The University of the State of New York

The State Education Department
State Review Officer
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No. 19-053

Application of a STUDENT WITH A DISABILITY, by his parent, for review of a determination of a hearing officer relating to the provision of educational services by the Ardsley Union Free School District

Appearances:
Jaspan Schlesinger, LLP, attorneys for respondent, by Carol Melnick, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from the decision of an impartial hearing officer (IHO) which denied her request to be reimbursed for the cost of transportation and the cost of private services obtained for her son for the 2017-18 school year, among other claims. Respondent (the district) cross-appeals from the IHO's determination that it failed to demonstrate that it had offered to provide an appropriate educational program to the student for the 2015-16 school year, among other claims. The appeal must be sustained in part. The cross-appeal must be dismissed.

II. Overview—Administrative Procedures

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

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

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

III. Facts and Procedural History

This appeal arises from an IHO's decision issued after remand (see Application of a Student with a Disability, Appeal No. 18-104). While the parties' familiarity with the facts and procedural history through the prior administrative appeal is presumed, the factual history will be repeated here in some detail in order to provide background for the issues presented in this appeal.

The student has a long history of behavioral and emotional challenges (Parent Exs. C at pp. 1-3; E; N at pp. 1-2; Dist. Exs. 93 at p. 1; 117 at pp. 1-2; 131 at pp. 1-2; 146 at p. 1). He received services through the Early Intervention Program and later through the Committee on Preschool Education (CPSE) (Dist. Exs. 121, 122, 129). At the end of preschool, the student was declassified and in kindergarten he received speech-language services through an accommodation plan

pursuant to Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. §794[a]) (Section 504) (Dist. Exs. 136, 137, 140, 144, 150, 151). At the end of kindergarten, the district found the student no longer met the eligibility criteria to be classified under Section 504 (Dist. Ex. 157). By parent report, the student did well in elementary school with some concerns regarding inattentiveness, poor organization skills, and distracting mannerisms (Dist. Ex. 5 at p. 1; see Dist. Exs. 154, 158-164). In middle school the student began to struggle with homework completion and illness, and his emotional state deteriorated (Dist. Exs. 5 at p. 1; 167; Parent Ex. C). He was diagnosed as having an adjustment disorder with depressed mood and a pervasive developmental disorder NOS; in November 2013 he began attending a behavioral health outpatient clinic (Dist. Exs. 3 at p. 2; 64 at p. 4). During the 2014-15 school year (seventh grade) the student began receiving "building level supports" at school before being reclassified in June 2015 (Impartial Hearing I Tr. pp. 5, 175-76; Dist. Ex. 21).[1]

In an April 29, 2015 email to the student's guidance counselor and the school psychologist, the parent indicated that it had been an emotionally difficult year for the student, that she, along with the guidance counselor and school psychologist, had discussed and planned throughout the year how to help the student using interventions available through general education, and still the student continued to struggle (Parent Ex. M).[2] The parent opined that it was time to reach out to the CSE to determine if there were services for which the student may be qualified (Parent Ex. M at p. 1). In an April 29, 2015 letter to the district, the parent requested a comprehensive individual evaluation of the student to determine the presence of disabilities that may necessitate special education services (Dist. Ex. 5 at p. 1).

On April 30, 2015 the parent provided the district with written consent for an initial evaluation of the student (Dist. Ex. 8). In response to the parent's request, in May and June 2015 the district conducted a speech-language evaluation, social history update, classroom observation,

[1] The record on appeal consists of two impartial hearings that have been consolidated, as described in more detail below. Transcript citations identified as "Impartial Hearing I" concern hearing dates conducted on April 12, 2018; June 4, 2018; June 15, 2018; July 9, 2018; August 15, 2018; September 26, 2018; December 18, 2018; and December 21, 2018 (Impartial Hearing I Tr. pp. 1-1033). Transcript citations identified as "Impartial Hearing II" concern hearing dates conducted on July 9, 2018; February 1, 2019; and February 26, 2019 (Impartial Hearing II Tr. pp 1-435).

[2] In spring 2015, the student was enrolled in general education classes and, as part of a response to intervention (RTI) process, participated in a weekly Dialectical Behavior Therapy (DBT) group within the school guidance department (Dist. Exs. 9 at pp. 1-2; 11 at p. 2). During the 2014-15 school year, the student's guidance counselor also provided a homework checklist for the student because completion had become an issue (Impartial Hearing I Tr. p. 24). According to the assistant superintendent, the student stopped participation in the DBT program as the parent did not agree with the continuation of the program (Impartial Hearing I Tr. p. 22). In a June 2015 email exchange regarding DBT the parent shared that the student's psychiatrist did not approve of pulling the student out of class for what he considered treatment of questionable benefit and the parent informed the district that she was "hoping that there [we]re other options available" when discussed at the next CSE meeting (Dist. Ex. 20 at p. 1). The assistant superintendent testified that the core of the DBT program, which had been included in building level supports over the last nine years, was mindfulness and involved such things as emotion regulation, distress tolerance, interpersonal relationships, and other components (Impartial Hearing I Tr. pp. 21-22). The assistant superintendent stated that the program provided a script for students when they were having conflicts in their life and that they learned coping skills and coping strategies to deal with issues in their adolescent life (id.). The assistant superintendent stated that one of the psychologists introduced the student to the program and that it had been supported by the student's physician as a "nice supplement" to his outside treatment program (id.).

and psychoeducational evaluation and solicited information from the student's teachers regarding his school performance (Dist. Exs. 9; 11; 14; 17; 19). In brief, the evaluations indicated that the student's overall cognitive abilities were in the superior range and his academic performance ranged from average to very superior; however, the student's speech intelligibility was poor and the student demonstrated impulsive behavior and difficulty in social situations (Dist. Exs. 9 at p. 5; 11 at pp. 1-3, 17; 19 at pp. 2-3, 7-8, 10-12, 14-19). In addition, the student's homework completion was inconsistent, his moods changed quickly, and he showed signs of depression (Dist Exs. 11, 17, 19).

On May 12, 2015, following an emotional crisis at school and reports of suicidal ideation, the student underwent a psychiatric examination and was subsequently hospitalized (Parent Ex. N at p. 1; Dist. Ex. 11 at p. 2). When discharged on May 20, 2015, the student was described as "stable and ready to resume school/work/activities" (Dist. Ex. 12 at pp. 1-2). Discharge diagnoses included major depression, "single episode, severe w psychotic," pervasive developmental disorder NOS, Tourette's disorder, and parent-child relationship problem (Dist. Ex. 12 at p. 2).

On June 25, 2015 a CSE convened to conduct an initial eligibility determination meeting for the student (Dist. Exs. 16 at p. 1; 21 at p. 1; 22 at p. 1). Finding the student eligible for special education as a student with an emotional disturbance, the CSE recommended one 42-minute session every other day in a special class-study skills Emotional Support Program (ESP) to work on organizational skills and the planning and completion of long- and short-term assignments; one 30-minute session per week of both individual counseling and group counseling; and one 30-minute session per week of speech therapy consultation (Dist. Exs. 21 at pp. 1, 2, 8-9; 22 at p. 1).[3]

The student entered the CSE recommended program in September 2015 and for the first few weeks of school was emotionally "dis regulated," made numerous trips to the nurse's office and on one recorded occasion hit his thigh repeatedly and refused to go to class (Impartial Hearing I Tr. pp. 407-09, 519-20, 607-08; Dist. Exs. 64 at p. 2; 108 at p. 1). In a September 25, 2015 email to the district, the parent requested that the district conduct an FBA (Parent Ex. T). The student's behavior improved from October 2015 through January 2016; however, in February 2016 it began to decline (Dist. Exs. 60 at p. 7; 108 at p. 1; Parent Exs. V; W; X; Y; BB). On March 2, 2016, the school psychologist completed an intensive day treatment (IDT) referral for the student (Dist. Ex. 115).[4] The parent visited the IDT program, but was not interested in having the student attend the program (Tr. pp. 63-64, 444-45, 626-33; Dist. Ex. 29).

[3] The middle school psychologist described the emotional support program (ESP) as a therapeutic program within the district building (Tr. p. 303). She stated that it was not a self-contained program and that students are with their grade-level peers throughout the day (Tr. pp. 303-04). The program had available for students a number of supports including a teaching assistant, individual and group counseling, a consulting psychiatrist, and a psychologist dedicated to the program (Tr. p. 304). The middle school psychologist stated that the focus of the program was to enable students to stay in school and in class, complete their assignments, and if they were exhibiting an emotional outburst or struggling to regulate their emotions they had a room where they could go and "decompress" or meet with the psychologist and complete their work in a more private setting (id.).

[4] The assistant director of special education described the IDT program as a "30 plus-day educational program provided for general education and special education students ages 12-18 who are in crisis" (Dist. Ex. 27 at p. 1; see Parent Ex. X at p. 5).

In an email dated March 16, 2016, the parent advised the district that she had requested an FBA early in the school year and had discovered the previous day that, contrary to her belief that an assessment had been completed or was ongoing, it had not been started (Dist. Ex. 27 at p. 2). In a March 15, 2016 prior written notice, the district requested consent from the parent to conduct a functional behavioral assessment (FBA) and the parent signed the consent form, dated March 18, 2016 (Dist. Exs. 25 at p. 1; 26).

On March 21, 2016, the district and parent executed an agreement to amend the student's IEP to reflect a change in speech services from one-time weekly consultation to one 30-minute session per week of individual speech-language therapy (direct services) and the addition of two speech-language annual goals, and the March 2016 IEP reflected the change (Dist. Exs. 24; 28 at p. 1; 30 at p. 1).[5] Also on March 21, 2016, an incident occurred at school which escalated to the point of the student engaging in self-injurious behavior and making threats to harm himself (Dist. Ex. 29). The parent was advised to have the student seen by emergency services at a hospital and the school psychologist re-initiated the IDT referral case that had been closed per a March 17, 2016 interview with parent (id.; see Parent Ex. KK).

In a March 24, 2016 email to the district, the parent attached a document described as a 10-day notice of unilateral placement, in which the parent informed the district that she believed—due to the failure of the student's IEP to timely offer appropriate accommodations, special education, and related services to address all aspects of his individual needs—the student had been denied a free appropriate public education (FAPE) and had sustained emotional harm (Dist. Ex. 82 at pp. 2, 4). Further, the parent stated that the student experienced anxiety at the thought of returning to the district school and due to the extreme and potentially injury-sustaining nature of his past reaction, the parent did not wish to test the student's limits by returning him to the middle school environment and risk further harm (id. at p. 4). The parent informed the district that she intended to withdraw the student from his current school and enroll him in a private school at public expense (id. at pp. 1-4).

A district enrollment information fact sheet indicated that the student exited to the Westfield Day School (Westfield) on April 13, 2016 (Dist. Ex. 32).

In an April 20, 2016 letter to the district, the parent expressed her disagreement with the district's evaluation of the student and requested an independent educational evaluation (IEE) at public expense (Dist. Ex. 35).

That same day, a CSE convened to conduct a parentally requested review of the student's educational needs (Dist. Ex. 33; 34 at pp. 1-13). The April 2016 CSE meeting information summary indicated that the student was parentally placed at Westfield at that time (Dist. Ex. 34 at

[5] The parent had shared concerns regarding the student's speech in a January 9, 2016 email to the district (Parent Ex. X at p. 1). The parent indicated that the student's speech continued to be rushed and hard to understand and requested the student's IEP be amended to include specific annual goals as well as the direct services of a speech-language pathologist (id.). In a January 13, 2016 email to her colleagues, the district speech-language pathologist stated that her consultation had been more direct in working with the student as well as "popping into" some classes and that she had reflected with the student on how his speech varied according to his comfort level/affect (id. at p. 2). The speech-language pathologist opined that she had "no problem" changing services to once individually for 30 minutes with annual goals (id. at pp. 2-3).

p. 1). According to the summary, the committee strongly maintained that the recommended program in the district continued to meet the student's needs and continued to recommend the same program and services offered in the student's previous IEP (compare Dist. Ex. 28 at p. 9 with Dist. Ex. 34 at p. 9). However, the CSE added annual goals related to following faculty directives and completing homework to the student's IEP (Dist. Ex. 34 at p. 8). In addition, due to the student's diagnosis of Crohn's disease, the IEP included health and safety supports daily and throughout the day and noted the student's need to access the nurse and bathroom (id. at pp. 2, 8, 9). Further, the April 20, 2016 IEP indicated that the student needed a BIP and stated that an FBA/BIP had been in process prior to this meeting and that upon the student's return to the district the FBA/BIP would be developed (id. at pp. 2, 7). Despite the district's assertion that its recommended program was appropriate, at the request of the parent it agreed to forward referral packets to state approved therapeutic day programs (id. at p. 2). Subsequently, the district sent referral packets to several programs seeking a non-public school placement for the student for the 2016-17 school year which could meet his social-emotional and academic needs (Dist. Ex. 36 at pp. 1-7).

The student was evaluated at the Montefiore Neurology & Autism Center (Montefiore) over five days, beginning April 27, 2016 and ending July 7, 2016 (Dist. Ex. 64).

As a result of a sleep study and multiple sleep latency tests conducted in May and June 2016 the student was diagnosed as having moderate obstructive sleep apnea (Dist. Ex. 51). The evaluating physician opined that prior to medical intervention the student would continue to be "excessively sleepy" and recommended school accommodations such as a later start time, tutoring, naps in the nurse's office, extensions for schoolwork, and possible alternative testing times (id. at p. 1).

In June 2016 the parent provided written consent for the district to conduct an OT evaluation and the evaluation was conducted on June 17th (Dist. Exs. 41, 44 at p. 2; 55 at pp. 1-4).In a June 2016 email the parent provided consent for the district to speak with and release records to the independent evaluators at Montefiore (Dist. Ex. 44 at p. 1).

The district scheduled a CSE meeting for June 20, 2016 to conduct the student's annual review (Dist. Exs. 50 at p. 1; 60 at p. 2). In an email dated June 14, 2016, the parent requested that the CSE meeting be rescheduled to a later time so that the IEE report would be complete and available for consideration (Dist. Ex. 53). In an email dated June 15, 2016, the district informed the parent that it needed "to move forward" with the annual review meeting scheduled for June 20th, and that the CSE would reconvene to review the evaluations once they were received (Dist. Ex. 54). In a June 17, 2016 email, the parent stated that the state approved therapeutic day programs could not confirm that they could accommodate the student's needs until all the reports and recommendations were available and she questioned why the district would not postpone the meeting (Tr. p. 57 at p. 1). The district replied the same day indicating that it was required to hold the student's annual review by June 30, 2016 and reiterating that the CSE would reconvene to review the private evaluations once shared with the district (Dist. Ex. 57).

On June 20, 2016 the CSE convened for an annual review of the student's educational needs and to plan for the 2016-17 school year and, as detailed above, without the parent in attendance (Dist. Ex. 60 at pp. 2, 15). Finding the student remained eligible for special education and related services as a student with an emotional disturbance, the CSE recommended one 44-minute session

in a 5:1 resource room (ESP) daily along with the same related services recommended in the previous IEP (compare Dist. Ex. 34 at p. 9 with Dist. Ex. 60 at p. 10). The June 2016 IEP indicated, as the prior IEP had, that the student required a BIP (Dist. Ex. 60 at p. 8; see Dist. Ex. 34 at p. 7).

The parent requested that the CSE consider a private neuropsychological evaluation of the student which was begun in April 2016 and completed in July 2016 (see Dist. Exs. 64 at p. 1; 70 at p. 1). In the neuropsychological evaluation report, the evaluator reported that the student continued to exhibit characteristics of an autism spectrum disorder noting that the student had deficits in socialization, was rigid and required predictability, and had difficulty communicating his emotions or showing empathy (Dist. Ex 64 at p. 19). The evaluator reported that the student experienced depression which was characterized by somatization, reduced concentration and lethargy, and that when confronted by external stressors the student might withdraw or when pressed further become self-abusive (id.). The evaluator identified schoolwork as the student's main stressor but noted that the student's symptoms were exacerbated by a sleep disorder and Crohn's disease (id.). Among other things, the evaluator recommended that the student be placed in a self-contained therapeutic school (id.).

The psychologist who conducted the neuropsychological evaluation of the student testified that after the evaluation, Montefiore initiated counseling, with which she was directly involved, and she met with the student once a week for both individual sessions and group social skills sessions (Tr. pp. 947, 952-53, 966-67).

On August 15, 2016, a CSE convened for a parentally requested review to consider the newly administered IEE, as well as the findings of a privately acquired medical sleep study; and to review the student's placement in light of these evaluations (Dist. Exs. 68 at p. 1; 71 at pp. 2-3; 73 at p. 1). Finding that the student remained eligible for special education and related services as a student with an emotional disturbance, the August CSE recommended a 6:1+1 special class placement at the Karafin School (Karafin) along with one 20-minute session per week of individual counseling, one 40-minute session per week of group counseling, one 40-minute session per week of individual speech therapy, and one 30-minute consult per quarter of parent counseling and training (Dist. Exs. 71 at p. 11; 73 at pp. 1-2). The committee also reviewed and revised the student's annual goals, program modifications, and testing accommodations in light of the new information (Dist. Exs. 71 at p. 2; 9-10; 73 at p. 1).

The August 2016 CSE determined that given the social/emotional supports within the Karafin program, that an FBA/BIP was not required at that time and that the need for an FBA/BIP would be re-assessed at a CSE review meeting following the first marking period (Dist. Exs. 71 at p. 8; 73 at pp. 1-2). The student began attending Karafin in September 2016 (Dist. Exs. 72 at pp. 1-2; 116 at p. 1).

The parent contacted the district in early September 2016 to express her concern regarding the student's morning transportation and her difficulty getting the transportation department to accommodate the student's sleep apnea (Dist. Ex. 74). She requested a CSE meeting, if necessary to revise the student's IEP, and informed the district that until other arrangements were made she would continue to use private transportation services at $25 per trip and would seek reimbursement (id.).

