and the reasons why those options were rejected; a description of each evaluation procedure, assessment, record, or report the CSE used as a basis for the proposed or refused action; and a description of the other factors relevant to the CSE's proposal or refusal (34 CFR 300.503[b]; 8 NYCRR 200.5[a][3]). State and federal regulation further provide that if the school district has not sent a prior written notice to the parent

regarding the subject matter of the parent's due process complaint notice, the district shall provide a response to the parent within 10 days of receiving the complaint (8 NYCRR 200.5[i][4][i] see 34 CFR § 300.508[e]). In this instance, the district responded to the parent's due process complaint notice and addressed each of the issues raised therein (see Dist. Ex. 2). The district's response to the parents' due process complaint notice did not specifically identify any other options considered by the CSE; however, it did respond to the parents' allegation that the CSE did not consider residential placement and indicated that the "CSE properly determined that no basis existed for student to require a residential placement" (*id.* at p. 3). As it is clear that the parents sought a residential placement, and not a less restrictive placement than the ISP, the district's response was reasonable.

Once the CSE determined that the ISP was an appropriate placement in the least restrictive environment in which the student could have been educated, the CSE was not required to thereafter consider other more restrictive placements along the continuum (see E.P. v. New York City Dep't of Educ., 2015 WL 4882523, at *8 [E.D.N.Y. Aug. 14, 2015]; B.K. v. New York City Dep't of Educ., 12 F. Supp. 3d 343, 359 [E.D.N.Y. 2014]; E.F. v. New York City Dep't of Educ., 2013 WL 4495676, at *15 [E.D.N.Y. 2014]; but see E.H. v. New York City Dep't of Educ., 164 F. Supp. 3d 539, 552 [S.D.N.Y. 2016][CSE was required to consider the parent's point of view that the student needed to be educated in the setting he was attending]). However, the district is reminded of its obligation to document in a prior written notice to the parents all of the options the CSE considered and the reasons why they were rejected. Here, given that the failure to consider less restrictive options was not an issue raised in the parents' due process complaint notice or in this appeal, the district's failure to consider or document other options along the continuum of services did not amount to a violation of the IDEA in this instance. The only issue on appeal is whether the district appropriately considered the parents' request for residential placement or whether it predetermined the student's placement, which is discussed in detail below.

Generally, a district is not required to consider placing a student in a nonpublic school if it believes that the student can be satisfactorily educated in the public schools (W.S. v. Rye City Sch. Dist., 454 F.Supp. 2d 134, 148-49 [S.D.N.Y. 2006]). "If it appears that the district is not in a position to provide those services in the public school setting, then (and only then) must it place the child (at public expense) in a private school that can provide those services. But if the district can supply the needed services, then the public school is the preferred venue for educating the child. Nothing in the IDEA compels the school district to look for private school options if the CSE, having identified the services needed by the child, concludes that those services can be provided in the public school . . . IDEA views private school as a last resort" (W.S., 454 F.Supp.2d at 148; see R.H. v. Plano Indep. Sch. Dist., 607 F.3d 1003, 1014-15 [5th Cir. 2010] [noting that under the IDEA, "removal to a private school placement [is] the exception, not the default. The statute was designed primarily to bring disabled students into the public educational system and ensure them a free appropriate public education"] [emphasis in original]; see also 8 NYCRR 200.6[j][1][iii] [State funding for private schools is only available if the CSE determines that the student cannot be appropriately educated in a public facility]; T.G. v. New York City Dep't of Educ., 2013 WL 5178300, at *19-*20 [S.D.N.Y. Sept. 16, 2013]; S.W. v. New York City Dep't of Educ., 646 F. Supp. 2d 346, 363 [S.D.N.Y. 2009]).

C. CSE Meetings Related to the 2016-17 School Year

1. Predetermination and Parent Participation

The district argues that the IHO erred in finding that the district violated the parents' procedural rights, resulting in a denial of FAPE, by predetermining the student's program for the 2016-17 school year. The district alleges that the May 2016 and May 2017 CSEs considered the parents' request for a residential placement but disagreed with the parents' desired recommendation.

As to predetermination, 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. v. New York City Dep't of Educ., 2015 WL 4597545, at *8-*9 [S.D.N.Y. July 30, 2015]; 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. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at *10-*11 [E.D.N.Y. Sept. 2, 2011], aff'd 506 Fed. App'x 80 [2d Cir. Dec. 26, 2012]; 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., 12 F. Supp. 3d at 358-59 [holding that "active and meaningful" parent participation undermines a claim of predetermination]).

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., 2015 WL 4597545 at *8, *10; E.F., 2013 WL 4495676 at *17 [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] ["A professional disagreement is not an IDEA violation"]; Sch. for Language & Comm'n Dev. v. New York State Dep't of Educ., 2006 WL 2792754, at *7 [E.D.N.Y. Sept. 26, 2006] ["Meaningful 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).

"[T]he IDEA only requires that the parents have an opportunity to participate in the drafting process" (D.D-S., 2011 WL 3919040, at *11 [E.D.N.Y. Sept. 2, 2011], 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]).

