



The University of the State of New York

The State Education Department

State Review Officer

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No. 19-083

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

Appearances:

Thomas, Drohan, Waxman, Petigrow & Mayle, LLP, attorneys for petitioner, by Neelanjan Choudhury, Esq.

Gina DeCrescenzo, PC, attorneys for respondent, by Gina M. DeCrescenzo, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from the decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to respondents' (the parents') son and ordered it to reimburse the parents for their son's tuition costs at the New York Military Academy (NYMA) for the 2016-17 and 2017-18 school years. The appeal must be sustained in part.

II. Overview—Administrative Procedures

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

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

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

III. Facts and Procedural History

The student suffered a severe head injury in December 2012 while participating in an athletic activity at his school (see Parent Exs. A at pp. 1-2; B at pp. 1-2; C; J at p. 1; Dist. Exs. 13, 14). The student received home instruction for part of his 2012-13 and 2013-14 school years due to his traumatic brain injury (TBI) (Tr. pp. 1333-34, 1344-46). The CSE found the student eligible for special education sometime in late 2013 as a result of his TBI but then declassified him prior to the start of the 2014-15 school year (Tr. pp. 1344-46).

The student began the 2014-15 school year (9th grade) without an IEP in place and, on December 4, 2014, the parents referred him to the CSE (Parent Ex. N at p. 2). In January 2015, the district conducted a psychological evaluation of the student, which determined that the student

continued to demonstrate issues with fatigue, attention, and executive functioning as a result of his brain injury, and recommended various strategies, modifications, and accommodations for the student (Parent Ex. D).¹ On January 21, 2015, the CSE convened and developed an IEP for the student that reflected much of the information contained in the January 2015 psychological evaluation report (Parent Ex. N at pp. 3-6). The CSE reconvened on February 26, 2015 to discuss creating a medical plan for the student and conducting a functional behavioral assessment (FBA) of the student to evaluate his difficulties with school attendance (Parent Ex. M at pp. 1-2). The district conducted an FBA of the student in March 2015 and developed a behavioral intervention plan (BIP) dated April 1, 2015 (Dist. Exs. 48; 49).

The CSE convened on June 11, 2015 to develop an IEP for the 2015-16 school year (10th grade) (Dist. Ex. 9). The CSE recommended: a resource room program, 5:1, five times weekly for 42 minutes; integrated co-teaching (ICT) services for math, five times a week for 42 minutes; individual occupational therapy (OT), one time a week for 30 minutes; and bi-weekly individual counseling services for 30 minutes (*id.* at pp. 1, 9). The IEP indicated that the parents disagreed with some of the information contained in the March 2015 FBA and did not agree with the BIP that was created for the student (*id.* at p. 7). On November 9, 2015, the student's IEP was amended without a meeting to remove ICT services for math (*id.* at p. 2). The CSE reconvened on November 12, 2015 to conduct a program review and to discuss the student's progress since the beginning of the 2015-16 school year (Dist. Ex. 10 at p. 1). The CSE continued the recommendations for resource room program, OT, and counseling services (*id.* at pp. 1, 10). The parents and school psychologist agreed that there was no need for a BIP at that time because the student had been attending school on a regular basis (*id.* at pp. 2, 8).

In February 2016, the student was assaulted by another student at school (Dist. Exs. 13; 14). According to the student's treating psychologist, the incident not only exacerbated the student's TBI, but it also gave rise to the student acquiring post-traumatic stress disorder (PTSD) (Dist. Ex. 15). The treating psychologist recommended indefinite homebound instruction due to the student's "acute stress disorder" and experience of "high anxiety and panic every time he goes into the school—despite his high motivation to return to classes" (*id.*). Around this time, the student also expressed suicidal ideation (Parent Ex. E; *see* Dist. Exs. 17 at pp. 1-2; 18 at p. 7).