By prior written notice dated September 13, 2016 the district recommended the following revisions to the student's August 2016 IEP, to be amended without a committee meeting: special alerts stating that the student had been medically diagnosed with Crohn's disease and moderate obstructive sleep apnea, as well as with anxiety, depression, and an autism spectrum disorder (Dist. Ex. 76 at p. 1).[6] The parent consented to the proposed changes in a letter signed and dated October 24, 2016 (Dist. Ex. 77; see also Impartial Hearing I Tr. p. 130).

A special education sub-committee convened on October 6, 2016 per the parent's request to review the student's transportation needs (Dist. Exs. 79 at p. 1; 81 at p. 1; 83 at p. 1). The October 2016 CSE determined that the then-current regular bus transportation was reasonable based upon the information provided at the meeting, however, as a resolution to the parent's request for alternate transportation, the district agreed to reimburse the parent through the end of the marking semester at the district's regular reimbursement rate (Dist. Ex. 81 at p. 2).

In February 2017 a CSE convened for a follow-up meeting, per the August 2016 IEP, to review the student's performance in his new program (Dist. Exs. 71 at p. 3; 94 at p. 1; 95 at p. 2; 96 at p. 1).[7] The meeting information summary indicated that the CSE revisited the student's annual goals and determined that they remained appropriate (Dist. Ex. 95 at p. 3). The February 2017 CSE further determined that the current regular bus transportation was reasonable and would remain as previously recommended on the IEP; and again, as a resolution to the parent's request, the district agreed to reimburse the parent through the annual review for the cost of mileage at the school district rate if the parent chose to arrange her own transportation (Dist. Ex. 95 at p. 3).

On June 6, 2017 a CSE convened to conduct an annual review and develop the student's IEP for the 2017-18 school year (Dist. Exs. 99 at pp. 1-2; 100 at pp. 1-15; 103 at pp. 1-3). Finding that the student remained eligible for special education and related services as a student with an emotional disturbance, the CSE again recommended a placement at Karafin with the same special class support and related services as previously recommended (Dist. Ex. 100 at pp. 1, 2, 9; see Dist. Ex. 71 at p. 11).

An August 31, 2017 prior written notice was sent to the parent of a proposed triennial reevaluation of the student (Dist. Ex. 104 at pp. 1-4). A second notice was sent dated September 14, 2017 (Dist. Ex. 105 at pp. 1-4).

After the commencement of the impartial hearing as set forth below, a CSE convened on November 30, 2017 for a parentally requested review and recommended the student for a change in placement from the NPS to the district high school's emotional support program (ESP) to begin

[6] The prior written notice also stated that in the physical development section of the IEP the statement "The CSE recommends an occupational therapy monthly consult to offer support and strategies to manage some sensory areas," should be eliminated in light of the comments section which notes that, "Additionally, the previously recommended OT consult is no longer recommended, and need will be reconsidered at a CSE review following the first marking period." (Dist. Ex. 76 at p. 1).

[7] The hearing record includes evidence that scheduling of the meeting was attempted multiple times after November 2016 but that the parent was unable to attend due to family circumstances (Dist. Exs. 84 at p. 1; 92 at p. 1; 95 at p. 2; 96 at p. 1).

on January 22, 2018 (Dist. Exs. 110 at pp. 1-2; 111 at pp. 1-16; 112 at pp. 1-3). The resulting IEP included some changes to annual goals with no other changes noted (Dist. Ex. 111 at pp. 1-16).

A. Proceedings Prior to Remand and Remand Decision

By due process complaint notice dated September 23, 2017, and an amended due process complaint notice dated October 2, 2017, the parent initiated an impartial hearing (Impartial Hearing I) and asserted that the district failed to offer the student a FAPE for the 2013-14, 2014-15, 2015-16, 2016-17, and 2017-18 school years (see generally IHO Decision at p. 4; Parent Ex. A).[8] The parent alleged an array of claims concerning the district's failure to offer the student a FAPE during those school years, and requested reimbursement for tuition at Westfield for a portion of the 2015-16 school year, reimbursement for the cost of an independent neuropsychological evaluation, reimbursement for the cost of private transportation during the 2016-17 school year, revisions to the student's IEP for the 2017-18 school year, and compensatory education as relief (see Parent Ex. A).

There were a total of eight hearing dates conducted by the parties under the auspices of Impartial Hearing I, beginning April 12, 2018 and concluding December 21, 2018 (Impartial Hearing I Tr. pp. 1-1058).[9]

In a due process complaint notice dated June 11, 2018, the parent initiated a second impartial hearing (Impartial Hearing II) and asserted additional claims against the district going back to the 2007-08 school year (see IHO Decision at pp. 5-6; Parent Ex. RRRR at pp. 1-9). Among other claims, the parent asserted that the district had violated its "child find" obligations and requested declaratory relief and compensatory education as proposed solutions (Parent Ex. RRRR at pp. 7-8).

The IHO was assigned to hear the matter initiated by the June 2018 due process complaint notice (Impartial Hearing II Tr. p. 3; see IHO Decision at pp. 5-6). A prehearing conference was held regarding the June 2018 due process complaint notice, during which the district asserted that the claims brought in that due process complaint notice were outside the applicable limitations period, and duplicative of the claims brought in Impartial Hearing I and moved to dismiss the matter (Impartial Hearing II Tr. pp. 3, 4-6).

The parties submitted written arguments with respect to the district's motion to dismiss, and the IHO granted the district's motion to dismiss the June 2018 due process complaint notice in

[8] There are multiple references to the September 23, 2017 due process complaint notice in the hearing record, but a copy of that document is not present in the hearing record for this matter; however, it was submitted as a part of the hearing record in Application of a Student with a Disability, Appeal No. 18-104 (see IHO Decision at p. 4; Parent Ex. A at p. 1). An SRO may, as a matter within his or her discretion, take notice of records before the Office of State Review in other proceedings, especially those between the same parties and involving the same student in order to avoid unnecessarily confusing or conflicting factual determinations by the same administrative tribunal (see Application of a Student with a Disability, Appeal No. 18-067; Application of a Student with a Disability, Appeal No. 16-007).

[9] The hearings conducted on December 18, 2018 and December 21, 2018 took place in the form of conference calls, and the transcripts of those hearings contain overlapping page numbers (see Impartial Hearing I Dec. 18, 2018 Tr. pp. 1011-1058; Impartial Hearing I Dec. 21, 2018 Tr. pp. 1011-1033).

a decision dated August 15, 2018 (see Impartial Hearing II Tr. pp. 3-88; IHO Decision at pp. 5-7). The parent appealed that determination and, in a decision dated November 14, 2018, a State Review Officer vacated the IHO's decision dismissing the parent's June 2018 due process complaint notice because the parent had not been provided an opportunity to present evidence regarding the accrual date of her claims or whether an exception to the statute of limitations applied and the matter was remanded to the IHO for further administrative proceedings (see Application of a Student with a Disability, Appeal No. 18-104). Specifically, the IHO was directed to determine whether or not a summary procedure with a limited hearing would be sufficient in order to make the necessary findings of fact and of law relative to the district's statute of limitations defense and whether or not it would be appropriate to allow the parent an opportunity to present further evidence to support her assertion that the withholding of information exception to the timeline to request an impartial hearing applied (id.).

After the matter was remanded to the IHO, the IHO and the parties agreed to consolidate Impartial Hearing I with Impartial Hearing II (December 18, 2018 Consolidation Order; see Impartial Hearing I Dec. 18 Tr. pp. 1014, 1018, 1031-33, 1046-1047).

B. Impartial Hearing Officer Decision

The parties proceeded with the consolidated impartial hearing on December 21, 2018 and concluded on February 26, 2019 after three additional hearing dates conducted under the auspices of Impartial Hearing II (Impartial Hearing II Tr. pp. 1-435). On February 2019, the parent's counsel—who had been representing the parent during these proceedings—withdrew as counsel for personal reasons and the parent has proceeded without counsel thereafter (Impartial Hearing II Tr. pp. 91-121).

In a decision dated May 9, 2019, the IHO provided a detailed description of the history of the proceedings, summarized the voluminous record evidence and testimony in the matter, and provided a description of the student's complex educational history (see IHO decision at pp. 1-91). Following that, the IHO set forth the applicable law and made a series of discrete findings with respect to each of the claims and allegations brought by the parent's due process complaint notices (id. at pp. 91-108).

The IHO followed the directions set forth in the remand decision and determined the date upon which the parent knew or should have known of each of her claims (IHO Decision at pp. 7-48). Focusing on the IHO's determinations that remain relevant upon appeal, I note that for limitations purposes, the IHO determined that the parent "knew or should have known" of her IDEA claims against the district on April 29, 2015, the date that the parent referred the student to the CSE for an eligibility determination (id. at pp. 10, 33-35). The IHO determined that any claims concerning a time period before that date would have to be filed by April 29, 2017 and that as a result, all of the parent's claims concerning any school years prior to the 2015-16 school year were dismissed (id. at pp. 10, 35). Within a detailed discussion of when the parent knew or should have known about her claims, the IHO also determined that there were no applicable exceptions to the limitations period (id. at p. 21).

With respect to the 2015-16 school year, the IHO determined that the district failed to provide the student a FAPE by failing to conduct an FBA, failing to re-convene the CSE during

the school year, failing to properly implement counseling services provided for in the student's IEP, and failing to sufficiently address self-management and organizational needs, among other reasons (IHO Decision at pp. 49-75, 98-105). The IHO also determined that the unilateral placement at Westfield was appropriate, and equitable considerations did not warrant a reduction in tuition reimbursement and ordered the district to reimburse the parent for the cost of the student's tuition at Westfield during a portion of the 2015-16 school year (id. at pp. 71-75, 108).

With respect to the 2016-17 school year, the IHO found that the district offered the student a FAPE, that the CSE's recommended services and placement of the student at Karafin was appropriate and denied the parent's request for reimbursement of transportation expenses incurred by the parent during the school year (IHO Decision at pp. 75-89, 96, 103-06, 108).

With respect to the 2017-18 school year, the IHO found that the district offered the student a FAPE, that the CSE's recommended services and placement of the student at Karafin was appropriate and denied the parent's request for reimbursement of transportation expenses incurred by the parent during the school year (IHO Decision at pp. 89-91, 95-98, 103,108). Additionally, the IHO found that the CSE had reasonably refused to supplement the Karafin curriculum with "work packets" from the district high school as the parent requested, because the Karafin staff at the CSE meeting did not support the idea.

Addressing the parent's request for compensatory education, the IHO noted that given that she had found that the district failed to offer a FAPE for only one school year (2015-16), there was insufficient evidence of a "gross denial of FAPE," but that "[n]evertheless" because the student's autism was not adequately considered in the years at issue the IHO ordered the district to arrange for an independent evaluation of the student by a board certified behavior analyst of the parent's choice, who had experience working with students on the autism spectrum, in order to determine if the student would benefit from direct or indirect behavioral support (IHO Decision at p. 106).

Lastly, the IHO ordered that the parent be fully reimbursed for the cost of an independent neuropsychological evaluation obtained by the parent, notwithstanding the district's cost-containment policy, because the parent reasonably chose an autism center to conduct the evaluation in the face of the district's repeated failure to assess the student's autism (IHO Decision at pp. 75, 78-79, 82, 108).

IV. Appeal for State-Level Review

The parent appeals. The parent asserts 23 claims of IHO error in the request for review, many of which are repetitive and not all of which are easily construed as IDEA claims or directly connected to the requested relief. The parent contends that the IHO erred in awarding the approximate amount rather than the actual cost of the independent neuropsychological evaluation, failed to address issues that the district "opened the door to" during the impartial hearing, erred in failing to find that the district's refusal to provide appropriate transportation to the student denied the student a FAPE, and erred in failing to order reimbursement to the parent for the full cost of the student's transportation to Karafin.

The parent asserts a number of claims with respect to the IHO's findings concerning the applicable limitation period, including that the IHO erred in setting the "knew or should have

known" date, and should have addressed the failure to assess the student's autism, failure to conduct an FBA, child find violations and errors in the district's RTI services that occurred as early as April 2013.

The parent asserts that the IHO erred in failing to find that the district committed a gross denial of FAPE and acted with gross misjudgment and deliberate indifference by failing to properly evaluate the student's needs with respect to autism and sleep apnea and failing to timely conduct an FBA. The parent also asserts that the IHO erred by failing to make findings adverse to the district with respect to additional procedural errors such as the district's failure to issue prior written notice of CSE determinations, and failure to hold a CSE meeting when recommending a change in program.

The parent also asserts that the IHO erred in finding that the district offered the student a FAPE during the 2017-18 school year because the district predetermined the student's IEP, denied the parent meaningful participation and failed to place the student in the least restrictive environment (LRE). The parent contends that the IHO erred in failing to award reimbursement for the services the parent obtained from Montefiore to supplement the program at Karafin.

For relief, the parent requests an award for the full cost of the neuropsychological evaluation, reimbursement for the cost of transportation to Karafin, reimbursement for the private services provided by Montefiore, reversal of the IHO's determination on the accrual date of the parent's claims related to child-find and an evaluation by someone who could diagnose the student with or rule out autism, a finding that the district committed a gross denial of FAPE in failing to properly evaluate the student's autism, a finding that the district failed to evaluate the student in all areas of need by failing to promptly act on a suspicion of disability including sleep disorders, a finding that the district's use of a particular therapy during its response to intervention process violated FAPE and/or the district's child find obligation, a finding that the district's referral of the student to a day-treatment program without a CSE meeting violated FAPE, and, finally, a finding that the district acted with gross misjudgment.

In an answer with cross-appeal, the district responds to the parent's allegations with admissions and denials and argues to uphold the IHO's decision to the extent it found that the district offered the student a FAPE during the 2016-17 and 2017-18 school years.[10] The district asserts that the IHO correctly determined that the parent's child find claims accrued no later than the date the parent referred the student to the CSE in April 2015, and properly dismissed all claims that accrued prior to September 2015 as time barred. The district contends that the IHO correctly dismissed the parent's claim that the CSE did not provide appropriate transportation and accommodations for the student's sleep apnea. The district further asserts that the IHO correctly dismissed the parent's claim that the student's program at Karafin was insufficiently challenging for the student, and properly determined that there was no need to supplement the program at Karafin with an increased workload, because Karafin staff were concerned the student would "shut

[10] I note that the parent's request for review and the district's memorandum of law both attempt to incorporate by reference into these pleadings their closing briefs submitted to the IHO; however such incorporation by reference is explicitly prohibited by the practice regulations (8 NYCRR 279.8[b]; see Req. for Rev. at p. 1; Dist. Mem. of Law at p. 1).

down" and the student was later given extra work at Karafin which prepared the student for a transition back to the district high school.

The district cross-appeals the IHO's decision with respect to five findings. First, the district contends the IHO erred in finding that the district denied the student a FAPE for the 2015-16 school year because the student was appropriately placed in the district's emotional support program (ESP), received the required related services and received appropriate strategies in self-management and organizational skills. Second, the IHO erred in finding that the unilateral placement at Westfield was appropriate because the hearing record does not support a finding that Westfield provided instruction specially designed to meet the unique needs of the student. Third, the district contends that the IHO erred in finding that equities balance in favor of tuition reimbursement, because the parent failed to provide 10-day notice of her intention to place the student at Westfield and did not fully cooperate with the district. Fourth, the district contends that the IHO erred in ordering the district to fund the parent's private neuropsychological evaluation of the student in an amount over the reasonable rate set forth in the district's policy concerning independent educational evaluations. And finally, the district contends that the IHO erred in ordering the district to arrange for an independent educational evaluation by a board certified behavior analyst for the purpose of assessing the student's behavior management needs because the parent did not disagree with any specific district evaluation, the student's behavior needs have already been adequately evaluated, and the order for the evaluation is inconsistent with the IHO's finding that the district offered a FAPE during the 2016-17 and 2017-18 school years.

In a reply and answer to the district's cross-appeal, the parent responds to the district cross-appeal and asserts that the IHO correctly found that the district failed to offer the student a FAPE during the 2015-16 school year, properly awarded tuition reimbursement at Westfield, and did not err with respect to ordering an independent educational evaluation or ordering full reimbursement for the independent neuropsychological evaluation.

V. Applicable Standards

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

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "'[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP'" (Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley,

458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). The Supreme Court has indicated that "[t]he IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement" (Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. __, 137 S. Ct. 988, 999 [2017]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ. of the Chappaqua Cent. Sch. Dist., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245).

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

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

education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).[11]

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

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

VI. Discussion

A. Statute of Limitations

In Application of a Student with a Disability, Appeal No. 18-104, as described above, an SRO remanded this matter for the IHO to develop the hearing record and make factual determinations as to when the parent's claims accrued for the purpose of applying the statute of limitations. The IHO has made such findings and the parent appeals from the IHO's findings.

The IDEA provides that a claim accrues on the date that a party knew or should have known of the alleged action that forms the basis of the complaint and requires that, unless a state establishes a different limitations period, the party must request a due process hearing within two years of that date (20 U.S.C. § 1415[f][3][C]; see also 20 U.S.C. § 1415[b][6][B]; Educ. Law § 4404[1][a]; 34 CFR 300.507[a][2], 300.511[e]; 8 NYCRR 200.5[j][1][i]; Somoza v. New York City Dep't of Educ., 538 F.3d 106, 114-15 & n.8 [2d Cir. 2008]; M.D. v. Southington Bd. of Educ., 334 F.3d 217, 221-22 [2d Cir. 2003]).[12] Because an IDEA claim accrues when the parent knew or should have known about the claim, "determining whether a particular claim is time-barred is necessarily a fact-specific inquiry" (K.H. v. New York City Dep't of Educ., 2014 WL 3866430, at *16 [E.D.N.Y. Aug. 6, 2014]). An exception to the timeline to request an impartial hearing applies

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

[12] New York State has not explicitly established a different limitations period; rather, it has affirmatively adopted the two-year period found in the IDEA (Educ. Law § 4404[1][a]; 8 NYCRR 200.5[j][1][i]).

if a parent was prevented from filing a due process complaint notice due to the district withholding information from the parent that the district was required to provide under the IDEA (20 U.S.C. § 1415[f][3][D][ii]; 34 CFR 300.511[f][2]; 8 NYCRR 200.5[j][1][i]; D.K. v. Abington Sch. Dist., 696 F.3d 233, 246 [3d Cir. 2012]; R.B. v. Dep't of Educ. of City of New York, 2011 WL 4375694, at *6 [S.D.N.Y. Sept. 16, 2011]).