As indicated above, the parents provided a copy of the private psychologist's evaluation to the district in advance of the May 2016 CSE meeting and requested that it be reviewed during the meeting (Parent Ex. I). Based on his assessment, the psychologist opined that the student's performance across cognitive, academic, projective and neuropsychological measures was consistent with an autism spectrum disorder with intellectual and language impairments (Parent Ex. I at pp. 15, 20). He reported that the severity level of the student's ASD was "Level 2 'requiring substantial support'" (id. at p. 20). According to the psychologist, the student's pattern of academic strengths and weaknesses followed the pattern of her cognitive functioning; overall, the student's academic skills were significantly below grade level and academic tasks were completed exceedingly slow, reflecting the student's [slow] processing speed and concern about making errors (id. at pp. 15). The psychologist reported that when feeling anxious, the student could become mute and transfixed (id.).

The psychologist suggested that "the scope and severity of [the student's] disabilities le[ft] her unable to benefit meaningfully from a day placement in a public school, even with the support of special classes, teaching assistants, consultant special education teachers, resource room or learning center, test accommodations and modifications" (id. at p. 16). He noted that "[a]s a result [the student's] academic development and enthusiasm for school [we]re receding and regressing" (id.). The psychologist commented that the coming two to three years were "critical in preparing [the student] for life after high school" and that the student's current academic program was not appropriate (id.). He explained that in addition to teaching the student academic and organizational skills, intensive efforts were also needed to foster the student's daily living skills and independence, self-sufficiency and confidence (id.). According to the psychologist, the student's "quiet and polite demeanor ma[de] it easy to underestimate her very significant needs" (id.). He opined that the student "require[d] a residential school offering a small, structured 24/7 academic environment, interwoven therapeutic support, and a proven intensive remedial language based curriculum that not only present[ed] topical material, but most importantly focus[ed] intently on skill development and actively cultivating the independence and vocational aptitude that w[ould] be needed beyond high school" (id.). The psychologist further opined that the student required "24/7 exposure to peers and an environment taught by special education teachers experienced and trained to teach" students with her profile (id.). Finally, the psychologist stated that without these supports the student was at risk of academic, social, and behavioral regression (id.).

In determining that the district staff did not have the requisite open mind during the May 2016 CSE meeting, it appears that the IHO relied primarily on the testimony of the student's mother and the private psychologist (IHO Decision at pp. 12-14). In particular, based on the student's mother's and private psychologist's testimony, the IHO found that the "Parents were effectively 'minimized'" . . . by the CSE's collective failure to recognize the Parents' position" (id. at p. 13). Reviewing the transcript, the private psychologist testified that the CSE chairperson "dismissed

[his evaluation report] offhandedly," that his evaluation was ignored, and that he left the meeting feeling as though the CSE chairperson "didn't think [the evaluation report] was worth the paper that it was written on" (Tr. p. 1311, 1316). The student's mother testified that she asked the CSE to consider searching for a residential placement and that her request "was dismissed out of hand" (Tr. pp. 2063-64). However, notwithstanding the impression that the parents and the private psychologist took away from the May 2016 CSE meeting, in addition to the May 17, 2016 meeting information summary prepared by district staff (Dist. Ex. 5 at pp. 1-3), the hearing record includes a recording of the three-hour meeting (Parent Ex. LL Parts I, II) and what purports to be a transcription of the recording (Parent Ex. PPP).³ A review of the recording of the May 2016 CSE meeting provides an objective lens to assess whether district staff predetermined the CSE's recommended program or inhibited the parents' ability to participate in the development of the student's program, in contrast to the IHO's findings based on the testimony of specific CSE participants (see P.G. v. City Sch. Dist. of New York, 2015 WL 787008, at *16 [S.D.N.Y. Feb. 25, 2015][credibility findings by an IHO are accorded deference unless non-testimonial, extrinsic evidence justifies a contrary conclusion]).

The transcription of the May 17, 2016 CSE meeting as written, certainly infused doubt as to the district's willingness to listen to the parents and their private psychologist. The recording of the meeting, however, clearly demonstrates that the parents, particularly the student's mother, engaged in a robust discussion with the other CSE members (Parent Ex. PPP at pp. 30, 32, 33, 34, 38; see Parent Ex. LL Part I at 1:25:20, 1:29:50, 1:33:23-1:34:42, 1:35:13-1:35:51, 1:36:15-1:36:35, 1:36:40-1:36:55, 1:49:17-1:49:47). The hearing record also reflects that the parents' private psychologist participated in the May 2016 CSE meeting (see Parent Ex. LL). After confirming that each district member of the CSE had read and received an additional copy of his evaluation, he proceeded to read aloud from it for over 30 minutes, while the CSE chairperson and the student's then-current teachers asked questions, asked his opinion on making changes to the IEP, and indicated that they were not seeing in school the issues that he reported were occurring in the home (compare Parent Ex. PPP at pp. 25-36; with Parent Ex. LL Part I at 1:10:55-1:47:01). Omitted in part and further transcribed incorrectly, is an exchange between the parents' private psychologist and the CSE chairperson on the restrictiveness of a residential placement and the similar neurocognitive profile of the student with the profiles of other students participating in the district's ISP (compare Parent Ex. PPP at pp. 36-37; with Parent Ex. LL Part I at 1:44:18-1:45:46). The CSE chairperson also stated that she wanted to make sure that the private psychologist was not just telling the parents what they told him they wanted, "I was sincerely asking the question as a professional because we do the same work. Is this what you recommend for this profile?"