The CSE reconvened on March 31, 2016 to review documentation related to the student's PTSD diagnosis and to discuss the parents' request for home instruction (Dist. Ex. 18 at p. 1). According to the CSE meeting information summary, the March 2016 CSE "recommended reworking the safety plan that is currently in place to address [the student's] diagnosis of PTSD" and "adding a social/emotional goal for the PTSD" to the IEP (*id.* at p. 1). The meeting information summary further reflected that the parents rejected these recommendations and would only agree to home instruction (*id.* at 2). The CSE requested further documentation from the parents regarding the PTSD diagnosis (*id.* at pp. 1-2). The IEP indicated that, before the February 2016 incident, the student had been doing well, but that his attendance had suffered in recent weeks (*id.*

¹ Although the June 2016 IEP listed this document as "Neuropsychological (01/08/2015)," the document is included in the hearing record and titled "Psychological Evaluation" (*see* Tr. pp. 814-15; Parent Ex. D at p. 1; Dist. Ex. 38 at p. 3). For the purposes of this decision, the document will be referred to as the "January 2015 psychological evaluation."

at p. 6). By prior written notice, dated March 31, 2016, the district rejected the parents' request for indefinite home-bound instruction (Dist. Ex. 17 at p. 2).

In a letter to the district dated April 6, 2016, the student's treating psychologist informed the district that he was willing to talk to school staff about the student's PTSD diagnosis (Dist. Ex. 20), and on April 11, 2016, a phone conversation took place between the district director of pupil personnel services and the student's treating psychologist (see Dist. Ex. 23). The parents and district exchanged several communications in April and early May 2016 regarding the PTSD diagnoses, the parent's request that the student receive home services, the student's continued nonattendance at the district school, and an upcoming CSE meeting (Dist. Exs. 22-31). One of the communications from the district set forth an "entry plan" to support the student's "return to school on April 25, 2016" (Dist. Ex. 25).

The CSE reconvened again on May 4, 2016 for a program review (Dist. Ex. 33 at p. 1). According to the meeting information summary, the CSE indicated that it would consider a BOCES placement for the student (id. at 2). The parents asked the CSE to consider a private placement of the student at NYMA, and the CSE informed them that it would need more information about the school, including whether it was State approved, and also noted that NYMA did not provide special education services (id.). The parents rejected the CSE's recommendation that the student continue to attend the district school with accommodations and reserved their right to place the student at a private school at public expense and file a State complaint (id.).

On May 17, 2016, the parents executed a contract for the student's at NYMA for the remainder of the 2015-16 school year (Parent Ex. O at pp. 1-4).

On or about May 18, 2016, the parents filed a State complaint with the New York State Education Department's (NYSED's) Office of Special Education (see Parent Ex. F at p. 1).²

On June 4, 2016, the student's father and the district director of pupil personnel services attended an intake appointed at the BOCES program that the CSE agreed to consider at the May 2016 CSE meeting; the student did not attend (see Dist. Ex. 36; see also Dist. Ex. 33 at p. 2).

The CSE met on June 14, 2016 to conduct the student's annual review and develop an IEP for the 2016-17 school year (11th grade) (Dist. Ex. 38 at p. 1). The CSE recommended that the student continue to be eligible for special education as a student with TBI and receive daily resource room services and related service of three 30-minute sessions of individual counseling per month or as needed and one 30-minute session of individual OT per six-day cycle, as well as several program modifications and accommodations and assistive technology (id. at pp. 1, 9-11). During the meeting, in response to the parents' inquiry, the committee indicated it was creating an

² In response to the parents' May 2016 state complaint, a letter dated July 11, 2016 was sent to both the parents and the district's superintendent from the NYSED's Special Education Quality Assurance (SEQA) Regional Office sustaining the parents' allegations and finding that the district denied the student a free appropriate public education for a 32 school-day period, from March 31, 2016 to May 17, 2016, due to the CSE's failure to recommend home and hospital instruction for the student (Parent Ex. F at pp. 1, 6). The SEQA Regional Office also noted that, since the parents had unilaterally placed the student at NYMA on May 17, 2016, no further action was required (id. at p. 6).

IEP for the student in the event the student reenrolled in the district program (id. at p. 2). The student's mother stated that she reserved her right to pursue due process (id.).

On June 20, 2016, the parents executed a contract for the student's attendance at NYMA for the 2016-17 school year (Parent Ex. P at pp. 1-4).

Turning to the 2017-18 school year (12th grade), on June 8, 2017, the CSE convened to conduct the student's annual review and develop an IEP (Dist. Ex. 43 at p. 1). The CSE recommended that the student receive daily resource room services and one 30-minute session of individual counseling services per six-day cycle or as needed, as well as several program modifications and accommodations and assistive technology (id. at pp. 1, 9-10). According to the meeting information summary, the CSE indicated that it would meet "to develop a transition plan if [the student] were to attend" and that it would schedule "a 5 week review" to assess the student's progress (id. at p. 2). The parents informed the CSE that the student could not attend the district public school due to his PTSD and indicated their intention to provide the district notice of their intent to unilaterally place the student at public expense (id.).