Initially, the parent contends that any claim that accrued within two years from the date she knew or should have known of the basis of the complaint—going either forward or backwards in time—is not barred by the statute of limitations. To support this, the parent cites to a section of the IDEA, which provides in pertinent part for "[a]n opportunity for any party to present a complaint . . . which sets forth an alleged violation that occurred not more than 2 years before the date the parent or public agency knew or should have known about the alleged action that forms the basis of the complaint" (20 U.S.C. § 1415[b][6][B]). At least three Circuit Courts have addressed the apparent incongruity between this provision and 20 U.S.C. §1415[f][3][c], which provides that a party may "request an impartial due process hearing within 2 years of the date the parent or agency knew or should have known about the alleged action that forms the basis of the complaint" and all three Circuit Courts have determined that 20 U.S.C. § 1415[b][6][B] was intended to mirror 20 U.S.C. §1415[f][3][c] so that the IDEA contains a single discovery based two year statute of limitations (see Ms. S. v. Regl. Sch. Unit 72, 916 F.3d 41 [1st Cir. 2019]; Avila v. Spokane Sch. Dist. 81, 852 F.3d 936, 940-44 [9th Cir. 2017]; G.L. v. Ligonier Valley Sch. Dist. Auth., 802 F.3d 601 [3d Cir. 2015]). Additionally, the Second Circuit has held that "a Due Process Hearing is limited to complaints about actions that the complainant knew of or should have known of within two years of the date that the hearing is requested" (Mr. P. v. W. Hartford Bd. of Educ., 885 F.3d 735, 747 n. 7 [2d Cir. 2018]). Accordingly, the parent's argument is rejected; the two-year statute of limitations running from the date the parent knew or should have known of the alleged action that forms the basis of the complaint will be applied to the parent's claims.

The parent next challenges the IHO's determination that the latest date the parent's claims related to child-find and the conduct of an initial evaluation of the student could have accrued was on April 29, 2015 when the parent referred the student for an initial evaluation.

The parent's claims that the IHO found to have accrued as of April 29, 2015 fall into a few different categories: a failure to evaluate the student in 2007 at the parent's request, a failure to evaluate the student in the 6th and 7th grades because the student was not meeting grade level expectations for all learning standards, a failure to provide the student with special education and related services to assist the student in achieving learning standards and taking part in accelerated courses offered to other students, and a failure to recognize that the student's behaviors stemmed from his disability and that the student should have been provided accommodations rather than discipline (see Parent Ex. RRRR).

A review of the parent's April 29, 2015 letter requesting that the student be evaluated to determine whether he had a disability requiring special education indicates that at the time of the letter the parent was aware of the actions forming the basis for her claims contained in her due process complaint notice (see Dist. Ex. 5). In her letter, the parent repeated some of the student's educational history, explaining that the student received early intervention and special education through his kindergarten school year (id. at p. 1). The parent further explained that although the

student generally did well in elementary school, there were concerns regarding "inattentiveness, poor organizational skills, and distracting mannerisms that were possible tics" (id.). The parent indicated that in middle school, the student began having greater difficulties in that he frequently did not complete homework or forgot to turn it in (id.). According to the parent, the student's difficulties were compounded by a medical issue, which required absences from school, causing the student to fall behind on his assignments (id.). The parent indicated that this led to a decline in the student's emotional state, which in turn caused the student to miss more school (id. at pp. 1-2). The parent further noted concerns that she described as "more clearly emotional in nature," including visits to the school nurse where the student was "teary eyed or emotional," an episode that appeared to be a panic attack, incidents of aggression towards other students, and "occasions where the student expressed thoughts of harming himself [] require[ing] an urgent psychiatric consultation" (id. at p. 2). The parent then indicated that "[w]hile intervention for emotional and behavioral issues were put in place, [the student's] academic performance continued to be a source of frustration" (id.). According to the parent, she took steps to clear distractions and began supervising his homework; however, this led to "resentment and defiance" and the parent was advised to stop overseeing the student's homework until his emotional state improved (id. at pp. 2-3). In the letter, the parent expressed her belief that the student struggled to keep up with school work even with support, and the parent requested that the student be evaluated in all areas of suspected disability, including "emotional disturbance, disorders of impaired executive functioning, and speech impairment, as well as his pre-existing diagnosis of autism" and that special education be considered for the student "in organization, time management, and other coping strategies" (id. at p. 3).

The parent raises a few specific objections to the IHO's findings. For one, the parent contends that the April 29, 2015 referral was prompted by the student's grades and emotional state, and that there was no indication the parent was aware of the student's "inability to efficiently manage his time and work load, in and of itself" (Req. for Rev. ¶13). However, this argument is contrary to the concerns raised in the parent's letter. For example, the parent expressed concerns regarding the student's poor organizational skills, she indicated that the student needed to learn strategies to help him handle academic pressures, she requested an evaluation for "disorders of executive functioning," and she requested a consideration of special education to address organization and time management (Dist. Ex. 5).

The parent also contends that the claims raised in the June 2018 due process complaint notice did not accrue until sometime in 2017, when the parent found out from State guidance that the district had an obligation to address the student's functional skills (Req. for Rev. ¶10). The parent contends that prior to her discovery that the State's Career Development and Occupational Studies (CDOS) learning standards incorporated functional skills, such as skills necessary for effective self-management, she did not know the student could be found eligible for classification and special education on that basis (id.). According to the parent she "did not know that the CDOS [learning standards] could form the basis of a complaint for a student who was passing and was not yet emotionally compromised" (Parent Mem. of Law at p. 18). However, even accepting the parent's allegation that she was not aware that she could pursue an initial evaluation of the student based solely on the student's lack of self-management skills, this claim accrued once the parent referred the student for an initial evaluation. In conducting an evaluation, a district must ensure that a student is appropriately assessed in all areas related to the suspected disability, including, where appropriate, social and emotional status (20 U.S.C. § 1414[b][3][B]; 34 CFR 300.304[c][4];

8 NYCRR 200.4[b][6][vii]). Additionally, an evaluation of a student must be sufficiently comprehensive to identify all of the student's special education and related services needs, whether or not commonly linked to the disability category in which the student has been classified (34 CFR 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]). Accordingly, even if the parent was not aware that the student's functional skills, in and of themselves, may have triggered the district's duty to evaluate the student, once the student was referred for an evaluation, the evaluation was required to address the student's abilities in those areas, and the parent's claim that the student should have been evaluated earlier must have accrued, at the latest, at that time.[13]

Separate from the parent's allegations related to child-find, the parent asserts that the district failed to properly evaluate the student to determine if he met the criteria for an autism diagnosis. The IHO had determined that the parent's claims related to the student's diagnosis had accrued at the time of the June 25, 2015 CSE Meeting, as the parent indicated to the CSE that the student was diagnosed with autism and suspected his behaviors of non-compliance may have been attributed to the autism diagnosis, but did not challenge the CSE's recommendations (see IHO Decision at pp. 42, 48). On appeal, the parent does not appear to be objecting to the June 2015 CSE's recommendations, but only to the district not conducting an evaluation that the parent had specifically requested to determine whether the student had a diagnosis of autism (see Req. for Rev. ¶18).[14] Notably, in her April 2015 letter referring the student for an initial evaluation, the parent specifically requested "a comprehensive individual evaluation that addresses all areas of suspected disabilities including, but not limited to, emotional disturbance, disorders of impaired executive functioning, and speech impairment, as well as his pre-existing diagnosis of autism" (Dist. Ex. 5 at p. 3). In response the district provided the parent prior written notice dated April 29, 2015 explaining the evaluations the district intended to conduct as part of the initial evaluation, and the parent signed consent for those evaluations on April 30, 2015 (see Dist. Exs. 7, 8). Upon signing consent for the identified evaluations, the parent knew or should have known whether the specific evaluation she had requested was included as part of the initial evaluation. Accordingly, the parent's assertion that the district failed to conduct an evaluation that she requested in her April 2015 referral letter accrued as of the parent's receipt on April 30, 2015 of the prior written notice identifying the evaluations that the district intended to conduct as part of the student's initial evaluation.

As the parent's claims related to child-find, an initial evaluation of the student, and the content of the initial evaluation accrued, at the latest, more than two years prior to

[13] The parent's assertion that the district's provision of counseling was an improper form of response to intervention, is essentially also a child-find claim in that it is an assertion that the district should have identified the student using a proper response to intervention process (see Req. for Rev. ¶15). Accordingly, it also accrued when the student was identified and evaluated in April 2015.

[14] Other than the district's alleged failure to assess the student for autism, the parent does not appeal from the IHO's determination that the parent knew or should have known of her claims related to the recommendations made by the June 25, 2015 CSE as of the date of the CSE meeting (see IHO Decision at pp. 42-48). Accordingly, the IHO's determination on this issue has become final and binding on both parties and it will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]).

the parent's filing of her initial due process complaint notice in September 2017 and the consolidated due process complaint notice in June 2018 (which is the due process complaint notice first asserting many of these claims), the IHO correctly determined that these claims were beyond the IDEA's two-year statute of limitations. Accordingly, the parent will not be able to pursue them further unless one of the exceptions to the statute of limitations applies.

The exceptions to the two-year limitations period for requesting an impartial hearing apply in circumstances in which a parent has been 1) prevented from filing a due process complaint notice due to a "specific misrepresentation" by the district that it had resolved the issues forming the basis for the due process complaint notice; or 2) the district withheld information from the parent that it was required to provide (20 U.S.C. § 1415[f][3][D]; Educ. Law 4404[1][a]; 34 CFR 300.511[f]; 8 NYCRR 200.5[j][1][i] R.B., 2011 WL 4375694, at *6).

Here the parent does not make a specific argument related to either exception with respect to her child-find claims. The parent's allegation that comes closest to asserting one of the exceptions is her claim that the district middle school report cards did not reflect the requirement for teachers to report on the CDOS learning standards. However, whether or not the district reported the student's progress with respect to the CDOS learning standards does not change the above analysis showing that the parent was aware as of the April 29, 2015 referral that the student was having difficulty with executive functioning, time management, and organizational skills (see Dist. Ex. 5). These are the same skills the parent contends were a part of the CDOS learning standards, specifically referring to the student's difficulties with "self-management——e.g. completing work he is otherwise capable of completing and turning assignments in on time" (Parent Mem. of Law. at p. 14). Additionally, the hearing record indicates that the parent and school staff regularly communicated regarding the student's difficulties with homework completion and organization during the 2014-15 school year, leading up to the referral of the student for special education in April 2015 (see Parent Exs. G at pp. 9-12, 14-17; H-J; K at pp. 2-4; L; see also Parent Ex. M). Accordingly, the parent's allegation related to her not knowing whether the school was working on functional skills with the student or whether he was making progress in those skill areas cannot support a claim that the district either misrepresented or withheld this information from the parent.

With respect to her claim that a specific evaluation was not conducted as a part of the student's initial evaluation, the parent asserts that either exception should apply because the district did not provide her with prior written notice. However, as discussed above, the district provided the parent with prior written notice identifying the evaluations the district would conduct as part of the initial evaluation of the student (Dist. Ex. 7). As the parent's allegation is contrary to the hearing record, it cannot support application of one of the exceptions to the statute of limitations.

Based on the above, I concur with the IHO's findings that the parent's claims related to child-find and the recommendations made at the June 2015 CSE meeting are barred by the statute of limitations. Additionally, the parent's claim that the district did not conduct a specific evaluation as part of the student's initial evaluation is also barred by the statute of limitations.

B. 2015-16 School Year

1. Special Factors - Functional Behavioral Assessment

The parent contends that the IHO correctly identified the district's failure to conduct an FBA and develop a BIP for the student during the 2015-16 school year resulted in a denial of FAPE for the student during that school year. The district cross-appeals the IHO's finding and asserts that the IHO improperly concluded that the district failed to respond to the parent's request to conduct an FBA and develop a BIP, reasoning that although the parent brought up the idea of conducting an FBA at the commencement of the 2015-16 school year, the district informed the parent as to why an FBA/BIP was not necessary at that time.

Under the IDEA, a CSE may be required to consider special factors in the development of a student's IEP. Among the special factors in the case of a student whose behavior impedes his or her learning or that of others, the CSE shall consider positive behavioral interventions and supports, and other strategies, to address that behavior (20 U.S.C. § 1414[d][3][B][i]; 34 CFR 300.324[a][2][i]; see 8 NYCRR 200.4[d][3][i]; see also E.H. v. Bd. of Educ., 361 Fed. App'x 156, 160 [2d Cir. Oct. 16, 2009]; A.C., 553 F.3d at 172). State procedures for considering the special factor of a student's behavior that impedes his or her learning or that of others may also require that the CSE consider developing a BIP for a student that is based upon an FBA (8 NYCRR 200.4[d][3][i], 200.22[a], [b]). Additionally, a district is required to conduct an FBA in an initial evaluation for students who engage in behaviors that impede their learning or that of other students (8 NYCRR 200.4[b][1][v]). State regulation defines an FBA as the process of determining why a student engages in behaviors that impede learning and how the student's behavior relates to the environment" and includes, but is not limited to,

> the identification of the problem behavior, the definition of the behavior in concrete terms, the identification of the contextual factors that contribute to the behavior (including cognitive and affective factors) and the formulation of a hypothesis regarding the general conditions under which a behavior usually occurs and probable consequences that serve to maintain it

(8 NYCRR 200.1[r]). According to State regulation, an FBA shall be based on multiple sources of data including, but not limited to, "information obtained from direct observation of the student, information from the student, the student's teacher(s) and/or related service provider(s), a review of available data and information from the student' record and other sources including any relevant information provided by the student's parent" (8 NYCRR 200.22[a][2]). An FBA must also be based on more than the student's history of presenting problem behaviors (8 NYCRR 200.22[a][2]).

Although State regulations call for the procedure of using an FBA when developing a BIP, the Second Circuit has indicated that, when required, "[t]he failure to conduct an adequate FBA is a serious procedural violation because it may prevent the CSE from obtaining necessary information about the student's behaviors, leading to their being addressed in the IEP inadequately or not at all" (R.E., 694 F.3d at 190; see L.O. v. New York City Dep't of Educ., 822 F.3d 95, 113 [2d Cir. 2016]). The Court also noted that "[t]he failure to conduct an FBA will not always rise to

the level of a denial of a FAPE," but that in such instances particular care must be taken to determine whether the IEP addresses the student's problem behaviors (id.).

As noted above, on April 29, 2015, the parent requested a comprehensive individual evaluation of the student "to determine the presence of one or more disabilities that necessitate special education services" (Dist. Ex. 5 at p. 1). The parent cited in her request concerns regarding the student's difficulty keeping track of and completing homework assignments; somatic complaints that interfered with the student's ability to attend classes and resulted in absences, tardiness, and prolonged visits to the school health office; and emotional episodes in which the student was teary-eyed and perhaps experiencing a panic attack (id. at p. 2). In addition, the parent noted that the student had engaged in behavior (hitting other children, defying authority) that resulted in disciplinary actions and expressed thoughts of self-harm (id.).

The hearing record shows that the district was aware of the intensity of the student's social/emotional needs at the time it conducted its initial evaluation in May and June 2015. A May 11, 2015 psychiatry visit note indicated that the student had an emotional crisis in school that day which stemmed from his receiving detention based on behavior from the end of the previous week (Parent Ex. N at p. 1). Reportedly, the student was surprised and confused and became very upset, tore up the detention slip, and refused to leave the classroom (id.). After the student was calmer district staff performed a screening and the student acknowledged having suicidal thoughts to cut himself with scissors (id.). The May 2015 psychiatry visit note stated that this was a student with clear difficulties and excessive sadness/depression, anxiety with somatic complaints and multiple areas of worry, and that he appeared acutely suicidal and warranted either hospitalization or partial hospitalization given his inability to function at school and increased hopelessness (id. at pp. 1-2). The note indicated that schoolwork was the main stressor for the student (id. at p. 1).

In June 2015 emails to the parent, the school counselor reported that "[a] few teachers have told me" that sometimes during class the student has his head down and will say "I don't feel like myself today," that once in Spanish class the student asked to leave class because he was worrying about the SATs and couldn't concentrate, and that on one occasion the student had his head down the entire class and was unable to complete the work (Parent Ex. Q at p. 1; Dist. Ex. 15).

A behavior rating scale completed by the student's ELA teacher as part of the district's psychoeducational evaluation highlighted some of the student's difficulties in school (Dist. Ex. 19 at pp. 10-12). According to the teacher's responses, the student often demonstrated poor control and may disrupt the schoolwork of his peers (id. at p. 12). The student sometimes appeared to act without thinking and had trouble staying seated (id.). In addition, the student could be overly active and disruptive of other adolescents' activities and interrupted others while speaking (id.). The teacher reported that at times the student sought attention while doing schoolwork (id.). The student's hyperactivity score was in the at-risk range (id.). The teacher's responses also yielded a depression score in the clinically significant range (id. at p. 10). The teacher reported that the student often seemed sad and lonely, could appear pessimistic and became easily upset or cried easily (id. at p. 11). Moreover, the student's social/emotional difficulties were discussed by the June 2015 CSE and the meeting information summary noted that the student's grades were negatively influenced by his inconsistent completion of home assignments, long-term projects and absences, and that the student could be moody, would keep his head down and not participate, did not always take notes, and presented as angry and frustrated with non-academic concerns (Dist.