³ Unfortunately, the transcription admitted into the hearing record is not an official transcript certified by a stenographer, and upon an exhaustive review and comparison with the entire recording, the transcription is wholly unreliable. There are errors on nearly every page, including contextual errors (compare Parent Ex. PPP at pp. 29, 30, 31, 32, 36, 38, 43-44, 47, 48, 51, 63; with Parent Ex. LL Part I at 1:22:04, 1:24:07, 1:24:21, 1:25:20, 1:30:31, 1:30:46, 1:33:23-1:34:42, 1:44:18-1:45:46, 1:49:17-1:49:32, Part II at 7:19-8:21, 15:05-16:12, 17:30, 24:20, 48:13), misidentified speakers (compare Parent Ex. PPP at p. 26, 37, 38; 47, 52, 53, 54, 59, 65 with Parent Ex. LL Part I at 1:14:11, 1:14:13, 1:46:59, 1:49:32; Part II at 16:20, 27:40, 29:27, 31:14, 40:06, 51:28, 51:56), and incorrect time stamp references (compare Parent Ex. PPP at pp. 29, 37; with Parent Ex. LL Part I at 1:21:33, 1:23:08, 1:46:22). Most concerning is that exchanges between CSE members that are essential to the disposition of this matter were entirely omitted (compare Parent Ex. PPP at pp. 36-37; with Parent Ex. LL Part I at 1:44:18-1:45:46).

(compare Parent Ex. PPP at p. 34; with Parent Ex. LL Part I at 1:45:30-1:45:44). At the conclusion of the private psychologist's presentation, the CSE chairperson indicated that the CSE did not agree with his recommendation of a residential placement (Parent Ex. PPP at p. 38; see Parent Ex. LL Part I at 1:49:47). The May 2016 CSE also completed a program review in addition to the student's annual review and recommended the district's ISP for the 2016-17 school year (Parent Ex. PPP at p. 66).

According to the transcription and recording, during the May 2016 CSE meeting the private psychologist expressed concern that the student needed more support than the district could provide in an eight-hour school day, even when outside services from OPWDD were considered (Parent Exs. LL; PPP at p. 35). The psychologist recommended that "moving forward" the student should be placed in a residential setting (id.). He stated that the goal for the student was developing "vocational independence" and opined that the student was "very impaired" (id.). He opined that although the student's academic skills "look[ed] good on paper," the standardized test scores could be misleading and the student was writing at a fifth or sixth grade level (Parent Exs. LL; PPP at p. 36). The psychologist explained that the help provided by the district during the school day was not going to be enough for the student to "get to where she needs to be" (id.). He stated that a 24-hour residential program with in-house activities that promoted socializing, where everything was "interwoven in the program, I think that is what she needs" (id.; see Parent Ex. PPP at p. 40). The CSE chairperson inquired as to whether residential placement was the psychologist's standard recommendation for students with developmental disabilities, and the psychologist replied that it was not standard, but he would recommend a residential placement for a student with this profile (Parent Exs. LL; PPP id. at p. 36). The CSE chairperson asked the psychologist if he thought the student's cognitive weaknesses were going to change if she were placed in a residential setting, and if the student was going to be able to "generalize and problem solve and live independently" (Parent Exs. LL; PPP at p. 37). The psychologist opined that the student could possibly live independently but suggested that the student's ability to generalize and problem solve would probably always be limited (id.).

The student's mother acknowledged during the May 2016 meeting that the parents asked the CSE to consider a residential placement because they wanted to solve the problems that the district was not seeing (compare Parent Ex. PPP at p. 38; with Parent Ex. LL Part I at 1:49:17-1:49:32). She suggested that the purpose of CDOS and the district's program was to "launch a child into the world to hopefully be independent" and that the parents did not think that was going to happen without a "24 hour scenario" (Parent Exs. LL; PPP at p. 38). The CSE chairperson stated, "I think we can agree to disagree" (compare Parent Ex. PPP at p. 38; with Parent Ex. LL Part I at 1:49:47). When asked by the psychologist if she thought the student would be independent, the CSE chairperson responded that unless the student's neurocognitive profile changed significantly the weaknesses she presented with would likely continue (Parent Exs. LL; PPP at p. 39). In terms of what she saw for the student, the CSE chairperson explained that OPWDD was available for continued support and that once students got older the district worked on transition to adult services such as ACCES-VR (id.). The CSE chairperson reported that the majority of the students in the district's program continued with adult services (id.).