The parents sent a 10-day notice to the district dated June 23, 2017, wherein they rejected the CSE's recommendations and informed the district that intended to place the student at NYMA at public expense for the 2017-18 school year (Parent Ex. K). The parents detailed that their decision was based on their view that the CSE's recommendations "do not identify any specific supports or academic programming that appropriately address [the student's] unique individualized needs of his [TBI], PTSD, cognitive fatigue, visual fatigue, executive functioning, physical needs, anxiety, or visual needs" (id. at p. 2). In a letter dated July 12, 2017, the parents further stated several disagreements with representations made in the district's June 8, 2017 prior written notice (Dist. Ex. 45; see Dist. Ex. 42).

On August 13, 2017, the parents executed a contract with NYMA for the student's attendance for the 2017-18 school year (Parent Ex. Q at pp. 1-4).

On August 21, 2017, the CSE reconvened to conduct a program review and to seek more information regarding concerns expressed by the student's outside counselor; however, the meeting information summary indicated that the outside counselor did not attend and that the parents did not bring any additional information to the meeting (Dist. Ex. 47 at p. 1). The meeting information summary indicated that "[d]ue to the lack of any new information from the parents, the CSE did not make any program changes" (id. at p. 2).

A. Due Process Complaint Notice

In a due process complaint notice dated May 15, 2018, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2015-16, 2016-17, and 2017-18 school years (IHO Ex. I). The parents outlined the student's educational and medical history as early as 2011 and continuing through the 2017-18 school year (see id. at pp. 1-5).

For all three school years, the parents alleged that the district failed to: (a) provide an appropriate program and placement which adequately addressed the student's academic, physical, social/emotional needs; (b) offer the student specialized assistance in math; (c) properly determine the student's learning deficits; (d) provide appropriate strategies or methods to provide for the

student's safety with respect to bullying and to address the student's resultant emotional responses; (e) take into account his PTSD diagnosis or provide him with an appropriate program, counseling recommendation, or safety plan or a respite from bullying; (f) provide appropriate services, accommodations, modifications or supports relative to the student's cognitive fatigue or his executive function deficits; (g) properly implement the student's mandated OT and counseling ; (h) offer the student PT; (i) create appropriate annual goals; and (j) create a post-secondary transition plan (IHO Ex. I at pp. 5-6).

Specific to the May 2016 IEP, the parents also asserted that the district failed to offer the student a FAPE when the CSE rejected their request for home instruction, and instead proposed to "desensitize" the student (IHO Ex. I at p. 4). For the 2016-17 school year, the parents asserted that the district failed to offer the student a FAPE when the June 2016 CSE ignored the parents' concerns, the recommendations from the student's doctors, as well as the student's progress during his limited time at NYMA, and instead, recommended that the student return to the district and that he only receive resource room, counseling, and OT (id. at p. 5). With respect to the 2017-18 school year, the parents asserted that the district failed to offer the student a FAPE when the CSE ignored the concerns of the student, his parents, and his medical team, and insisted that student return to the district with the same special education supports and services: resource room, counseling, and OT (id.).

For relief, the parents requested an award of tuition reimbursement for the student's full tuition and related expenses at NYMA for the latter part of the 2015-16 and the entire 2016-17 and 2017-18 school years, as well as related travel expenses (IHO Ex. I at p. 7).

C. Impartial Hearing Officer Decision

An impartial hearing convened on August 23, 2018, and concluded on June 4, 2019, after a total of nine days of proceedings (Tr. pp. 1-1689).^{3, 4}

In a decision dated July 23, 2019, the IHO determined that the district failed to offer the student a FAPE for the 2016-17 and 2017-18 school years, NYMA was an appropriate unilateral placement for the student, and equitable considerations did not warrant a reduction or denial of an

³ According to the IHO decision, a prehearing conference was held on June 27, 2018 (IHO Decision at p. 1). However, a transcript or a written summary of the prehearing conference was not made a part of the hearing record, as required by State regulation (8 NYCRR 200.5[j][3][xi]).