Ex. 21 at p. 2; see Dist. Ex. 17). The CSE meeting summary stated that the CSE discussed "how the student's grades d[id] not reflect his potential and appeared to be influenced by his noted social-emotional issues" (Dist. Ex. 21 at p. 2). The June 2015 IEP recommended the support of the ESP for the student, yet indicated that the student did not need a BIP (id. at pp. 2, 7, 8).[15]

Moving forward, the school psychologist testified that when the student started eighth grade in September 2015 he was really struggling and different from what district staff anticipated; notably the student was "incredibly angry," "bitter," and "emotionally dis-regulated" and the first three weeks of school were the most difficult (Impartial Hearing I Tr. pp. 407-409, 519-20).[16] In September 2015, the student was involved in an incident in which he started hitting his thigh very hard and refused to go to class (Impartial Hearing I Tr. pp. 607-08; Dist. Ex. 64 at p. 2). Nurse's logs indicate that the student was in the nurse's office five times during September 2015 for reasons which included him being "sluggish," "upset and teary eyed," and having elbow discomfort, and that he "refused to leave [the health office] and go to class" (Dist. Ex. 108 at p. 1). The student's June 2016 IEP indicated that intensive engagement with the ESP staff, counseling, meetings, and interventions regarding class attendance followed and that improvement in the student's mood, openness to school work and class attendance progressed through the end of September (Dist. Ex. 60 at p. 7). Reportedly, as fall progressed the student's functioning generally improved, with episodes of fluctuations in mood and resistance attending and participating in certain classes, and he reportedly benefitted from meetings at school with his oldest brother and on days he was struggling with his mood, phone access with his father (id.).

In a September 25, 2015 email to the district, the parent requested that the district perform an FBA "to make sure that the interventions we have in place are appropriate for whatever is motivating his behavior in the first place," that a formal BIP be indicated in the student's IEP, and that a record of his progress be monitored and reported so that the plan's efficacy could be periodically reviewed and modified as needed (Parent Ex. T at p. 2). The parent testified that at that time the student was visiting the nurse's office on a frequent basis and she wanted to rule out underlying medical issues, but also to determine whether the student needed to leave the class or if the district and parents were reinforcing the student's wish to avoid something by letting him go to the nurse or taking him home from school (Impartial Hearing I Tr. pp. 607-08). The parent further testified that in a September 29, 2015 conversation she told the assistant director of special education that she had asked for an FBA and that the assistant director "nodded ascent" which the parent stated led her to believe that "she was going along with it, the BIP" (Impartial Hearing I Tr. pp. 608-09). In a September 30, 2015 email to the district, the parent asked to be informed "if you have any update regarding a possible formal Behavior Intervention Plan" (Parent Ex. U at p. 1).

When asked if he had considered whether an FBA or "BIT" (sic) would be necessary during this time period the school psychologist stated that, "[n]o, didn't cross my mind at all" because it

[15] Although the June 2015 IEP and the evaluations conducted prior to it fall outside the applicable limitations period and are not a subject of this appeal, I note that there was enough information available to the district that the student engaged in behaviors that impeded his learning or that of others to suggest that the district should have conducted an FBA as part of the student's initial evaluation.

[16] The school psychologist reported that the student's anger was directed at his mother and stemmed from the fact that he was "forced to take a math class through the summer" (Impartial Hearing I Tr. pp. 407-08; but see Impartial Hearing I Tr. pp. 614-15).

was a brand-new situation and the student was very unstable (Impartial Hearing I Tr. pp. 410-11). The school psychologist noted that the staff were working "very, very hard" to establish rapport and provide support, encouragement, and "the sort of safety net or oasis… of what ESP is to him" (id.). The school psychologist also explained that the staff were "trying to get [the student] to go to class" so he would not fall further behind (id.).

The parent testified that she again inquired about the progress of the student's FBA at a meeting in October 2015 and that the school psychologist's response, that the student was being work avoidant and manipulative, led her to believe that the district staff were coming to a conclusion regarding the function of the student's behaviors (Impartial Hearing I Tr. pp. 616-17). In a March 2016 email, the parent stated she was "just following up" on her request for a meeting and asked for a copy of the FBA and BIP (Parent Ex. CC). The parent testified that it was a surprise to her to learn on March 14, 2016 that there was no FBA and that the district cited lack of consent as the reason (Impartial Hearing I Tr. p. 617).

In an email dated March 16, 2016, the parent stated that she had requested an FBA "early this school year" and just discovered that an assessment had not been performed or started (Dist. Ex. 27 at p. 2). In a March 16, 2016 reply, the district acknowledged that the parent sent an email on September 30, 2015 "requesting an update on a possible formal Behavioral Intervention Plan" (id.).[17] The district explained in the March 2016 email that the student was recommended for the emotional support program (ESP) and that behavior management strategies were a part of the program, that most students were responsive to the supports and did not require a student-specific plan, and that staff were learning ways to work more effectively with the student implementing class-wide behavior management strategies (id.).

The March 16, 2016 email from the district acknowledged that at that time a more formal FBA/BIP might be warranted as the student was "not always responsive to the already established behavior management techniques employed" (Dist. Ex. 27 at p. 1; see Dist. Ex. 25). The email indicated that once the parent signed a consent for the FBA, the team would meet to design a plan (Dist. Ex. 27 at p. 1; see Impartial Hearing I Tr. pp. 427-29).

The parent testified that prior to March 2016 the district did not tell her that consent was necessary for the district to conduct an FBA and that from September 2015 to March 2016 she had not received any communication from the district asking for her consent to perform an FBA (Impartial Hearing I Tr. p. 617). School districts "must make reasonable efforts to obtain written informed consent of the parent," which is required prior to conducting an initial evaluation or reevaluation" (8 NYCRR 200.5[b][1]; see 34 CFR 300.300[c][1][i]; see also 34 CFR 300.9; 8 NYCRR 200.1[*l*]). However, in this instance, the district had already sent the parent prior written notice for the initial evaluation in April 2015 and had obtained the parent's consent to conduct an FBA (see Dist. Exs. 7; 8).[18] The April 29, 2015 prior written notice indicated an FBA would be

[17] The district's email did not acknowledge the parent's September 25, 2015 email where she specifically requested that the district conduct an FBA of the student (Dist. Ex. 27; see Parent Ex. T at p. 2).

[18] 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"

conducted if the "student displays interfering behaviors in school which detract from the learning process" (Dist. Ex. 7 at p. 1). It is unclear from the hearing record as to why the district required additional consent from the parent after the parent made a second request for an FBA in her September 25, 2015 email to the district (see Parent Ex. T at p. 2).

The school psychologist testified that he contacted the parent following her September 2015 request for an FBA and explained that an FBA was not necessary or appropriate at the time because the program had reinforcers and supports, and staff was trying to develop a rapport with the student (Tr. p. 425). The psychologist reported that the parent accepted his explanation (Tr. p. 425). This testimony was consistent with the district's March 2016 email to the parent, which implied that the district did not conduct an FBA earlier in the year because the district wanted to see if the class wide behavior management strategies would work for the student (see Dist. Ex. 27 at p. 1). Nevertheless, the district's explanation does not comport with State regulation, which requires an FBA be conducted for students who engage in behaviors that impede their learning or that of other students (8 NYCRR 200.4[b][1][v]); but only requires that a BIP be considered for a student who "exhibits persistent behaviors that impede his or her learning or that of others, despite consistently implemented general school-wide or classroom-wide interventions" (8 NYCRR 200.22[b][1][i]). Accordingly, a BIP may not have been required for the student if the school-wide or classroom-wide interventions addressed the student's behaviors; however, considering the student was exhibiting behaviors that interfered with learning before the district placed the student in the ESP, the district was required to conduct an FBA and such classroom wide interventions should not have been taken into account in determining whether to proceed with an FBA (see Application of the Bd. Of Educ., Appeal No. 16-045 [in considering when an FBA must be conducted, finding that "a serious procedural violation is to be found in all cases if the student had interfering behaviors and an FBA was not conducted as part of the IEP development process"]).

Based on the above, the district's failure to conduct an FBA, even considering its reasons for not conducting an FBA of the student—combined with the district's failure to reasonably respond to the parent's September 25, 2015 request for an FBA by explaining in a prior written notice the reasons for deciding not to conduct an FBA or document an effort to obtain written consent of the parent—constitutes a serious procedural violation. Such a procedural failure will result in a denial of FAPE if it impeded the student's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision-making process, or caused a deprivation of educational benefits (see 20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]).

The school psychologist testified that, after the initial few weeks, participation by the student was "great" and that generally, the student did "really, really well," went to class, and had a little bit of bad mood or fatigue (Impartial Hearing I Tr. pp. 419-23). The nurse's log confirms

(emphasis added 34 CFR 300.503[a]; 8 NYCRR 200.1[oo]; 200.5[a][1]). Further, 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]).

that the student's visits to the nurse diminished between October 2015 and January 2016 (Dist. Ex. 108 at p. 1).

However, the hearing record is replete with evidence that while the student was making some gains he still exhibited behaviors which required additional supports throughout the school year.

For example, emails from school staff and from the parent during the fall of 2015 and early 2016 detailed the student's missing work and his failure to turn in assignments, which in turn impacted his grades (Parent Exs. V at p. 1; W at p. 2; X at p. 1).

In a January 2016 email exchange, the parent informed the district that the student had been having increased depression symptoms; in response, the assistant superintendent for special education stated that the student was "not a morning person," was typically tired and irritable in the a.m., and was often resistive and non-compliant with staff attempts to assist him in better organizing and checking his work (Parent Ex. Y at pp. 1-2).

While the student's June 2016 IEP indicated that the student had a broad period of emotional stability in the ESP with improved academic functioning, attitude toward school, and general mood through the mid-school year, it also indicated that at mid-year the student reported difficulty falling asleep and fatigue, and questions of behavioral and medical issues were raised, and medications were adjusted (Dist. Ex. 60 at p. 7). The IEP indicated that at the mid-year point, the student's self-regulation weakened and school functioning worsened (id.).

Nurse's logs indicated that during February 2016 the student was in the nurse's office seven times for reasons such as headaches and dizziness and for being teary-eyed and upset (Dist. Ex. 108 at p. 1).

In a February 28, 2016 email to district staff, the parent stated "[a]s you are probably aware" the student has had some difficult moments over the past few weeks (Parent Ex. AA). In a February 29, 2016 email to the district, the parent wrote, "I understand that, as you said, the amount of attention [the student] requires from you, the school nurse, and the rest of the school staff is beginning to impact on your ability to attend to other students" (Parent Ex. BB). The parent stated that she stood by her reasons for not taking the student home including the potential for reinforcing unwanted behavior (id.). The parent requested a CSE meeting to "discuss our options for dealing with" the student's behaviors which were adversely impacting his learning as well as that of other students (id.).

The parent testified that she had received emails from district staff telling her that the student was going to fail or that he was failing and that around February or March, when the student was really falling behind, the school psychologist asked her to "step in and try to motivate him" (Impartial Hearing I Tr. p. 595). In addition, the school psychologist testified that there was a time that the student's behavior shifted and that the "patterns that were present in 7th grade, and to a lesser degree what were present in September started to emerge" (Impartial Hearing I Tr. p. 427). The school psychologist stated that "[i]t could have been somewhat after the February break," that there was more resistance some days to go to class and more putting his head down and a "gradual increase in his mood dis-regulation" (Impartial Hearing I Tr. pp. 427-28).

In March 2016, the parent was still receiving emails from teachers regarding missing assignments (Parent Ex. DD at pp. 1-5). On March 2, 2016 the student was involved in an incident in which he punched a wall in frustration and sustained abrasions on his knuckles (Dist. Exs. 64 at p. 2; 108 at p. 1). On March 2, 2016 the school psychologist completed an intensive day treatment referral for the student (Dist. Ex. 115). The referral stated that while the student had had "month long periods" of very good functioning, he had struggled with depression and refusal to consistently attend class, especially in the morning, since the end of the seventh grade (id. at p. 1; see Impartial Hearing I Tr. pp. 430-32, 433-35).On March 21, 2016 the district and parent agreed to amend the student's IEP without a meeting and modified the IEP to included changes in speech-language services and the addition of two speech-language annual goals; however, the IEP continued to indicate that the student did not need a BIP and did not note the initiation of an FBA (Dist. Ex. 28 at pp. 1, 8).

The school psychologist's testimony and written report detailed a March 21, 2016 incident in which the student was unresponsive and refused to follow teacher directives; the incident culminated in the student exhibiting self-injurious behavior ("slammed his forehead right into the locker," "began to punch himself in the head incredibly hard, I mean, as hard as you physically could") and threats to harm himself (Impartial Hearing I Tr. pp. 461-471, Dist. Ex. 29).

The district indicated in the meeting information summary of the student's April 20, 2016 CSE meeting that the student needed a BIP and stated that an FBA and BIP had been in process prior to the CSE meeting and that upon the student's return to the district the FBA and BIP would be developed (Dist. Ex. 34 at pp. 2, 7).

In an email to the parent dated September 12, 2016, the district stated "[i]n response to your e-mail of 6/6, please note that the steps for an FBA/BIP were in process at the time that you had decided" to remove the student from the district program (Dist. Ex. 75 at p. 1).[19] However, after all the above events and in spite of plans from the June 2016 CSE meeting to conduct an FBA upon the student's "return to the CSE recommended program," the August 2016 CSE recommended a non-public school placement that offered supportive management strategies for the student and determined that an FBA was not necessary at that point (Dist. Ex. 71 at pp. 2, 3). The meeting information summary indicated that the CSE would revisit the student's need for an FBA/BIP after the first marking period (id.; Dist. Ex. 73 at p. 1).

Based on the above, and as the IHO adroitly observed, there was no actual behavior plan specific to the student during the 2015-16 school year and so when motivators such as contact with his father or brother were no longer available, the ESP team had no plan in place to actually target the student's avoidant behaviors (IHO Decision at p. 59). The school psychologist stated that he did not have any written notes or reports monitoring the student's progress from counseling or DBT sessions (Impartial Hearing I Tr. pp. 508-09). In the end, the district's failure to conduct an FBA—as, by all measures, the student's behaviors during the 2015-16 school year warranted such an assessment, and one had been specifically requested by the parent in the beginning of the school year—impacted the district's ability to meet the student's behavioral needs during the 2015-16

[19] There is not an email with this date in the hearing record.

school year. Therefore, I must concur with the IHO's determination that the failure to conduct an FBA resulted in a denial of FAPE for the student during the 2015-16 school year.

Having found a denial of FAPE for the 2015-16 school year based on the district's failure to conduct an FBA, it is not necessary to decide the parent's other claims regarding the 2015-16 school year. Although the IHO founded her determination that the district failed to offer the student a FAPE during the 2015-16 school year on a number of other considerations including an asserted failure to provide the student with group counseling services, failure to address the student's needs with respect to self-management and organizational skills, and a failure to timely re-convene the CSE, I base my finding of a denial of FAPE on the district's failure to conduct an FBA, which constituted a serious procedural violation that prevented the CSE from obtaining necessary information about the student's behaviors, leading to their being inadequately addressed during the 2015-16 school year (R.E., 694 F.3d at 190; see L.O, 822 F.3d at 113 [2d Cir. 2016]).

2. Unilateral Placement

The district also cross-appeals the IHO's finding that Westfield was an appropriate unilateral placement, reasoning that the hearing record did not support the IHO's finding because there was insufficient evidence that Westfield's program was specifically designed to meet the student's unique needs. I disagree and, for the reasons set forth below, decline to overturn the IHO's finding with respect to the unilateral placement at Westfield.

A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak, 142 F.3d at 129). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (Carter, 510 U.S. at 13-14). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ. of the City Sch. Dist. of Yonkers, 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement'" (Gagliardo, 489 F.3d at 112, quoting Frank G. v. Bd. of Educ. of Hyde Park, 459 F.3d 356, 364 [2d Cir. 2006]; see Rowley, 458 U.S. at 207). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). When determining whether a unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether the placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see Gagliardo, 489 F.3d at 115; Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] ["evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]). A private placement is appropriate if it provides instruction specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; Educ. Law § 4401[1]; 34 CFR 300.39[a][1]; 8 NYCRR 200.1[ww]; Hardison v. Bd. of Educ. of the Oneonta City Sch. Dist., 773 F.3d 372, 386 [2d Cir. 2014]; C.L. v. Scarsdale Union Free Sch. Dist., 773 F.3d 372, 836 [2d Cir. 2014]; Gagliardo, 489 F.3d at 114-15; Frank G., 459 F.3d at 365).

The Second Circuit has set forth the standard for determining whether parents have carried their burden of demonstrating the appropriateness of their unilateral placement.

> No one factor is necessarily dispositive in determining whether parents' unilateral placement is reasonably calculated to enable the child to receive educational benefits. Grades, test scores, and regular advancement may constitute evidence that a child is receiving educational benefit, but courts assessing the propriety of a unilateral placement consider the totality of the circumstances in determining whether that placement reasonably serves a child's individual needs. To qualify for reimbursement under the IDEA, parents need not show that a private placement furnishes every special service necessary to maximize their child's potential. They need only demonstrate that the placement provides educational instruction specially designed to meet the unique needs of a handicapped child, supported by such services as are necessary to permit the child to benefit from instruction.

(Gagliardo, 489 F.3d at 112, quoting Frank G., 459 F.3d at 364-65).

a. The Student's Needs

A brief discussion of the student's needs is necessary to evaluate the appropriateness of Westfield. A variety of documents in the hearing record detail the student's needs at the time the parent decided to unilaterally place the student.