Although the CSE did not further discuss the student's need for a residential placement, the committee attempted to address the parents' concerns by reviewing the student's annual goals

(Parent Exs. LL; PPP at p. 41). The student's mother suggested that the CSE needed to find a way to generalize the focusing goal to the home environment and the parents' attorney suggested that the student was in need of additional goals for study skills (Parent Exs. LL; PPP at pp. 42, 47). The CSE chairperson suggested increasing family training to assist the student and parents with developing a home routine for completing homework (Parent Exs. LL; PPP at p. 42). The student's mother described the efforts that she had made to assist the student at home and explained that the student's distractibility and compliance at home did not "translate from school where it is very structured to a real life situation" (Parent Exs. LL; PPP at pp. 42, 44). She stated that "the parent is trained it's the child that isn't" (Parent Exs. LL; PPP at pp. 42, 46). The CSE chairperson opined that the only way to achieve generalization was to work in the home (Parent Exs. LL; PPP at p. 43). She suggested that the CSE recommend weekly parent training, that would include staff going into the home, for six months (Parent Exs. LL; PPP at p. 45). At the end of six months the CSE would evaluate the parent training to see if it was helpful (Parent Exs. LL; PPP at p. 47).

The CSE discussed adding or changing the student's IEP goals based on the parents' concerns, specifically goals related to writing, time management, ADLs, selective mutism, and accessing social opportunities (Parent Exs. LL; PPP at pp. 49-64).

To summarize the parents' position, the attorney for the parents reminded the May 2016 CSE that the parents had requested consideration of a residential placement for the student (Parent Exs. LL; PPP at p. 65). She pointed out that the parents' private psychologist had provided a report and the family had provided a lot of input as to why the student required the level of support available in a residential placement (*id.*). She cited the student's weak ADLs, lack of independent living skills, and anxiety and noted that the district's own evaluations captured these deficits (*id.*). The attorney explained "we don't think this appropriate for any child of her profile, but we do think we have certainly given you enough to consider that she does need this 24/7 seamless environment" (Parent Exs. LL; PPP at pp. 65-66). She indicated that if continuing in the same program was the district's recommendation then the parents "disagreed and reserved all rights" (*id.*). The CSE chairperson indicated that the CSE would recommend "their program" and told the parents they could "decline it and [the student] doesn't have to come" (Parent Exs. LL; PPP at p. 66).

At the conclusion of the meeting, the May 2016 CSE recommended the district's ISP consisting of a 15:1 special class for English (modified English) one time daily for 40 minutes; a 15:1 special class for social studies one time daily for 40 minutes (modified social studies); a 12:1+(3:1) special class for ISP study skills one time daily for 40 minutes; a 12:1+(3:1) special class for ISP study skills one time daily on alternate days for 40 minutes; consultant teacher services (direct ISP) for math one time daily for 40 minutes; consultant teacher services (direct and indirect ISP) in science class one time daily for 40 minutes; consultant teacher services (direct and indirect ISP) for vocational skills two times daily for 40 minutes; and consultant teacher skills (direct and indirect ISP) for physical education one time on alternate days for 40 minutes (direct and indirect ISP), with related services and accommodations (Dist. Ex. 5 at pp. 10-12).

In a letter dated August 18, 2016, the parents notified the district that they were rejecting the recommendations of the May 17, 2016 CSE, because they did not believe that the IEP offered the student sufficient and appropriate support and did not offer an accurate depiction of the student's present levels of performance or appropriate goals (Parent Ex. N at p. 1). The parents

opined that the student's "self-confidence across academic and social domains ha[d] plummeted" (id.). In addition, the parents asserted that the academic and social supports in the district's ISP "could not compensate for the discouraging fact that the academic demands of a Regents-based curriculum [we]re beyond [the student's] abilities as demonstrated by her very low Regents scores . . ." (id.).

According to the parents, the May 2016 CSE's recommendation did not sufficiently address the student's very low adaptive living skills and the student required constant prompting and redirection to complete basic tasks in a reasonable amount of time (Parent Ex. N at p. 1). The parents noted that, in addition, the student had "rigid habits and routines that could not be interrupted without significant upset" and that "[w]ithout support [the student] would be unable to leave the house each day" (id.). The parents indicated that the student's progress toward using time management strategies in school had not generalized to the home and community and opined that it "w[ould] not generalize without the consistent support across all settings provided by a residential educational placement" (id. at pp. 1-2). The parents further asserted that the student's social needs could not be met in a public school because despite strong social interest, the student's "cognitive deficits, time needed to process incoming information, quirky neurophysiology, inattention and executive dysfunction and anxiety combine[d] to make for stilted social skills and much self-consciousness in the social arena" (id. at p. 2). The parents posited that the student had no peers in district and that she required a setting that promoted the development of authentic friendships and focused development of language and social skills for home, community, and vocational environments for adulthood (id.). The parents noted that the proposed IEP included only one social/emotional/behavioral goal and that, taken together with the student's speech-language goals which related to reading, this was "wholly insufficient to address [the student's] significant social language and developmental needs" (id.).

The parents opined that "[t]he ISP program, by its very nature as a school day program, cannot address [the student's] needs" related to ADLs nor could it meet the student's socialization needs due to the lack of students with similar profiles (Parent Ex. N at p. 2). The parents asserted that due to her significant demonstrated difficulties, the student required a residential placement to address her ADL deficits and prepare her for transition to adulthood and adult services (id.).

The parents advised the district that they had enrolled the student in the Riverview School for the 2016-17 school year and anticipated that they would seek tuition reimbursement from the district due to its failure to offer the student a FAPE (Parent Ex. N at p. 2).

In response to the parents' August 18, 2016 letter, the CSE reconvened on August 31, 2016 to address the concerns raised by the parents "point by point" (Dist. Ex. 4 at p. 1). Much like the May 2016 CSE, the August 2016 CSE discussed the appropriateness of the district's proposed IEP and the parents' desire for a residential placement for the student (id. at pp. 1-3).

Upon review by the committee, the attorney for the parent indicated that the present levels of performance did not offer an accurate description of the student, more specifically, they only described the student's progress and did not reflect the student's struggles as reported by the parent (Dist. Ex. 4 at pp. 1-2). In response, the district agreed to update the present levels of performance to more explicitly describe the student's needs and the parents' concerns (id. at p. 2).

Next, the attorney for the parents noted that the private psychological evaluation highlighted concerns regarding the student's ADLs and social isolation that were not reflected in the IEP (Dist. Ex. 4 at p. 2). The student's mother opined that the student's normal behavior in school had not generalized to settings outside of school and there was no way to support such progress without the school's help (id.). The student's mother further opined that there was no social cohort for the student at the district's high school, however, the special education teacher reported that the student would be participating in a peer mentorship program at the high school, which would offer her the opportunity to develop friendships (id.).

Turning to daily living skills, the attorney for the parents asserted that the IEP did not reflect the severity of the student's deficits (Dist. Ex. 4 at p. 2). The student's mother reported that at home the student had difficulty with showering and time management (id.). Although the parent acknowledged home support provided by the student's special education teacher and the student's eligibility for home and community services through OPWDD, she characterized these efforts as "too little, too late" (id.). She asserted that the student needed the "gestalt," which was not possible within the school district and therefore the student required a residential placement (id.). The district special education teacher opined that the student could be successful in the district with the home and community supports that were in place (id.).

The student's mother reported that she had not seen progress in the home and community similar to that reported in school, that the student continued to have difficulty with self-advocacy and with regulating her tone and voice when in the community (id.). The parent further reported that the student had difficulty being flexible in response to changes in routine (id.).

Based on the CSE's discussion, the district staff agreed to add goals addressing functional math, self-advocacy in the community, self-regulation, and flexibility with regard to changes in routines to the student's IEP (Dist. Ex. 4 at p. 2). The meeting information summary noted that the committee reviewed the student's speech-language goals and agreed upon a "conversational" goal related to abstract and figurative language (id.). The attorney for the parents stated that the student's goals needed to be implemented in a seamless environment, such as a residential setting, and asserted that the approach taken by the district was too piecemeal (id.). According to the meeting information summary, the student's special education teacher described the student's program and explained that the student would be participating in an internship and would receive social skills training three times per week—once as part of a vocational class, once as part of a pull-out group, and once as part of a speech-language group (id.). In addition, social skills would be reinforced in the student's program throughout the day (id.). The student's mother opined that the district's program could not replicate the "24/7 work done in a residential placement" (id.).

According to the meeting information summary, the CSE chairperson opined that the district's program was appropriate, considering the student's needs and goals, and that a residential placement would be too restrictive for the student (Dist. Ex. 4 at pp. 2-3). She reiterated that the student was on the CDOS track, and a candidate for the lab school at the community college and that it would be beneficial for the student to remain in district and build relationships in the community (id. at p. 3). At the conclusion of the meeting, the CSE recommended that the student continue in the ISP at the district's high school and the student's mother and attorney voiced their disagreement with that recommendation (id. at p. 3).

Although there is much more information in the hearing record relative to the May 17, 2016 CSE meeting, the documentary evidence available also demonstrates that the August 2016 CSE did not deny the parents the opportunity to meaningfully participate in the development of the 2016-17 IEP by predetermining its recommendations. Given its willingness to reconvene and address the parents' concerns and to make changes to the IEP, the hearing record does not support the IHO's determination. In light of the above, I find that the district and the CSE possessed the requisite "open mind" with respect to the student's program for the 2016-17 school year, that the evidence does not support that there was impermissible predetermination of the student's program, and that the parents were provided with ample opportunity to offer input and participate in the development of the student's IEP for the 2016-17 school year.

D. CSE Meetings Related to the 2017-18 School Year

1. Predetermination and Parent Participation

The district also appeals the IHO's determination that "the mindset of the District carried into the 2017/2018 school year," which the IHO used as a basis for finding a denial of FAPE for the 2017-18 school year. Having already determined that the IHO erred in finding that the district predetermined the student's programming for the 2016-17 school year and considering the IHO's lack of independent analysis regarding the 2017-18 school year, the IHO's decision concerning that school year is conclusory and lacks any evidentiary support in the hearing record. However, in the interest of providing a thoughtful and well-reasoned decision, the actions of the May 2017 CSE and August 2018 CSE are reviewed herein to determine if the district predetermined its program at those meetings and if the parents had an opportunity to participate in the development of the student's program.

The May 31, 2017 CSE convened to review the results of the student's triennial evaluation, current functioning and needs, and to make recommendations for the 2017-18 school year (Dist. Ex. 6 at p. 1). Among the participants in the May 2017 meeting were several representatives from Riverview participating by phone, as well as a "SPOA Coordinator" and "Mental Health Representative" (*id.*). The CSE meeting began with Riverview staff providing an update of the student's program at the school (*id.* at pp. 1-2).