As noted above, in May 2015 the student was hospitalized following an emotional crisis at school and reports of suicidal ideation (Parent Ex. N at p. 1; Dist. Exs. 11 at p. 2; 12 at pp. 1-2). A hospital discharge summary indicated that the student had been diagnosed with major depression, single episode, "severe w psychotic," pervasive developmental disorder NOS, Tourette's disorder, parent-child relational problem and Crohn's disease (Dist. Ex. 12 at p. 2).

In and around the time the student was hospitalized, the district conducted an evaluation of the student in accordance with the parent's April 29, 2015 request for a comprehensive individual evaluation (see Dist. Ex. 5 at p. 1). The evaluation formed the basis for the CSE's determination to classify the student on June 25, 2015 and develop an IEP for him (Dist. Ex. 21 at pp. 1, 3). The evaluation also helped to identify the student's needs at the beginning of the 2015-16 school year.

Prior to the student's hospitalization, the district conducted a speech-language evaluation in early May 2015 (Dist. Ex. 9). The results of the evaluation indicated that the student presented with above average language comprehension, expression, abstraction and social pragmatics; however, his speech production was marked by minimal mouth movements, rapid rate, and lack of natural pauses (id. at pp. 3-5). The student's speech intelligibility was influenced by the student's fatigue and level of physical comfort and when fatigue and medical variables were present he demonstrated imprecise consonant production and mild tongue protrusion which impacted his intelligibility (id. at p. 5).

The student was hospitalized at the time the district conducted a social/developmental history on May 19, 2015 (Dist. Ex. 11). Relevant to the student's educational needs, the social history indicated that the student's mother was concerned with the student's inability to keep track of homework assignments and the effect of negative feedback and compromised grades on the student's self-esteem (id. at p. 1). The student's mother described him as affectionate, enthusiastic, and eager to please and reported that when the student took an interest in something he was self-driven and persistent (id. at p. 2). However, the parent also reported that at times the student found it difficult to change his behavior and he could be sensitive to what he perceived to be criticism or disapproval and would shut down/refuse to speak, avoid eye-contact or become uncooperative in these instances (id.). The student's mother characterized the student as having a short attention span, lacking in self-control, and impulsive at times (id. at p. 3). She reported that the student withheld affection and hid his feelings (id.). According to the parent, the student could overreact when faced with a problem, required significant parental attention and struggled to calm himself down (id.).

On June 1, 2015, four days after the student's return to the district from being hospitalized, the district conducted a classroom observation of the student in his math class (Dist. Ex. 14 at p. 1). The observer noted that at the beginning of the class the student faced the window, rather than the front of the room where a video was being shown, and he had his backpack on his lap (id.). Initially the student shifted his gaze between the video and his hands, which were playing with the backpack (id.). The student did not laugh when the other students laughed (id.). However, as the class went on the student became more engaged in watching the video and interacting with another student (id.). During a group assignment, the student complied with an individual, but not a group, directive from the teacher (id. at p. 2). The student joked around with peers, advised his group that they had approached a problem incorrectly, and explained his work to peers (id.). The observer noted that when the teacher praised another group's work, but not the student's, the student put his head on his desk (id.).

In addition to the evaluations described above, the district also conducted a psychoeducational evaluation of the student (Dist. Ex. 19). A June 2, 2015 administration of the Stanford-Binet Intelligence Scales-Fifth Edition yielded a full-scale IQ of 121 (92nd percentile) which fell in the superior range of cognitive abilities (id. at pp. 2-3, 18). The student demonstrated stronger verbal abilities (superior range) than non-verbal abilities (above average range) and a "particular strength" working with numbers and mathematical concepts to solve both nonverbal and verbal problems (id. at pp. 4, 18).

With respect to the student's academic abilities, administration of the Wechsler Individual Achievement Test-Third Edition (WIAT-III) showed that the student demonstrated skills in the average range in reading comprehension, oral expression, and oral reading fluency; however, these appeared to be areas of relative weakness for the student when compared to his performance on other subtests particularly, mathematics (Dist. Ex. 19 at pp. 7-9, 18-19).

The student's social/emotional development was also assessed as part of the June 2015 psychoeducational evaluation. The student was assessed using the Behavior Assessment System for Children-Second Edition (BASC-2) parent and teacher rating scales (Dist. Ex. 19 at p. 19). Responses provided by the student's parents and teacher indicated that the student presented with elevated levels in emotional and attentional problems (id.at p. 19). The student's teacher reported

that the student engaged in impulsive behaviors and demonstrated some difficulty within social situations, presented as sad at times and often seemed lonely, cried easily when in school, and took a negative view of some situations (id. at pp. 10-12, 19). The parents' responses indicated elevated levels for the student in some rule breaking behavior and they reported that the student sometimes hit/teased peers, interrupted others when they were speaking, appeared sad at times and changed his mood quickly and had difficulty at times with socialization (id. at pp. 14-17, 19). The parents indicated that the student demonstrated impulsive behaviors and appeared to have little self-control over his own actions (id. at pp. 14, 16,19). The parents also reported that the student complained to them about being teased and felt that others did not understand him (id. at pp. 14, 19). Both parents reported that the student had made statements regarding harming himself and not wanting to live (id. at pp. 14, 16, 19).

Teacher reports from June 2015 indicated the following: in science the student demonstrated weaknesses in his on-task behavior, class participation and ability to interact appropriately with adults (Dist. Ex. 17 at p. 1). The teacher reported that the student was bright and liked science but that he was also moody, put his head down and did not participate and his speech was difficult to understand (id.). The student's social studies teacher reported that the student was interested in the subject matter and connected content to current events and past studies, but that the student's homework completion and submittal was very inconsistent, he did not always take notes in class, and at times he did not appear present in the class (id.). She also noted that the student had frequent absences (id. at p. 2). The student's ELA teacher reported that the student had difficulty with organization and homework completion (id. at p. 3). She reported that the student could easily make up work when he had been absent and stated that the student was one of her strongest readers/writers (id.). However, she also noted that the student had poor attendance, was late with assignments, and was difficult to understand verbally (id.). The student's Spanish teacher reported that the student's skills were strong at the beginning of the year but as the year progressed the student had become weaker; he was very fidgety or non-responsive and would put his head down and sometimes fall asleep in class (id. at p. 4). The teacher indicated that the student was always able to pick up where he left off and it did not take much for him to catch up or understand a new concept (id.). The student's math teacher reported that the student's strengths included his problem-solving ability, strong mathematical thinking skills, and ability to simplify challenging concepts (id. at p. 1). The student's weaknesses included his energy, post-lunch drama, and anger/frustration with non-academic concerns (id. at p. 6). Collectively, the teachers reported numerous strategies that had worked with the student including seating him with a friend who was supportive, holding individual conferences with the student, supplementing notes for the student, using a positive tone when speaking with the student, giving the student class time to make up work, and allowing the student time and space when he was in a "'crisis'" mode (id.).

During the course of the 2015-16 school year, the student continued to struggle with completing classwork and homework and turning it in, the ability to remain focused during class, and sleepiness (Parent Exs. V; W; Y). In an email dated January 27, 2016, the student's mother advised the assistant director of special education that the student exhibited increased symptoms of depression and "was taking hard that he failed a recent Math cumulative exam, because he says his grades in Math are usually high" (Parent Ex. Y at p. 1).

During February 2016 the student visited the health office seven times over five days due to complaints of dizziness, headache, fatigue and emotional stress (Dist. Exs. 27 at p. 2; 108 at p.

1). An IDT referral dated March 2, 2016 indicated that the student was struggling with depression (Dist. Ex. 115 at p. 1). According to the referral, the student tended to go to the nurse's office and went to sleep there and was missing classes and complaining of headaches or difficulty focusing (id.).

In March 2016 the student visited the health office an additional four times over three days, primarily for headaches (Dist. Exs. 27 at p. 2; 108 at p. 1). On March 21, 2016 the student was non-responsive to attempts to engage him in his classes (Dist. Ex. 29). When prompted to attend his math class the student engaged in self injurious behavior that included hitting his forehead on a school locker, punching a concrete wall with his fist, punching his face with his fist, making self-harm statements and tearfully stating that he needed a break (id.).

b. Specially Designed Instruction

The IHO found that that the parent's unilateral placement of the student at Westfield was appropriate.

An online brochure, entered into evidence by the parent, described Westfield's mission as being "dedicated to helping students overcome academic difficulties and personal obstacles, through carefully designed programs for individual achievement" (Parent Ex. QQ at p. 1). The brochure detailed the reasons students attended Westfield including underachievement despite being bright, AD/LD, learning disabilities, social-emotional problems, and other special education classifications (id.). The brochure identified Westfield's "3 Principles" as an integrated supportive experience, a corrective learning environment, and a comprehensive approach (id.). With respect to the integrated support experience, the brochure described underachievement as a syndrome and indicated that Westfield's approach was psycho-educational and supportive and combined an active clinical program, including individual and group therapy, with specialized instruction (id. at p. 2). According to the brochure, Westfield's environment enabled students to experience a '"corrective emotional experience"' and offered students "the opportunity to handle school life 'under more favorable circumstances"' (id.). Class size at the school was five or less students and students who were easily distracted, on medication, or had developed maladaptive behaviors could be provided with "a constant and reassuring adult presence or involvement throughout the day" (id.). According to the brochure, the school developed a comprehensive educational plan that addressed each student's unique psychological, educational, or behavioral objectives, goals and needs (id.). The plan was refined throughout the academic year to keep the student on track toward completing credits and New York State graduation requirements (id.). The school offered an interim placement program for students who required a medical leave of absence, needed mental health or psychoeducational evaluations, or required an extended leave from their private or public school (id. at p. 4).

The academic/assistant director of administration (assistant director) for Westfield testified that Westfield was a small independent therapeutic day school "for kids who are struggling with bumps in the road" and averaged about 25 enrolled students (Impartial Hearing I Tr. pp. 793, 812-14).[20] She stated that Westfield followed the New York State curriculum for grades 7-12, and

[20] The assistant director noted that although Westfield was not on the state's "approved list," it operated with the consent of the commissioner of New York State as a school for students with disabilities grades 7-12; and had a

offered "Regent's, SATs, and ACTs," but also provided a therapeutic environment, as there were four therapists on staff (Impartial Hearing I Tr. p. 793). According to the assistant director, when the student attended Westfield, the school was housed in a converted Victorian home with seven classrooms; the students were grouped by grade level for their different classes (Impartial Hearing I Tr. pp. 814-20). The assistant director noted that although Westfield followed "a regular school day," "the umbrella" was the therapeutic support that the school offered (Impartial Hearing I Tr. p. 793). The assistant director explained that Westfield was "not a drug and alcohol rehab. We're not a place for kids with oppositional defiant behavior that is their primary issue. We are not a behavior-planned school. Those are what we're not" (Impartial Hearing I Tr. p. 799). The assistant director noted that Westfield admitted students with "depression, anxiety, some kids on the spectrum" along with "kids who've been bullied. Generally [,] any kid who reaches a bump in the road as they develop as adolescents, and our goal is always to help them get better" (Impartial Hearing I Tr. pp. 799-800). The assistant director went on to report that Westfield tried not "to retain kids" but rather as soon as they were over their hurdles, Westfield encouraged them to go back to a mainstream setting (Impartial Hearing I Tr. p. 800). The assistant director noted that the average length of attendance for students at Westfield was two and one-half years; however, she indicated that the length of time was "not that telling" and "d[id]n't really mean a lot" when considering the variety of circumstances under which students came to the school (Impartial Hearing I Tr. pp. 800-01). The assistant director testified that she reported to the director/owner who was a licensed clinical social worker (Impartial Hearing I Tr. p. 812). The owner was the therapeutic director and she was the academic director (id.).

The assistant director reported that she was familiar with the student, as he entered the school in eighth grade following a hospitalization (Impartial Hearing I Tr. p. 794). At the time the parent was seeking a therapeutic environment to try to help her son (id.). According to the assistant director, the parent shared the usual documentation with the school such as the student's IEP, report cards, and any testing that was done at that point (id.). The assistant director testified that Westfield did not formally evaluate the student when he entered the program but based on informal evaluation determined that the student was very competent and very much on grade level and above grade level in math (Impartial Hearing I Tr. p. 796).

With regard to the student's attendance, the assistant director indicated that the student attended regularly, however, he struggled with getting to school on time and being awake when he was there (Impartial Hearing I Tr. p. 795). The assistant director reported that the school addressed this issue by adjusting the student's first period class by allowing him to skip homeroom and thereby start school at 9:30 a.m. (Impartial Hearing I Tr. p. 796). She explained that Westfield tried not to give the student core or important subjects first period, or if he did miss something the school allowed the student to make it up later in the day (id.). She noted that she thought the student's problem "could have been seen as depression"; that the student's sleepiness was "quite extreme"; and that Westfield staff did not know what was causing him to sleep, or to be so tired and withdrawn (Impartial Hearing I Tr. p. 797).

BEDS number and offered Regents (Impartial Hearing I Tr. p. 813).

According to the assistant director, "sleep was the big problem for [the student]. It wasn't oppositional kind of sleep at all. It was something that appeared to be something out of his control" (Impartial Hearing I Tr. pp. 805-06).[21] The assistant director reported that initially Westfield staff attributed the student's sleep issues to depression or medication as the student would "just conk out" (at school) (id.). She noted that when the student needed a break and was seated in a chair in the office, "he would be in the deepest, snoring sleep, so deep" (Impartial Hearing I Tr. p. 806). According to the assistant director, there were other times where Westfield staff let the student sleep on the couch in the therapy office, and "he would be out" (id.). Additionally, she commented that when the student woke up, he was "refreshed and cognizant and ready to go," that afternoons were usually better than mornings for the student and that Westfield attempted "to adjust his schedule that way" (id.). The assistant director stated the student did not receive any disciplinary action for being late to school (Impartial Hearing I Tr. p. 806-07). She reported that Westfield knew that this was the student's problem and staff were not going to punish him for his problem, they were trying to help (Impartial Hearing I Tr. p. 807). Westfield did not perceive the student's tardiness or not going to class as a negative behavior worthy of discipline (id.). To address the student's sleep and emotional needs, the assistant director stated that Westfield staff tried to help the student figure out what was going on, that it was not "normal behavior," nor was it a behavior he wished to have; it was beyond the student's control and that for Westfield to become punitive was just not fair (id.; see Dist. Ex. 70 at p. 1).

According to the assistant director, Westfield's "goal was to get [the student's] academics done with him" and along with English, mathematics, science, Spanish, and social studies, he participated in physical education and either art or music (Impartial Hearing I Tr. pp. 801, 817; Dist. Ex. 62 at p. 1). To address the student's academic and social needs, the assistant director noted that Westfield provided the student with a "traditional academic eighth grade program" and, in addition, "gave him a counselor twice a week and group counseling once a week" (Impartial Hearing I Tr. pp. 794-95).[22] Further, the assistant director indicated that there were "probably four kids" in the student's English class; and four students in his science and social studies classes (Impartial Hearing I Tr. pp. 819, 824-26). Although the student's mathematics "ability level was very high," the assistant director testified that the student attended a one-to-one mathematics class because he "had missed too much school" and Westfield needed to "catch him up and prepare him" to take the Regents exam (Impartial Hearing I Tr. pp. 822-24). The assistant director testified that when the student exited Westfield in June 2016 at the end of the school year, the Westfield director made a therapeutic recommendation for the student to see a sleep specialist (Impartial Hearing I Tr. pp. 797-98, 827-28).

It is not clear from the hearing record if Westfield directly addressed the student's speech difficulties. As noted above, the student's IEP was amended in March 2016 to add speech-language therapy as a direct service in order to address the student's articulation (Dist. Ex. 28 at p. 1). The assistant director was unclear whether the student received speech therapy while at Westfield (Impartial Hearing I Tr. pp. 831-33). The assistant director testified that, at the time of the student's

[21] Likewise, the parent noted that the student's greatest obstacle to learning exhibited at Westfield was "his persistent sleep" (Dist. Ex. 70 at p. 1).

[22] According to the director, each individual counseling session was 25 minutes long, and each group counseling session was 45 minutes long (Impartial Hearing I Tr. p. 795).

attendance, when Westfield was located in a different public-school district, that school district provided services to students attending Westfield (Impartial Hearing I Tr. p. 831). She testified that she did not believe that the public-school provided services to the student "unless he had speech, but I don't recall that" (id.). According to the assistant director, because the student came to Westfield so late in the year, her guess was that the public school did not provide speech for the student (Impartial Hearing I Tr. pp. 831-32). However, she qualified her statement by saying that if speech was written on the student's IEP that Westfield would have tried to arrange it but then noted that "I don't recall he had speech, but I might be wrong" (Impartial Hearing I Tr. p. 832). When showed the student's April 2016 IEP with direct speech-language therapy listed on it the assistant director testified that in that instance she would have advised the parent to seek an IESP from the public-school district (Impartial Hearing I Tr. pp. 832-33). She could not recall having a specific conversation with the parent advising her to do so but noted that it was something she would do with any parent "so I don't know why I wouldn't have done it with her" (Impartial Hearing I Tr. p. 833). The assistant director conceded that if the public school had developed an IESP for the student that she would have a copy of it and that she did not (id.). She therefore opined that the district did not provide the student with speech-language services (id.).