According to the meeting information summary, Riverview staff explained that they taught "functional skills in the dormitory setting," noting that the student's greatest challenges were "morning and evening routines," and that the student was distracted by her phone (Dist. Ex. 6 at p. 2). The meeting information summary reflected that the student used a timer at Riverview, similar to the one she successfully operated at her locker in the district school, as an external cue to assist with transitions and time management (*id.*). Riverview staff reported that the student's daily living skills and ability to self-advocate had improved and because the student was completing her routines more quickly, she had more time for other things such as socializing (*id.*). Further, Riverview staff noted that the student had difficulty falling asleep at night, as she felt she had to process information from the whole day, and indicated that they were helping the student express negative feelings or worries earlier and throughout the day (*id.*). The CSE discussed "supporting the student's 'executive function' and ensuring efficacy across" both school and home settings (*id.*).

The meeting information summary further indicated that the CSE reviewed the results of a May 2017 psychological evaluation, which included the results from the parents' May 2016 private psychoeducational evaluation (Dist. Ex. 6 at pp. 2, 5; see Tr. pp. 581, 2204-05; Dist. Ex. 11). The district speech-language therapist reviewed the results of the student's triennial testing and noted that due to the student's distractibility, "the testing results may have demonstrated less than her capabilities" (Dist. Ex. 6 at p. 2). The speech-language therapist further indicated that the student's pragmatic skills and overall "conversational initiation" were similar to her level of ability when she attended the district high school (id.). According to the meeting information summary, the results of educational testing were reviewed by the district special education teacher who noted that the "scores from the district's testing were similar" to the May 2016 privately obtained evaluation (id.).

The May 2017 CSE next discussed the student's IEP for the next school year, and the meeting information summary reported that district staff "elucidated the student's specific needs, and recommended goals to accurately address those needs" (Dist. Ex. 6 at p. 2). According to the summary, when the parent asked if Riverview's program plan would be represented in the student's IEP, the director of educational services (director) stated that "this year's progress would be noted in the PLEPs" (id.). The parent advised the CSE that because "the IEP draft that was being formed in the current discussion was not available for her to review prior to the meeting, she would reject the [district] IEP" (id.). The director explained that the IEP would be developed "based on the Committee's discussion at this meeting," and that it would be provided to the parents for their review (id.). The meeting information summary noted that the director offered to have the committee take a break to allow the parents time to review the draft, but the parents declined the offer (id.). The meeting information summary indicated that district staff recommended goals for the student that addressed study skills, writing mechanics and output, mathematics, speech-language skills, and daily living skills and that the CSE also recommended additional support for reading comprehension and writing to be delivered in a resource room setting by a reading specialist (id.).

The CSE meeting information summary indicated that based upon the discussion at the meeting, the CSE recommended the ISP in the district public high school noting that the placement would "meet the student's needs in the Least Restrictive Environment" (Dist. Ex. 6 at p. 2; see Tr. pp. 976, 1909). The parents disagreed with the recommended placement, asked the committee to seek a residential school for the student, and inquired as to how the student would get to school in the morning (id.). According to the meeting information summary, the district special education teacher responded that parent training in the home would continue to address the student's ability to get to school but the parent requested 24-hour support asserting that the student's current progress was "based on the adult support and supervision at the boarding school" (id.). The parent explained that the student had "no friends, no social group or romantic opportunities in [the district school]" and stated that the district IEP was not appropriate for the student (id.). According to the meeting summary, the district special education teacher responded by noting that the student demonstrated progress in the district's ISP; she had friends and interacted regularly with peers in the cafeteria and in class; she advocated for herself and appeared confident in classroom group activities and presentations; and with modifications to some academic work, the student was very successful and was mastering many Regent's level concepts (id. at pp. 2-3).

As noted in the meeting information summary, the "county representative" asked about a "middle ground between [the district] High School and the student's boarding school," and asked about the family's access to support services through OPWDD (Dist. Ex. 6 at p. 3). The director explained that a day program (e.g., special class in a segregated setting) would be the middle ground and opined that the district high school's ISP was most appropriate and would meet the student's academic, vocational, and functional skills needs through the daily vocational block, which included internships in the community (id.). Further, the director discussed the "transition program after 12th grade into the Lab School program" at a local community college; and noted that the ISP addressed "the skills discussed by the boarding school staff" and allowed "the student to be educated in her home school and form connections in her community" (id.). The parents stated their disagreement with the placement and noted that the stress of taking the Regents exams was not worth it for the student (id.).

The district special education teachers discussed the student being on track to receive a diploma and CDOS credential based on State criteria including mastery of CDOS standards and passing State Regents examinations (Dist. Ex. 6 at p. 3). According to the meeting information summary, the parents reiterated that the State tests affected the student emotionally especially during administration and further stated that without the academic pressures, the student was more social and benefitted from Riverview's internal clubs (id.). The student's father discussed his daughter's success at Riverview; her mother noted that the student would not be able to pass State Regents examinations because they were too difficult (id.). The district special education teacher discussed "modifying the instruction and materials to meet the student's needs in preparing for the exams," stated that it "was not unrealistic to think the student c[ould] pass Regents exams," and noted that many students in the ISP were passing Regents examinations (id.). The meeting information summary also noted that the student had already passed a Regents examination (id.).

As noted in the meeting information summary, the CSE discussed the internships that were available at the district high school and the district special education teacher listed the "many internships in the local community" that were accessed by students in the ISP (Dist. Ex. 6 at p. 3). According to the summary, the special education teacher also outlined the nature of the courses, classes, and teacher credentials that the student needed for success, and explained that the student would "take a math class specifically designed to teach functional math skills as well as provide preparation for" the State algebra Regents examination (id. at p. 2). Additionally, the CSE discussed that the student would be enrolled in a resource room with a reading specialist and "take a study skills class" to further work on IEP goals and homework, and that the student would participate in a general education physical education class and a double vocational block where she would receive instruction in vocational concepts through the CDOS standards, engage in social skills group, and work on functional reading and math skills, as well as participate in an internship in the community (id.).

According to the meeting information summary, at the conclusion of the May 2017 CSE meeting, the director of special education reiterated the student's need to be with same-aged peers and access her home community-based instruction (Dist. Ex. 6 at p. 3).

By letter dated August 9, 2017, the parents rejected the May 31, 2017 IEP (Parent Ex. V at p. 1). The parents stated that the May 2017 IEP failed to offer an appropriately ambitious program

for the student's unique needs and offered insufficient and inappropriate supports (id.). The parents noted that the May 2017 CSE solely relied on information provided by Riverview staff and acknowledged the student's progress at Riverview while recommending a district program that did not sufficiently address the student's continued "low" adaptive living skills (id.). The parents also stated that the student's social development needs could not be met in a day placement and that the student did not have peers in the recommended placement (id.). The parents further opined that the student required a seamless setting that would promote the development of authentic friendships with similar peers and the intensive, focused development of language and social skills for community and vocational environments for adulthood (id.). The parents pointed out that the recommended program included only two social/emotional/behavioral goals and did not include counseling to provide services to assist in these goals (id.). Additionally, the parents found the student's one speech-language goal to be inappropriate and confusing (id.). Overall, the parents indicated that the student's recommended program was insufficient to address her significant cognitive, social, language, transition and developmental needs (id. at pp. 1-2). The parents asserted that the "ISP program, by its very nature as a school day program, cannot address [the student's] needs for daily living skills independence" (id. at p. 2).

In response to the parents' letter, the CSE reconvened on August 29, 2017 "to address the concerns that the parent outlined in her letter dated August 9, 2017 rejecting the IEP" (Dist. Ex. 7 at p. 1; see Tr. pp. 562-63, 2220). According to the meeting information summary, the parent advised the August 2017 CSE that she rejected the proposed IEP because the district "could not provide her with 24-hour support for the student in the home to address functional and social/emotional needs" (id. at p. 1). Further, the parent discussed the social benefits of Riverview and stated that the district's high school special education program was not meeting those social needs (id. at p. 2). The director responded that the student had an appropriate program in her home district "with community internships and peers, building functional skills that the student will need for adulthood" and that the program continued to be "the least restrictive and most efficient for equipping the student to be a functional and effective adult in her home community" (id.).

The meeting information summary reflected the CSE's discussion related to the specific complaints raised in the parents' letter, including a request by the director for the parent to clarify, with examples, the low adaptive living skills that were referenced in the letter (Dist. Ex. 7 at p. 2). The director noted that the committee had recommended family training to address ADLs in the home, such as managing the morning routine, as well as internships and community supports to address community functioning (id.). The director "asked the mother if there was anything missing and the mother did not identify anything further" (id.). The director noted the "parent's complaint that there [wa]s insufficient counseling" and indicated that the IEP included recommendations for individual as well as group counseling (Dist. Ex. 7 at p. 2; see Tr. p. 2210). The CSE also discussed that a full-time school psychologist was dedicated to the district's ISP (id.). According to the meeting information summary, the parent discussed the student's level of stress as it related to the CDOS mandate and the student's difficulty coping with the stress of taking State examinations (Dist. Ex. 7 at p. 2). The CSE acknowledged the parent's concern, discussed the test anxiety workshops conducted by the school psychologists and counselors, and added a goal to the student's IEP to address coping with stress (Dist. Ex. 7 at p. 2; see Tr. p 982). In response to the student's mother's view that the student would never pass the algebra State examination and it was "inappropriate" for the student to attend algebra classes when she should be spending time learning

functional math skills, district staff explained that the student would be working on functional academic skills, including reading, writing, and math, during the vocational block, ISP math class and study skills class (id.).