Even if the student did not receive speech therapy at Westfield, given that the student's speech production was primarily influenced by his "fatigue and emotional affect" Westfield addressed these needs as indicated above by modifying his daily schedule to address his sleep needs and through individual and group counseling sessions to address his emotional affect.[23] Given the student's above described needs, and the description provided in the hearing record of the supports Westfield provided, the hearing record support's the IHO's finding that Westfield provided the student with specially designed instruction to address his identified needs.

c. Progress

With respect to the student's progress at Westfield, a finding of progress is not required for a determination that a student's unilateral placement is adequate (Scarsdale Union Free Sch. Dist. v. R.C., 2013 WL 563377, at *9-*10 [S.D.N.Y. Feb. 4, 2013] [noting that evidence of academic progress is not dispositive in determining whether a unilateral placement is appropriate]; see M.B. v. Minisink Valley Cent. Sch. Dist., 523 Fed. Appx. 76, 78 [2d Cir. 2013]; D.D-S. v. Southold Union Free Sch. Dist., 506 Fed. Appx. 80 [2d Cir. 2012]; L.K. v. Northeast Sch. Dist., 932 F.Supp2d 467, 486-87 [S.D.N.Y. 2013]; C.L. v. Scarsdale Union Free Sch. Dist., 913 F. Supp. 2d 26, 34 [S.D.N.Y. 2012]; G.R. v. New York City Dep't of Educ., 2009 WL 2432369, at *3 [S.D.N.Y. Aug. 7, 2009]; Omidian v. Bd. of Educ., 2009 WL 904077, at *22-*23 [N.D.N.Y. March 31, 2009]; see also Frank G., 459 F.3d at 364). However, a finding of progress is, nevertheless, a relevant factor to be considered (Gagliardo, 489 F.3d at 115, citing Berger, 348 F.3d at 522 and Rafferty v. Cranston Pub. Sch. Comm., 315 F.3d 21, 26-27 [1st Cir. 2002]).

[23] There was no discussion with the assistant director during the hearing regarding the student's diagnosis of Crohn's disease and his need for the bathroom/nurse as indicated on the March 2016 IEP (see Impartial Hearing I Tr. pp. 789-834; see also Dist. Ex. 28 at p. 7). Likewise, in the parent's statement to the CSE regarding the student's experience at Westfield, the parent did not discuss the student's physical needs associated with Crohn's disease (see Dist. Ex. 70 at pp. 1-2).

The assistant director testified that the student made progress during his time at Westfield and noted that the student completed eighth grade, got a high school credit for algebra and managed to pass his classes with C pluses and Bs (Impartial Hearing I Tr. p. 798). She opined that this was "pretty good . . . given how much of a struggle it was for [the student] to be attentive and awake for decent periods of time" (id.). According to the assistant director, student progress at Westfield was monitored by "vocabulary tests or writing papers," preparation for the Regents exam including practice tests, and "whatever the usual things that are done in the classroom" (id.). She explained that Westfield purposely functioned as a traditional school with the difference being very tiny classes of four to five students, which allowed the school to individualize; however, she noted that the school did not "cut back on the curriculum or under assess [the student] as a result" (Impartial Hearing I Tr. pp. 798-99). Likewise, the parent opined that absent the punitive actions (such as detention), and with the individual attention at Westfield, the student was able to "move along in the curriculum at a pace suited to his abilities" (Dist. Ex. 70 at p. 1). The parent further noted that the student completed his academic requirements in a school setting in the company of other students at Westfield (id.). According to the student's June 23, 2016 Westfield report card, the student passed the algebra Regents exam and earned a "B" in the class (Dist. Ex. 62 at p. 2). Similarly, the student passed eighth-grade science, English, social studies, Spanish, and physical education (id. at pp. 1-2). The student's science teacher reported that the student was extremely diligent in getting his work done and it was completed accurately; the student's English teacher reported that the student grasped many ideas that were discussed but did not hand in a culminating project, which hurt his grade; the student's social studies teacher reported that the student "did a good job doing investigative research" and was able to turn in his final project; and the student's Spanish teacher reported that the student showed great aptitude for the Spanish language but his attendance and performance on written tasks was inconsistent (id. at p.1).

The student's student support teacher reported that the student struggled to stay awake in the morning, but his attitude when awake was positive and socially comfortable (Dist. Ex. 62 at p. 2). He reported that even when the student was sleepy, he was cooperative and tried to be engaged in chess or checkers (id.).

Based on the foregoing, the hearing record supports finding that the student made progress while at Westfield, and that the student's progress at Westfield does not provide a basis for finding that Westfield was not appropriate to meet the unique needs of the student. Accordingly, the IHO's conclusion that Westfield was an appropriate educational placement for the student must be upheld.

3. Equitable Considerations

The district's cross appeal of the IHO's finding that equitable considerations did not preclude an award of tuition reimbursement is based upon the district's claim that the parent failed to provide the district with an appropriate 10-day notice of her intention to remove the student from the district and unilaterally place the student at Westfield at public expense, and on its claim that the parent has not cooperated with the district's efforts to develop a program for the student. I disagree with both claims for the reasons set forth below.

The final criterion for a reimbursement award is that the parents' claim must be supported by equitable considerations. Equitable considerations are relevant to fashioning relief under the

IDEA (Burlington, 471 U.S. at 374; R.E., 694 F.3d at 185, 194; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 68 [2d Cir. 2000]; see Carter, 510 U.S. at 16 ["Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable"]; L.K. v. New York City Dep't of Educ., 674 Fed. App'x 100, 101 [2d Cir. Jan. 19, 2017]). With respect to equitable considerations, the IDEA also provides that reimbursement may be reduced or denied when parents fail to raise the appropriateness of an IEP in a timely manner, fail to make their child available for evaluation by the district, or upon a finding of unreasonableness with respect to the actions taken by the parents (20 U.S.C. § 1412[a][10][C][iii]; 34 CFR 300.148[d]; E.M. v. New York City Dep't of Educ., 758 F.3d 442, 461 [2d Cir. 2014] [identifying factors relevant to equitable considerations, including whether the withdrawal of the student from public school was justified, whether the parent provided adequate notice, whether the amount of the private school tuition was reasonable, possible scholarships or other financial aid from the private school, and any fraud or collusion on the part of the parent or private school]; C.L., 744 F.3d at 840 [noting that "[i]mportant to the equitable consideration is whether the parents obstructed or were uncooperative in the school district's efforts to meet its obligations under the IDEA"]).

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

The IHO found that equitable considerations supported full tuition reimbursement, reasoning that the parent participated in the CSE meetings, among other indications of cooperation with the district, and provided sufficient notice to the CSE of her intention to remove the student from the public school (IHO Decision at pp. 74-75). The IHO stated that the purpose of the notice requirement was to provide the CSE with an opportunity to resolve the parental reasons for the removal, and that there was no reason why a specific unilateral placement school needed to be identified in the notice letter (id.).

The hearing record supports the IHO's determination. According to the district's assistant superintendent, on March 17, 2016, the parent, the student, and the psychologist from the district's ESP visited an IDT program to consider intake into that program because the student appeared to be struggling in the ESP in the public school (Impartial Hearing I Tr pp. 62-64). Days later, on March 21, 2016, an incident in school occurred that included an episode of self-injurious behavior by the student at school and threats to harm himself, wherein he stated, "I need a break" (Impartial

Hearing I Tr. pp. 634-43; Dist. Ex. 29). On March 24, 2016, the parent wrote to the district giving notice of her intention to unilaterally place the student (Dist. Ex. 82). In the notice, the parent informed the district that she believed, due to the student's IEP's failure to timely offer appropriate accommodations, special education, and related services to address all aspects of his individual needs, the student had been denied a FAPE and sustained emotional harm; and, further, stated that due to the extreme and potentially injury-sustaining nature of his past reaction, the parent did not wish to test his limits by returning him to the middle school environment and risk further harm (id. at p. 4). The parent informed the district that she intended to withdraw the student from his current school and enroll him in a private school at public expense (id. at pp. 1-4). The student's first day at Westfield was April 13, 2016 (Impartial Hearing I Tr. pp. 35-36, 647). The parent identified the school to the district on April 12, 2016 (Impartial Hearing I Tr. p. 836; Parent Ex. KK). I find that the parent's notice letter satisfied the regulations' intent to have the parent state her concerns and her intention to unilaterally place the student, and that it occurred more than 10 business days prior to the student's entry into Westfield.

The district points to the parent's refusal to consider returning the student to the middle school after the March 21, 2016 incident and the parent's failure to provide consent for the district to communicate with the student's doctors after the March 21, 2016 incident as indicators of a failure to cooperate with the district. To the extent those two assertions could indicate a lack of cooperation, there are multiple indications of the parent fully and effectively cooperating with the district in developing the student's educational program up to and after her decision to unilaterally place the student. Just prior to the March 21, 2016 incident, the parent worked with the district's psychologist to consider placement in an IDT, and had agreed with the CSE to modify the student's IEP to include direct speech-language therapy (Impartial Hearing I Tr. pp 602-03, 625-29; Dist. Exs. 24; 28). Further, the parent participated in the April 2016 CSE meeting and indicated her willingness to develop a plan to return the student to district schools and take the student back to the middle school for certain events, which later occurred (Impartial Hearing I Tr. pp. 647-48, 658; Parent Ex. ZZZ at pp. 53-56).

Accordingly, based on the arguments presented by the district, I decline to overturn the IHO's finding that equitable considerations supported reimbursement of tuition at Westfield during the 2015-16 school year.

C. Failure to Address Sleep Apnea and Special Transportation during the 2016-17 and 2017-18 School Years

The parent contends that the IHO erred in failing to recognize, as a denial of FAPE, the district's refusal to provide appropriate special transportation as a related service and to reimburse the parent for the full cost of the student's transportation to Karafin. The district contends that the IHO correctly determined that the district was not required to reimburse the parent for the cost of the student's transportation to Karafin.

The IDEA specifically includes transportation, as well as any modifications or accommodations necessary in order to assist a student to benefit from his or her special education, in its definition of related services (20 U.S.C. § 1401[26]; see 34 CFR 300.34[a], [c][16]). In addition, State law defines special education as "specially designed instruction . . . and transportation, provided at no cost to the parents to meet the unique needs of a child with a

disability," and requires school districts to provide disabled students with "suitable transportation to and from special classes or programs" (Educ. Law §§ 4401[1]; 4402[4][a]; see Educ. Law § 4401[2]; 8 NYCRR 200.1[ww]).

In this case, the hearing record includes numerous accounts of the student's history of tardiness and difficulty staying awake at school (Parent Exs. U at p. 1; Y at p. 2; NN at p. 2; Dist. Exs. 9 at p. 1; 108 at pp. 1-2).

A June 2016 progress report from Westfield stated that the student still struggled staying awake in the mornings but that his attitude when awake was positive and socially comfortable (Dist. Ex. 62 at p. 2). The Westfield academic director testified that regarding the student's attendance "it was more about getting there on time or mostly about being awake when he was there" and therefore the school waived homeroom for the student and attempted to "get him here" for first period at 9:30 (Impartial Hearing I Tr. pp. 795-96). In addition, the academic director noted that when the student could not sleep at night and needed that "little extra sleep, which was so important" they tried not to give the student "core" or important subjects first period (id.).

Within a June 2016 OT evaluation report the student noted that he had difficulty sleeping and that he often felt irritated and angry (Dist. Ex. 55 at p. 1). Within the June 2016 IEP's present levels of performance section, there were numerous notations regarding the student's fatigue and sleepiness (e.g., in speech therapy he would place head on the desk and verbalize his fatigue and remark, "This just takes too much energy") (Dist. Ex. 60 at pp. 6-7).

In addition, after noting that there were occasions when the student exhibited fatigue, the June 2016 present levels of performance included the statement that "given [the student's] propensity to quickly recover when it was time to transition to a class or activity he wishe[d] to attend, the sleep d[id] not appear to be genuine but rather part of an avoidance repertoire the student accesse[d] at those times he cho[se] not to comply with academic demands/expectations" (Dist. Ex. 60 at p. 6). However, the IEP is silent as to where this hypothesis as to the student's behavior came from, the district did not conduct an FBA to track the student's sleep as a behavior, and the hypothesis appears to be contrary to the abundance of evidence in the record regarding the student's sleep difficulties.

In addition, in a June 10, 2016 letter from the Sleep Disorder Center, the treating physician stated that the student had "just" received the diagnosis of moderate obstructive sleep apnea which was apparently the source of his excessive daytime sleepiness; and noted that the student may require surgical intervention for treatment as well as assisted ventilation during sleep with continuous positive airway pressure (CPAP) (Dist. Ex. 51 at pp. 1-2). The physician stated that the student would benefit from school accommodations including a later start time, additional tutoring, trips to the nurse for brief refreshing naps, extensions for homework and projects, and alternate testing times (id. at p. 1).

The parent shared with the district her concern regarding the student's difficulties with sleep and early start times in an August 2016 email to the district stating that she "did a test drive" to the potential school placements, the results of which may be a deciding factor in her choice of placement because of the student's sleep apnea and difficulties in the morning (Parent Ex. DDD at p. 2). According to a parent statement prepared for the August 2016 CSE meeting, the greatest

obstacle to learning at Westfield was the student's persistent sleepiness which continued to plague his mornings and Westfield's late start, with the first academic period beginning at 9:30 (a.m.) proved to be beneficial for the student (Dist. Ex. 70 at p. 1).

The August 2016 CSE meeting summary stated that the CSE convened to review the newly administered IEE (a neuropsychological evaluation) and the findings of a privately administered medical sleep study, as well as to review placement in light of these evaluations (Dist. Ex. 71 at p. 2). The August 2016 meeting summary stated that the neuropsychological evaluation indicated that the student met the criterion for the diagnoses of anxiety, depression, and autism spectrum disorder; and, further, specifically noted that the student's depression was characterized generally by somatization, reduced concentration, and lethargy (id.). Findings of the recent sleep study indicated that the student received the diagnosis of moderate obstructive sleep apnea, remained under a private physician's care, and that a medical treatment plan was in process (id.). While the August 2016 IEP included an accommodation for periodic breaks for when the student was feeling dysregulated or tired, the CSE meeting summary also indicated that tardiness and absences due to the student's medical condition would require a medical note (id. at pp. 3, 11). As noted by the assistant superintendent, the regularly scheduled bus to Karafin was put in place for the student at the start of the 2016-17 school year (Impartial Hearing I Tr. p. 120). The present levels of performance in the August 2016 IEP repeated the statement from the June 2016 IEP indicating that the student's issues with sleep did not appear to be genuine (compare Dist. Ex. 60 at p. 6, with Dist. Ex. 71 at p. 6).

While the district accommodation for rest breaks at school was welcomed, this did not address the concerns voiced by the parent, the staff at Westfield, or the recommendation of the sleep center physician which identified the student's need for a later start/transportation pick-up time to address the student's obstructive sleep apnea and his difficulties in the morning (Impartial Hearing I Tr. pp. 795-796; Parent Ex. DDD at p. 2; Dist. Ex. 51 at pp. 1-2; 70 at p.1).

The parent made repeated attempts to convince the district to modify the student's program to accommodate his needs with respect to sleep apnea and special transportation. By a September 6, 2016 email to the district, the parent requested alternative transportation for the student, noting the student's obstructive sleep apnea and the need for a later start time as an accommodation to address his difficulties waking up in the morning (Parent Ex. EEE at p. 1). The parent explained that even with the relatively late start time at Karafin, of 8:30 a.m., the student struggled to make it to his first period class on time (id.). The parent further stated that the district-arranged transportation was scheduled to pick the student up at 7:16 a.m., which she believed negated any benefit of the school's late start time (id.). The parent informed the district that she had arranged for alternate transportation with a pick-up time of 7:50–8:00 a.m. and that unless the district could arrange for an alternative pick-up time, she would make the private transportation arrangement permanent and request that the district reimburse the cost (id.).

The parent shared this request with the district transportation department (Parent Ex. EEE at p. 2; Dist. Ex. 74 at p. 1).

In a follow up email dated September 9, 2016 the parent contacted the district regarding transportation accommodations for the student due to his sleep apnea and informed the district she would continue to use private transportation services at $25 per trip and would seek reimbursement

(Parent Ex. EEE at p. 4; Dist. Ex. 74 at p. 1). In a September 9, 2016 email the district assistant superintendent replied, "[w]e are looking into the matter and will be in contact with you" (Parent Ex. EEE at p. 5).

In a September 13, 2016 email to the district, the parent requested an IEP amendment to include accommodations for the student's obstructive sleep apnea and specifically requested that a later transportation pick-up time of 7:50–8:00 a.m. be included in the student's IEP (Parent Ex. FFF at pp. 1, 6; see Dist. Ex. 51 at pp. 1-2).

In a letter dated September 29, 2016 from the Sleep Disorder Center, the physician stated that the student suffered from obstructive sleep apnea and required assisted ventilation at night while he slept which had resulted in great improvement in his ability to wake up in the morning and stay awake during the day (Parent Ex. GGG). The physician further explained that the parent had found success in driving the student to school at 8:00 a.m. for an 8:30 a.m. start time and the student was able to be alert and functional all day (id.). However, the physician explained, if the student needed to take the school bus, which was scheduled to arrive at 7:16 a.m., the student would lose "45 precious minutes" of sleep time which would result in daytime sleepiness; and, further, would counteract all the good that had been accomplished by having him use assisted ventilation at night (id.). The physician stated that he supported the parent in her request for a bussing schedule to accommodate the student's need to be picked up at 8:00 a.m. rather than 45 minutes earlier (id.). In addition, the physician noted that the student also received the diagnoses of autism and depression and that "when he comes upon a schedule and routine that is effective then it behooves the family, school and school system to adhere to that effective schedule" (id.).

In an October 6, 2016 letter to the CSE, the parent reiterated her September 2016 request of an accommodation for a late pick time for the student due to his sleep apnea and the reimbursement sought for past transportation costs (Dist. Ex. 80 at pp. 1-3).

The October 2016 CSE meeting summary stated that the CSE convened, per parent request, to review the student's transportation needs (Dist. Ex. 81 at p. 1).[24] At the October 2016 CSE meeting, the CSE determined that the current regular bus transportation was reasonable based on the information provided at the meeting (id. at p. 2). The assistant superintendent further explained that the CSE felt that this was reasonable transportation for the student and that he could sleep on the bus (Impartial Hearing I Tr. p. 121). It was noted in the October 2016 meeting summary that it was in the student's best interest to arrive as scheduled in order to have time to socialize and to prepare for class (Dist. Ex. 81 at p. 2). To resolve the parent's request, the comments portion of the CSE meeting summary indicated that if the parent chose to arrange for her own transportation of the student, the district would reimburse the parent through the end of January for the cost of mileage at the district rate (id.).

In support of the CSE's decision, the assistant superintendent testified that Karafin staff did not recommend that the student's transportation be changed to arrive at a later time (Impartial Hearing I Tr. p. 133). This detail, however, does not address the stated concern regarding the transportation pick-up time (see Parent Exs. EEE at p. 1; GGG). Indeed, as the parent and the

[24] The October 2016 IEP maintained the same present levels of performance with respect to the student's sleep as the August 2016 and June 2016 IEPs (compare Dist. Ex. 81 at p. 5, with Dist. Exs. 60 at p. 6; 71 at p. 6).

sleep center physician had explained in a number of exchanges with the district, the student was arriving on time at school, rested and better prepared to remain alert in school because the parent made alternate transportation arrangements (Parent Exs. EEE at p. 1; GGG). The request to the district was for a later bus pick-up time not a later arrival time.

In an October 24, 2016 email to the district, the parent continued to request an 8:00 a.m. transportation schedule or reimbursement for private funding of the service (Parent Ex. JJJ at p. 1). In a November 3, 2016 reply email the district stated that "[a]s we discussed previously, the District will reimburse you at the rate of $16.95 per day through the end of the first semester if you choose to arrange your own transportation" (id. at p. 3).

In January 2017, a CSE reconvened to review the student's performance in the new program and discussed the parent's request for a continuation of alternate transportation (Dist. Ex. 95 at pp. 2, 3). The January 2017 CSE meeting summary stated that the student had been late a few times in January and that the parent shared that the student's ability to be ready on time for a transportation pick-up at 7:10 a.m. waxed and waned (id. at p. 3). Once again, the CSE determined that the regular bus transportation was reasonable, noting that the student had the opportunity to take a rest break during the school day as needed and that the student could sleep on the bus ride to school (id.).

While it was recommended to have the student utilize the scheduled bus, again as a resolution to the parent's request, the district agreed to reimburse the parent, through the annual review, for the cost of mileage at the district rate if the parent chose to arrange her own transportation (Dist. Ex. 95 at p. 3). The comments included as part of the CSE meeting summary indicated that the parent would provide the CSE with an updated report from the private sleep specialist for the upcoming annual review meeting (id.).

Moving on to the 2017-18 school year, at the June 2017 annual review meeting the parent reported that the student's sleep apnea had improved overall and that symptoms continued to wax and wane; and, further, that it was sometimes hard for the student to wake up in the morning (Dist. Ex. 100 at p. 2). Reportedly the student attended school regularly and was generally on time (id.). The committee determined that the current regular bus transportation recommendation continued to be reasonable based on the information provided (id.). The present levels of performance did not indicate any concerns with respect to fatigue or sleep issues (id. at pp. 2-6).

The Karafin school counselor reported in the October 2017 classroom observation that the student "now rides the morning bus to Karafin in addition to riding the dismissal bus" (Dist. Ex. 116 at p. 2).

Overall, the evidence in the hearing record shows that the district failed to grapple with the student's need for a later pick-up time in the morning, as identified by the parent, other than by agreeing to reimburse her for privately arranged transportation; rather, the CSE felt that sleeping on the bus or resting at school as an accommodation would be adequate for the student and did not explain why it did not follow the recommendation of the sleep center. Additionally, while I acknowledge that some later reports indicate that the student's ability to successfully ride the morning bus had improved, this does not negate the student's need for an accommodation during portions of the 2016-17 and 2017-18 school years.

In light of the above, I find that the IHO erred on this point regarding transportation and the district will be directed to reimburse the parent for the full cost of transportation of the student to Karafin obtained by the parent during the 2016-17 and 2017-18 school years.

D. 2017-18 School year

1. Predetermination and Parent Participation

The parent contends that the IHO erred in failing to find that the district predetermined the student's program at Karafin for the 2017-18 school year, because the district did not have the requisite open mind with respect to the contents of the student's IEP and instead conformed the student's program to what Karafin could provide, denying the parent participation in developing the program. The district counters that the IHO correctly determined that the parent's participation was not impeded and that the district was not required to supplement Karafin's curriculum.

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. v. New York City Dept. Of Edic., 12 F. Supp. 3d 343, 358-59 [E.D.N.Y. 2014] [holding that "active and meaningful" parent participation undermines a claim of predetermination]).

The 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. v. New York City Dep't of Educ., 2013 WL 4495676 at *17 [E.D.N.Y. Aug. 19, 2013] [stating that "as long as the parents are listened to," the right to participate in the development of the IEP is not impeded, "even if the [district] ultimately decides not to follow the parents' suggestions"]; P.K. v. Bedford Cent. Sch. Dist., 569 F. Supp. 2d 371, 383 [S.D.N.Y. 2008] ["A professional disagreement is not an IDEA violation"]; Sch. for Language & Commc'n Dev. v. New York State Dep't of Educ., 2006 WL 2792754, at *7 [E.D.N.Y. Sept. 26,

2006] ["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]).

Here, the CSE met on June 6, 2017 to conduct the student's annual review and develop a program for the student's 2017-18 school year (Parent Ex. ZZZ at pp. 131-186; Dist. Ex. 100). The CSE was composed of the district's assistant superintendent for pupil personnel services in special education who chaired the CSE meeting, a speech therapist from the district high school, a district high school guidance counselor, a district high school psychologist, a district high school English teacher, the student's mother, a district school psychologist and the student's case manager, a district high school special education teacher, the student's counselor from Karafin, a Karafin English teacher, a Karafin speech teacher, and a Karafin math teacher (Parent Ex. ZZZ at p. 131; Dist. Ex. 100 at p. 15; see Impartial Hearing I Tr. at p. 20).

The transcript of the June 2017 CSE meeting present in the hearing record reflects that the meeting began with the student's teachers and providers discussing the student's academic and social-emotional progress, needs, and struggles (Parent Ex. ZZZ at pp. 132-36). Thereafter, the parent discussed her concerns with the student's inconsistent organization and completion of homework and described an honors biology curriculum from a university that the student was engaged in to supplement the curriculum at Karafin (id. at pp. 136-38). Next, the parent asked about whether the student's IEP would contain accommodations and the CSE chairperson and the student's counselor from Karafin explained the strategies, positive behavioral interventions, and supports to address behaviors that were on the draft IEP and built into the Karafin program (id. at pp. 139-40). The parent and the CSE chairperson then discussed what organizational tools the student would benefit from, including the assistive technology and goals recommended for the IEP (id. at pp. 140-142). The parent then informed the other CSE members of the student's medical condition and needs with respect to Crohn's disease and sleep apnea (id. at pp. 142-43). The CSE then discussed the Karafin start time and transportation and arrival time issues for the student, and reviewed the student's attendance (id. at pp. 143-44). Next, the student's postsecondary goals were discussed, and the parent related the student's interest in a civic organization he had recently joined, engineering, math, and science (id. at pp. 144-45).

The CSE then began to discuss the annual goals on the IEP with input from the parent and the student's teachers and providers at Karafin (Parent Ex. ZZZ at p. 145). A study skills goal was modified to become more rigorous after input from the parent and a Karafin teacher (id. at p. 146). A goal concerning math homework completion was discussed and changed to reflect homework in all subjects after input from the parent and clarification from the student's counselor at Karafin that he "has homework or makeup work in, throughout all of his classes" (id. at p. 147). A social goal was made more rigorous after input from the parent and the student's counselor at Karafin (id.

at p. 148). The student's counseling goals were discussed with minor changes made after input from the parent, the CSE chairperson, and the student's counselor at Karafin (id. at pp. 148-151). Lastly, the student's speech provider from Karafin asked for two goals to be added to the draft IEP, which was done (id. at p. 151).

The CSE then discussed the recommended placement and the CSE chairperson related that although the student had made significant progress in many areas, it was her opinion that the student continued to require placement in a special class setting, and the parent agreed that the student continued to need Karafin's support (Parent Ex. ZZZ at p. 152). The parent expressed the concern that planning for a transition back to the district high school should be expressly made within the IEP, and the CSE chairperson stated that that was a "wonderful goal," but that the IEP under development was a one-year plan and the goals were "based on his performance in the here and now" (id. at pp. 152-55). The district high school psychologist responded to a question from the parent and related that in order to be properly placed in the less restrictive environment of the district's ESP setting, the student would need to be better able to independently self-regulate emotionally (id. at p. 155). The CSE chairperson related that one of the social/emotional goals in the draft IEP was intended to improve the student's ability to regulate himself (id. at p. 156). More discussion was had of what would be required in terms of progress in study skills and homework completion for appropriate placement at the district high school with input from the parent and other CSE members, and those needs were noted to be relatable to existing goals in the draft IEP (id. at pp. 156-60). The parent repeated her opinion that the student continued to need, at that time, the support provided at the recommended placement in Karafin (id. at p. 160). The CSE chairperson related that Karafin's program would move the student "along the continuum at his pace to become more independent," and the student's English teacher at Karafin stated that the student was ready for and would be assigned more homework in the future including some "long-term" assignments (id. at p. 161). There was discussion about quantifying the amount of daily homework with an addition to the study skills goals in the draft IEP (id. at pp. 161-65). The Karafin counselor related that a particular amount of homework was not the focus of the goal as intended, rather that the student improved on the skills needed to receive the homework, complete it, and bring it back to class (id. at pp. 166-67). The parent stated that "homework packets" from the district high school could be used to supplement the program at Karafin, and she disputed the CSE chairperson's view that the district was not in a good position to monitor how much daily homework Karafin assigned, or what happened in the home concerning homework (id. at pp. 166-68). By way of ending the discussion and moving on to other portions of the student's IEP, the CSE chairperson stated that she would document the discussion in the comments section of the IEP, and note in the IEP that Karafin would continue to increase the amount of homework assigned to the student as the student became more emotionally prepared to accept and perform additional work (id. at p. 168). The comments section of the June 2017 does contain the documentation of the discussion and Karafin's proposal to increase the amount of homework assigned to the student during the school year (Dist. Ex. 100 at p. 2).[25]

[25] The parent asserts that the IHO erred in including the fact that Karafin "eventually. . . provide[ed] more work in a controlled setting to determine [the student's] tolerance to increased demands" as support for her reasoning that the district offered the student a FAPE during the 2017-18 school year, because an IEP must be evaluated prospectively as of the time of its drafting and retrospective testimony that the school would have provided additional services beyond those in the IEP may not be considered, citing, among other cases, L.O. v. New York

The transcription of the June 2017 CSE meeting as written, demonstrates the district's willingness to listen to the parent's concerns and that the CSE made multiple additions and modifications to the student's recommended program based upon the parent's input at the CSE meeting. The transcript of the meeting demonstrates that the student's mother engaged in a robust discussion with the other CSE members, and that the district possessed the requisite "open mind" with respect to the contents of the student's IEP. Accordingly, I decline to find that the district impermissibly predetermined the student's program or impeded the parent's right to participate in the development of the student's June 2017 IEP and recommended program for the 2017-18 school year.

2. Failure to Address All Areas of Need

Turning to the parent's substantive claims with respect to the 2017-18 school year, the parent contends that the June 2017 IEP did not provide services that would allow the student to demonstrate his readiness to return to a mainstream program in the district high school. The parent asserts that the program at Karafin needed to be supplemented with "a certain level of outside work" in the form of homework from Karafin and examples of work being done at the district high school in order for it to be appropriate. To that end, the parent informed the June 2017 CSE of her intention to seek supplemental services at district expense and now seeks reimbursement for the services she obtained from Montefiore.[26]

a. June 2017 IEP - Needs

While the student's current level of functioning and identified needs are not in dispute in this matter, a review thereof will provide important context to the issues at hand. The June 2017 CSE meeting summary stated that the student attended Karafin for the 2016-17 school year and teacher reports indicated that he had a very successful year and that while he was reluctant to

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City Dep't of Educ. (822 F.3d 95, 114-15 [2d Cir. 2016]). It may be that the IHO's reference to Karafin's "eventual" increase in homework constitutes reliance upon impermissible retrospective evidence, rather than a permissible explanation of how services listed in the IEP would be implemented—or were implemented—in the present matter (IHO Decision at p. 97). In any event, I have excluded the evidence of Karafin's eventual change in homework assignments from consideration and nonetheless have come to the same conclusion as the IHO in that the district offered a FAPE to the student during the 2017-18 school year.

[26] The parent refers to a November 2017 report, prepared by the psychologist who conducted the July 2017 neuropsychological evaluation in support of her request for reimbursement for the services provided by Montefiore (Req. for Rev. ¶8). While the report identifies the student's progress, continuing needs, and makes a number of recommendations, it does not identify how the student was supported at Montefiore (see Parent Ex. WWW). Further, there is limited information in the hearing record regarding those services. The psychologist from Montefiore testified that Montefiore conducted a neuropsychological evaluation of the student when he was 14, April 2016, and then initiated counseling, with which she was directly involved (Tr. pp. 947, 953, see Dist. Ex. 64). She stated that she met with the student once a week and that he participated in both individual sessions and group social skills sessions (Tr. pp. 952-53, 966-67). According to the neuropsychologist, during sessions the student talked about "major upsetting incidents" and his desire to return to the district high school (Tr. p. 696). The psychologist testified that through "our counseling" and the work at Karafin the intent was to help the student develop coping strategies "in order to be able to not fall apart when he was faced with stressful work" (Tr. p. 971). As examples, the psychologist stated that there were things we gave him to do (e.g., writing assignments, activities to organize time) that would put a little more stress on him to actually see how he was coping and to try to provide him with more coping strategies (Tr. p. 974).

participate initially, it was reported that at the time of the June 2017 meeting that the student "fully participate[d]" in the program (Dist. Ex. 100 at p. 1).

New information identified on the June 2017 IEP as being considered by the committee included a speech-language report and a teacher report bearing the same date as the CSE meeting (Dist. Ex. 100 at p. 3). The June 2017 IEP's present levels of performance included reports that in math the student continued to function above grade level, worked well independently, and enjoyed the continual challenge; however, it was also reported that the student needed to improve his consistency in returning homework and that this was the student's greatest area of weakness (id. at p. 5). The CSE meeting summary indicated that the school had increased the time to complete homework and that the parent had attempted to motivate the student at home (id. at p. 1). The June 2017 IEP's present levels of performance further stated that the student read on grade level or slightly above and that his writing was advanced for his grade, his comprehension was strong, his inferential skills were developing appropriately, and he wrote clearly and accurately and explored his ideas fully (id. at p. 5). In addition, it was reported that his pragmatic language skill development would continue to be addressed (id.). The parent reported that the student supplemented his curriculum in biology with a university self-paced online course (id. at p. 2).

With respect to social development, the June 2017 IEP stated that while the student had a difficult transition into Karafin and struggled with the idea of not going back to the district program, he slowly became more engaged in the classroom and was making steady progress in the class and completing work on grade level (Dist. Ex. 100 at p. 5). The June 2017 CSE meeting summary stated that the student continued to struggle with insight, self-awareness, and flexible thinking and required assistance with the thinking process; continued to require flexibility in his classes when experiencing an emotional issue; and fixated on a topic for two or three weeks when he became emotionally overwhelmed (id. at p. 2). The parent reported that the student had difficulty with "shifting" and emotional tolerance remained an issue as he became overwhelmed when work had accumulated (id.). The parent further noted that the student had difficulty with deadlines and expressed that the habits needed to become ingrained for the student regarding more independent planning and organizing (id.).

b. June 2017 IEP – Recommendation

The June 2017 CSE recommended for the student a 6:1+1 special class, one 20-minute session per week of individual counseling, one 40-minute session per week of group counseling (5:1), one 40-minute session per week of individual speech-language therapy, and one 30-minute consult per quarter of parent counseling and training (Dist. Ex. 100 at p. 9). The June 2017 IEP included three study skills annual goals specifically targeting the student's needs regarding recording and returning homework and developing strategies for completing assignments, projects, or tests (id. at pp. 7-8). The June 2017 IEP included two speech-language annual goals which involved expressing reasons for his actions, opinions, and feelings and identifying problematic circumstances and offering possible solutions and outcomes (id. at p. 8). Also, the June 2017 IEP included six social-emotional annual goals targeting the student's needs regarding acknowledging personal boundaries, initiating and maintaining peer interactions, identifying and expressing feelings/strengths about self, identifying feeling and emotions, identifying and using coping strategies, and identifying responses to social situations with favorable outcomes (id. at pp. 8-9).

In addition, the June 2017 IEP outlined accommodations for the student including: positive reinforcement, health and safety supports, visual supports, periodic breaks, graphic organizers, and access to a "program available computer" to assist with organizational skill development (Dist. Ex. 100 at pp. 9-10). Within the June 2017 IEP's post-secondary goals the CSE indicated that the student would continue to develop his study skills to organize his work environment and improve his time management skills (id. at p. 7). The June 2017 IEP included testing modifications of periodic breaks and alternate testing times and indicated that due to the student's diagnosed sleep disorder testing may need to be delayed or rescheduled (id. at p. 11).

The June 2017 CSE meeting summary indicated that all members were in agreement with the recommendation, however, it was also noted that the parent raised a concern that Karafin did not offer Spanish at a more advanced level (Dist. Ex. 100 at p. 2); As noted above, the parent raised concerns about the curriculum available at Karafin and there was a disagreement between the parent and district as to whether Karafin would be challenging enough for the student (Parent Ex. ZZZ at p. 152-68).