The parent expressed concern that there was "only one," "confusing" speech-language goal and the district speech-language therapist discussed the rationale for the goal and explained the assessment process (Dist. Ex. 7 at p. 2). According to the speech-language therapist, an area of need that was evident from testing the student was her ability to recall information that was presented without context, and that the "student would always need a little help in the social domain" (pragmatic language) (id.). The director asked the Riverview staff if they had any input regarding the "student's speech abilities and needs" and they "stated that their speech-language goals addressed the student's executive functioning and listed benchmarks" (id.). According to the meeting information summary, the benchmarks included strategies on time management, transitions, and reducing behaviors that inhibit task completion; and the Riverview staff noted that planning and time management were "important for the student's speech and language needs" (id.). The district staff explained that they addressed these skills through a daily living skills goal (id.). When the student's mother expressed concern that the student's pragmatic language skills had not generalized into the community, the CSE added a speech-language consult to the IEP so that the speech-language therapist could work with the student directly in the community to address that need (Dist. Ex. 7 at p. 2; see Tr. pp. 565-66). When the district special education teacher added that the student could practice and improve pragmatic skills in the community on field trips and community-based educational experiences such as internships, the parent stated, "it is too little, too late" (Dist. Ex. 7 at p. 2). The meeting information summary also noted that by parent report the student had made progress while at Riverview and her community skills had "improved" (id.). The student's mother stated that the student's needs could only be addressed in a residential setting with 24-hour support and that she felt it was not possible to generalize language pragmatics with typical students in the district high school program (Dist. Ex. 7 at p. 2; see Tr. pp. 567, 2222-23).

The meeting information summary indicated that the parent expressed feeling disconnected from the district program and thought the teachers did not have "high educational standards" for the student because the special education teacher suggested using spell-check and auto correct when the student composed writing on the computer (Dist. Ex. 7 at p. 3). The parent stated that in order for the student to get a job, which was the goal of the CDOS credential, the student would need to capitalize and punctuate; the special education teacher noted that while the student was instructed in grammar and punctuation she would also be taught to use strategies and tools such as spell-check (id.). The parent opined that her expectations were higher for the student than the district's expectations were and that as far back as early intervention she was told to mitigate her expectations (id.).

According to the meeting information summary, a "guest of the parent" who attended the CSE meeting stated that the evidence showed that the student had not met expectations; district staff noted that the data taken indicated progress toward the student's goals (Dist. Ex. 7 at p. 3). "The committee stated" that "a residential program would be too restrictive for the student" and that the district "special education program was appropriate for the student's current individual educational needs, home-community functioning and transition to adulthood" (id.).

As noted in the meeting information summary, the director noted that once the parent stated her concerns, the district had been trying to address them; but the parent stated that the student's needs could not be met in a non-residential placement (Dist. Ex. 7 at p. 3). The CSE discussed plans for the recommended vocational training and internships including socialization, vocational and functional skills (*id.*). The director "offered that the CSE would amend the IEP if the parent or [the district] ISP or [the] boarding school no longer felt these to be needs or the needs had changed" (*id.*). The meeting information summary further indicated that the director compared the Riverview program with the district ISP and stated that the ISP "ha[d] everything that the boarding school ha[d]" and that the ISP "afford[ed] the student opportunities in her home district, her hometown, in her least restrictive environment, supporting her relationships and helping her succeed here" (*id.*). The director continued that the "boarding school's assessment of the student's strengths and needs were aligned evenly with what the [district] special education program offer[ed]" (*id.*). According to the meeting information summary, the August 2017 CSE meeting concluded with the parent verbalizing her disagreement with the CSE's recommendation for the student to receive special education services in the district ISP and stating that she would be exercising her due process rights (*id.*).

Here as in the prior school year, the district provided the parents the opportunity to participate in both the May 2017 CSE meeting and again at the August 2017 CSE meeting. The hearing record reflects that the CSE listened to a number of the parents' concerns and attempted to adapt its program or provide additional services to address those concerns; however, the district did not accede to the parents' request for placement in a residential school. Considered as a whole, the hearing record reflects a parental disagreement with a school district's proposed IEP and placement recommendation that does not amount to predetermination by the district or a denial of the parents' meaningful participation in the development of the program (see E.H. v. Bd. of Educ., 361 Fed. App'x 156, 160 [2d Cir. 2009]; E.F. v. New York City Dep't of Educ., 2013 WL 4495676, at *17 [E.D.N.Y. Aug. 19, 2013]; DiRocco, 2013 WL 25959, at *18-*20; P.K., 569 F. Supp. 2d at 383 ; Sch. For Language and Commc'n Development, 2006 WL 2792754 at *7).

Based on the foregoing, I find that the district and the CSE did not engage in improper predetermination and that the parents were permitted to meaningfully participate in the development of the student's IEP for the 2017-18 school year. As such, I find that the IHO erred by determining that the district denied the student a FAPE for the 2016-17 and 2017-18 school years.

VII. Conclusion

In summary, the evidence in the hearing record does not support the IHO's finding that the student's placement was predetermined by the district for the 2016-17 and 2017-18 school years. Having determined that the district did not fail to offer a FAPE in the LRE for the 2016-17 and 2017-18 school years, it is not necessary to determine whether Riverview was an appropriate unilateral placement or whether equitable considerations support the parents' claim, and the necessary inquiry is at an end (see T.P., 554 F.3d at 254; MC v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]).

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

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision, dated December 10, 2018, is modified, by reversing those portions which found that the district failed to offer the student a FAPE for the 2016-17 and 2017-18 school years and directed the district to pay for the costs of the student's tuition at Riverview.

Dated: **Albany, New York**
 March 13, 2019

CAROL H. HAUGE
STATE REVIEW OFFICER