Turning to the parent's concern regarding the student's readiness to return to the public school, the parent felt that at the June 2017 CSE meeting there was a lack of agreement regarding what needed to be in the student's IEP regarding transition (Impartial Hearing I Tr. p. 699). The parent wanted to discuss whether it was possible to provide the district curriculum and requirements while the student attended Karafin (Impartial Hearing I Tr. p. 701-02). The parent thought Karafin was good for certain of the student's needs but that it could not meet the student's needs for transitioning back to the public-school setting (Impartial Hearing I Tr. pp. 706-07). According to the June 2017 CSE meeting summary and comments section, the parent indicated that she wanted the student to continue to be challenged in all areas in order to promote readiness for a return to the district high school and Karafin staff and the district assured the parent that the student would continue to be challenged with additional work based upon his readiness and his own needs (Dist. Ex. 100 at p. 2).

Without repeating the discussion that took place during the June 2017 CSE meeting, which was discussed in detail above, the parent expressed concerns in regard to planning for a transition back to the district high school and wanted to establish a reasonable amount of daily homework for the student (see Parent Ex. ZZZ at pp. 152-55, 162-66). According to Karafin staff, the focus was on having the student improve on the skills he needed to receive homework, complete it, and bring it back to class (id. at pp. 166-67). The CSE explained that the IEP included an annual goal to improve the student's ability to self-regulate, which was a skill needed to transition to a less restrictive setting and that Karafin provided a therapeutic support program to help the student increase his self-confidence, grow his self-esteem, and help him become more independent, areas that the student needed to work on to be successful in another setting (id. at pp. 155-56, 161-62).

In addition, and specifically regarding the issue of homework, the parent argues that the CSE refused to include measurable annual goals pertaining to the student's management of homework because it was contrary to the structure of the classes at Karafin. It was the opinion of the parent that "everyone" at the June 2017 meeting agreed that the student could do more work, but they "just don't have it here at Karafin to give him" (Impartial Hearing I Tr. pp. 880-81). The parent testified that she wanted the district to provide the student with the district's curriculum that the student could work on at home after his Karafin school day (Impartial Hearing I Tr. p. 873).

In addition, the parent felt that the student's IEP should include an annual goal stating a certain amount of homework would be completed by the student (Parent Ex. ZZZ at pp. 160-166).

The assistant superintendent testified that she understood that homework was always an issue for the parent and that she wanted the student to be more responsible with his homework (Impartial Hearing I Tr. p. 153). Further, in response to the parent's request at the June 2017 CSE meeting, the Karafin school counselor stated that the homework annual goal, as written, stated that "when he's gonna get homework or make up work that it comes in. Because, right now, that is the focus of what he needs to do. He's not independently completing work at home" (Parent Ex. ZZZ at p. 166). The Karafin counselor continued, again as set forth above, in stating that the amount of time is not the focus, "it's WHEN he is assigned something, he does it and he brings it in" (id. at pp. 166-67). The Karafin counselor explained, "[t]hat's the skill," and then that translates into the longer-term goals (id.). The Karafin English teacher stated at the June 2017 CSE meeting that the student would get more homework next year than he did this past year and noted that the student was in a stronger position to be able to cope without being overwhelmed, but not necessarily on a nightly basis (Parent Ex. ZZZ at p. 161).

The discussion during the June 2018 CSE meeting is consistent with discussions from the prior CSE meeting in February 2017, which indicated that the program was "sensitive to increasing the student's work commitment and that the student [was] being pushed to what he can handle at this time" (Dist. Ex. 95 at p. 3). Karafin staff stated there was a fine line between support and putting too much pressure on the student and were concerned he would shut down. (Dist. Ex. 95 at p. 3). It was noted that overall there had been improvement in the area of not shutting down; however, it was also shared that if too much pressure was placed on the student, he would shut down (id.). The CSE also responded to the parent's request for participation from district staff to discuss whether the student could keep pace in the district and noted that the goal for the student was not to keep pace with another program, but was to make meaningful progress in his current program and to be given an appropriate amount of work based upon his needs and that the student's IEP was based on his needs at that time (Dist. Ex. 95 at p. 2).

The psychologist who conducted the July 2016 private neuropsychological evaluation testified that she observed growth in the student during the 2016-17 school year and felt Karafin was an appropriate placement (Impartial Hearing I Tr. pp. 1002-03). She also stated that during the 2016-17 school year the student was not ready to return to the district and testified that Karafin was appropriate to meet his needs until the student showed he could manage the work load at the public school (Impartial Hearing I Tr. pp. 971, 974). She further stated it would be wise to give the student the opportunity to take on more work (Impartial Hearing I Tr. p. 972).

As detailed above, the June 2017 CSE identified the student's current needs and provided appropriate annual goals with respect to social skills, social-emotional wellbeing, study skills and homework completion.

As identified by the IHO, it was not inappropriate for the June 2017 CSE to defer to the Karafin staff in terms of the amount of work the student should be receiving and it was reasonable that the district would not supplement the Karafin curriculum with extra "work packets" when the Karafin staff was not in agreement (see IHO Decision at p. 91).

In light of the above, I find the June 2017 CSE properly balanced the evidence available regarding the student's social-emotional needs and his academic needs and that the June 2017 IEP was designed to meet the student's individual needs and enable him to make progress in the general education curriculum. Accordingly, the parent's claim for reimbursement for the cost of the private services she obtained during the 2017-18 school year is dismissed.

E. Independent Educational Evaluations

1. Neuropsychological Evaluation

The IHO granted "full reimbursement" for the private neuropsychological evaluation but limited the amount to $4,000.00 (IHO Decision at p. 108).[27] However, the parent requests that the district reimburse her the full cost of the evaluation, which was $4,200.00 (Parent Ex. KKK at pp. 3-4; see Req. for Rev. Ex. PSRO-1).[28] The district cross-appeals and asserts that the rate should be limited by the district's policy, pursuant to which the district contends it informed the parent that it would reimburse $2,160.00.

The IDEA and State and federal regulations guarantee parents the right to obtain an IEE (see 20 U.S.C. § 1415[b][1]; 34 CFR 300.502; 8 NYCRR 200.5[g]), which is defined by State regulation as an "individual evaluation of a student with a disability or a student thought to have a disability, conducted by a qualified examiner who is not employed by the public agency responsible for the education of the student" (8 NYCRR 200.1[z]; see 34 CFR 300.502[a][3][i]). Parents have the right to have an IEE conducted at public expense if the parent expresses disagreement with an evaluation conducted by the district and requests that an IEE be conducted at public expense (34 CFR 300.502[b]; 8 NYCRR 200.5[g][1]; see K.B. v Pearl Riv. Union Free Sch. Dist., 2012 WL 234392, at *5 [S.D.N.Y. Jan. 13, 2012] [noting that "a prerequisite for an IEE is a disagreement with a specific evaluation conducted by the district"]; R.L. v. Plainville Bd. of Educ., 363 F. Supp. 2d. 222, 234-35 [D. Conn. 2005] [finding parental failure to disagree with an evaluation obtained by a public agency defeated a parent's claim for an IEE at public expense]). Informal guidance from the United States Department of Education's Office of Special Education Programs indicates that if a parent disagrees with an evaluation because a student was not assessed in a particular area, the parent has the right to request an IEE to assess the student in that area (Letter to Baus, 65 IDELR 81 [OSEP 2015]). If a parent requests an IEE at public expense, the school district must, without unnecessary delay, either ensure that an IEE is provided at public expense or initiate an impartial hearing to establish that its evaluation is appropriate or that the evaluation obtained by the parent does not meet the school district criteria (34 CFR 300.502[b][2][i]-[ii]; 8 NYCRR 200.5[g][1][iv]). If a school district's evaluation is determined to be appropriate by an IHO, the parent may still obtain an IEE, although not at public expense (34 CFR 300.502[b][3]; 8 NYCRR 200.5[g][1][v]). However, both federal and State regulations provide that "[a] parent is entitled to only one [IEE] at public expense each time the public agency

[27] The IHO appears to have limited the request for reimbursement to $4,000.00 due to the testimony of the district's assistant superintendent, who reported that the parent submitted a bill to the district in that range (see Impartial Hearing I Tr. p. 127; IHO Decision at p. 82).

[28] The parent attached a copy of an invoice to her request for review.

conducts an evaluation with which the parent disagrees" (34 CFR 300.502[b][5]; 8 NYCRR 200.5[g][1]).

Additionally, when a parent requests an IEE, the district must provide the parent with a list of independent evaluators from whom the parent can obtain an IEE, as well as the district's criteria applicable to IEEs should the parents wish to obtain evaluations from individuals who are not on the list (Educ. Law § 4402[3]; 34 CFR 300.502[a][2]; [e]; 8 NYCRR 200.5[g][1][i], [ii]; see Letter to Parker, 41 IDELR 155 [OSEP 2004]). Upon request, the district is required to provide the parents with information regarding where IEEs may be obtained, as well as the district's criteria applicable to IEEs should the parents wish to obtain evaluations from individuals who are not on the district's list of independent evaluators (34 CFR 300.502[a][2]; [e]; 8 NYCRR 200.5[g][1][i], [ii], [vi]; see Letter to Parker, 41 IDELR 155 [OSEP 2004]). The criteria under which the publicly-funded IEE is obtained, including the location of the evaluation and the qualifications of the independent evaluator, must be the same as the criteria that the public agency uses when it initiates an evaluation (34 CFR 300.502[e][1]; 8 NYCRR 200.5[g][1][ii]; see Letter to Anonymous, 103 LRP 22731 [OSEP 2002]). If the district has a policy regarding reimbursement rates for IEEs, it may apply such policy to the amounts it reimburses the parent for the private evaluations (34 CFR 300.502[e][1]; see Individual Educational Evaluation, 71 Fed. Reg. 46689-90 [Aug. 14, 2006]). The district may also establish maximum allowable charges for specific tests to avoid unreasonable charges for IEEs (see Letter to Anonymous, 103 LRP 22731 [OSEP 2002]). When enforcing reasonable cost containment criteria, the district must allow parents the opportunity to demonstrate that "unique circumstances" justify an IEE that does not fall within the district's cost criteria (id.; Individual Educational Evaluation, 71 Fed. Reg. 46689-90 [Aug. 14, 2006]).

On April 20, 2016, the parent sent a letter to the CSE noting that she disagreed with an individual evaluation conducted by the district and that she was requesting an IEE at public expense (Dist. Ex. 35). The parent indicated that she did not believe that the evaluations conducted by the district identified all of the student's special education needs (id.). Further, the parent indicated in a May 23, 2016 email that the district approved of her request for an IEE during the April 2016 CSE meeting and that she was obtaining the IEE in order to clarify "areas of concern which were not adequately addressed by the district's Psychoeducational, behavioral, and emotional evaluations" and that she "wish[ed] to obtain an evaluation for sensory processing problems" (Dist. Ex. 40). Further, the parent requested a copy of the district's policy on IEEs, noting that she had not yet received it but was relying a copy of the district's policy she received the prior year (id.). In an email dated May 24, 2016, the district assistant superintendent of pupil services identified the amount the district would pay for a psychological evaluation, educational evaluation, and speech-language evaluation and sent the parent a copy of the district's policy regarding IEEs (Dist. Ex. 42).[29] Although the district policy indicated that the district established a list of qualified providers, there is no indication that the list was shared with the parent or if the providers on the list accept the district's rates for evaluations (id. at p. 2). On June 1, 2016, the parent provided the district with consent to share the student's records with the evaluator who conducted the IEE (Dist. Ex. 44 at p. 1). On August 3, 2016, the parent sent the invoice and report for the neuropsychological IEE to the district (Parent Ex. KKK at p. 1). The district assistant

[29] The district reimbursement rates were set in accordance with the rates set by BOCES (Impartial Hearing I Tr. p. 124; Dist. Ex. 42 at p. 2).

superintendent of pupil services replied, indicating that the district would reimburse the amount of $2,160, which she described as the amount allowable per district policy (id. at p. 2). The parent protested the cap and, in response, the assistant superintendent indicated that the district was not advised that the parent was seeking a neuropsychological evaluation of the student (id. at pp. 3-4, 7).

Based on the above, although the communication between the school district and the parent regarding the IEEs could have been clearer, considering that the parent identified the specific evaluator in June and gave the district consent to discuss the student's educational records with the evaluator, and because the district failed to provide the parent with a list of potential evaluators when it provided the parent with the district's policy, the parent is entitled to full reimbursement for the independent neuropsychological evaluation (see Educ. Law § 4402[3]; 34 CFR 300.502[a][2]; [e]; 8 NYCRR 200.5[g][1][i], [ii]; see Letter to Parker, 41 IDELR 155 [OSEP 2004]). Moreover, the IHO apparently intended to order reimbursement in full, and did not otherwise provide a reason why reimbursement was limited to $4,000.00 for the evaluation. Therefore, the parent is granted full reimbursement in the amount of $4,200.00 for the private neuropsychological evaluation, and the IHO's order is modified to provide this as set forth below.

2. Evaluation by Board Certified Behavior Analyst

The district objects to the IHO's order directing the district to "arrange for an independent evaluation by a board certified behavior analyst, experienced with students on the autism spectrum, of the parents' choice … for the purpose of assessing whether [the student] would benefit from behavior management consultation or services and review of the evaluation by the CSE" (IHO Decision at p. 108). The IHO noted that this evaluation was granted "because [the student's] autism was not adequately considered" by the district and the evaluation was "to determine if [the student] may benefit from indirect or direct behavioral support in his current program and/or as he transitions to post-secondary education, including in areas recognized as 'student responsibilities,' to be considered by the CSE" (id. at p. 106). The district argues the IHO erred in finding that the student's diagnosis of autism was not adequately considered and erred by ordering the independent evaluation. The district contends that it considered a sufficient amount of evaluative data regarding the student and that the finding is contrary to the IHO's other findings. The parent contends that the IHO's recommendation for a consultation was justified by the student's "difficulties with self-management" and the conflicting opinions of the parent and the district staff regarding the student's behaviors.

It is within an IHO's authority to order an IEE at public expense as part of an impartial hearing (34 CFR 300.502[d]; 8 NYCRR 200.5[g][2]; [j][3][viii]; Luo v. Roberts, 2016 WL 6831122, at *7 [E.D. Pa. Oct. 27, 2016] [noting that an IHO "is permitted, and in some cases required, to order an [IEE] at public expense"], on reconsideration in part, Luo v. Owen J. Roberts Sch. Dist., 2016 WL 6962547 [E.D. Pa. Nov. 28, 2016], aff'd, 2018 WL 2944340 [3d Cir. June 11, 2018]; Lyons v. Lower Merrion Sch. Dist., 2010 WL 8913276, at *3 [E.D. Pa. Dec. 14, 2010] [noting that the regulation "allows a hearing officer to order an IEE 'as part of' a larger process"]; see also S. Kingstown Sch. Comm. v. Joanna S., 2014 WL 197859, at *9 n.9 [D.R.I. Jan. 14, 2014] [acknowledging opinion that the regulation empowers hearing officers to solicit independent expert opinions but disagreeing that the regulation gives an IHO "the inherent power to make up remedies out of whole cloth"], aff'd, 773 F.3d 344 [1st Cir. 2014]). Furthermore, IHOs are "granted

broad authority in their handling of the hearing process and to determine the type of relief which is appropriate considering the equitable factors present and those which will effectuate the purposes underlying IDEA" (Warren Consolidated Schs., 106 LRP 70659 [LEA MI 2000]).

Here, it was reasonable for the IHO to direct the independent evaluation as the hearing record demonstrates that more information regarding the student's needs for direct and/or indirect behavioral support may be beneficial for the student and the parties. As discussed above, the district did not conduct an FBA during the 2015-16 school year, and the district failed to conduct an FBA for the student until April 2018 (see Parent Ex. HHHH). The parent expressed concern regarding the student's social/emotional needs, including concerns regarding the root causes of the student's behaviors, both prior to and after the FBA was conducted (see Parent Exs. T at p. 2; U at p. 1; BB; CC; FF; GG; IIII at p. 1; Dist. Exs. 5; 40; 80). The FBA included in the hearing record does not indicate who performed the evaluation or compiled the information (see Parent Ex. HHHH). In addition, the FBA did not address whether the student would benefit from indirect or direct behavioral support in his current program or as he transitions to post-secondary education, which is the information the IHO is looking to gain from the IEE. Further, following the completion of the FBA, the parent informed the district that she still had concerns with how the district was addressing the student's behavioral needs (see Parent Ex. IIII at p. 1). Based on the hearing record, the IHO acted within her authority to direct the IEE and the district has not presented a compelling reason to overturn the IHO's decision on this issue.

VII. Conclusion

As set forth above, I have sustained the IHO's determinations with respect to the applicable limitations period and dismissed that portion of the parent's appeal. I have also sustained the IHO's determinations with respect to finding a denial of FAPE for the 2015-16 school year and her order of tuition reimbursement at Westfield and dismissed the district's cross appeal of those findings. I have sustained the parent's appeal with respect to reimbursement for the full cost of transportation during the 2016-17 and 2017-18 school years. I have sustained the IHO's determination with respect to FAPE for the 2017-18 school year and dismissed the parent's appeal of that issue and denied her request for reimbursement of supplemental services provided by Montefiore. Lastly, I have sustained the IHO's determinations with respect to reimbursement for the cost of a neuropsychological IEE and the order of a new IEE, except to clarify that order to reflect the accurate cost of the neuropsychological IEE. All other relief requested by the parent is denied.

I have considered the parties' remaining contentions and find that I need not address them in light of my determinations with respect to the limitations period, the denial of FAPE for the 2015-16 school year, and my other determinations herein.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

THE CROSS-APPEAL IS DISMISSED.

IT IS ORDERED that the decision of the IHO dated May 9, 2019 is hereby modified to require the district to reimburse the parent for the cost of private transportation of the student from the home to Karafin during the 2016-17 and 2017-18 school years upon the presentation of sufficient proof of such expenses to the district; and

IT IS FURTHER ORDERED that the decision of the IHO dated May 9, 2019 is hereby modified to require the district to reimburse the parent for the actual cost of the independent neuropsychological evaluation report completed in July 2016 in the amount of $4200.

Dated: **Albany, New York**
July 19, 2019

CAROL H. HAUGE
STATE REVIEW OFFICER