⁴ In response to the district's motion to dismiss, the IHO issued an interim decision on June 22, 2018, reserving judgment regarding whether or not the parents' claims relating to the May 2016 IEP were barred by the statute of limitations, but denying the district's motion to dismiss the remainder of the parents' claims on statute of limitations grounds and denying the district's motion to the extent it sought summary dismissal of the parents' claims on the ground that the unilateral placement did not provide special education services (IHO Ex. V at pp. 4-5). Subsequently, in a June 29, 2018 interim decision, the IHO determined that the parents' claims relating to the May 2016 IEP accrued on the date of the May 4, 2016 CSE meeting, and, since the parents filed their due process complaint notice more than two years thereafter, on May 15, 2018, the IHO granted the district's motion to dismiss the parents' claims pertaining to the May 2016 IEP as outside the IDEA's statute of limitations (IHO Ex. VI at pp. 2-3). The IHO's determinations granting in part and denying in part the district's motion to dismiss have not been appealed and, therefore, they are final and binding upon the parties and will not be further discussed (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]).

award of tuition reimbursement (IHO Decision at p. 42). The IHO ordered the district to reimburse the parents for the cost of the student's tuition at NYMA for both school years (*id.*). The IHO however, denied the parents' request for transportation costs for those years because the student was able to drive himself to NYMA (*id.*). The IHO also denied "all other requests for relief" (*id.*).

With respect to the 2016-17 school year the IHO found that at that the June 2016 CSE had a considerable amount of information about the student's profile, including information about the student's TBI and of the effects that it had on his school performance and emotional circumstances (IHO Decision at p. 30). For example, the IHO noted the CSE had: information from the student's treating psychiatrist, the parents and his teachers; the district's own records of the student's academic performances and his attendance, including late arrivals and early departures; and the January 2015 results of its commissioned psychological examination, which alerted the CSE to problems associated with the student's brain injury, including sleep issues, cognitive fatigue, and poor executive functioning (*id.*). The IHO further noted that the CSE was also aware that, despite being a "bright boy" with high verbal conceptual abilities, the student had a significant deficit in processing speed, which adversely affected his executive functioning and suggested impaired neurological functioning (*id.*). Moreover, the IHO found that the district was placed on notice through its receipt of reports from several outside specialists, all of which attested to a "series of difficulties caused by school injuries" that interfered with the student's ability to succeed with the services and accommodations provided to him by his school (*id.* at p. 33). The IHO also noted that the student's suicidal ideations were discussed at the March and April 2016 CSE meetings and, therefore, the CSE had to be aware of the issue at the time of the June 2016, meeting (*id.*).

The IHO found that, based upon the totality of information available to the CSE at the June 2016 meeting, "the June 14, 2016 IEP did not provide a program sufficiently tailored to meet [the student's] needs and provide sufficiently for him to make appropriate progress either educationally or emotionally" (IHO Decision at p. 34). The IHO opined that it "should have been apparent" to the CSE that its steps to accommodate the student's disability prior to February 2016 - by providing a resource room for organizational and math skills, OT, counseling services and accommodations such as frequent breaks, modified coursework and homework, early dismissal from class and staggered tests - were inadequate and that the student needed an alternate placement (*id.*). The IHO also noted that a "medical or health plan" that was referred to during CSE meetings in January and February 2015 did not appear to have "stem[med] the tide" of the student's symptoms or school attendance" issues and the plan itself was not contained in any of the student's IEPs (*id.*).

The IHO further found that "the inability to provide FAPE for [the student] came into sharper relief by the events of February and March of 2016" when the student was assaulted at school by another student in February and thereafter experienced suicidal ideation in March (IHO Decision at 34). The IHO found that the CSE refused the student home instruction starting in March 2016 and continuing through June 2016 despite the strong urging of his treating psychiatrist to provide such instruction (*id.* at pp. 34-35). The IHO noted that instead of offering home instruction the district represented to the parent that it would rework "a safety plan" – that was not actually "delineated in an IEP" – and thereafter memorialized a proposed plan for the student to return to school in a letter to the parent (*id.*). The IHO found that the district denied the student a FAPE by persisting in its position that the student should remain at the district school, despite the student's established inability to attend that school, and instead should have sought an appropriate outside placement (*id.* at p. 35). The IHO also determined that the district "did not and probably

could not provide the sort of flexibility in scheduling and in pacing of instruction for the student as the doctors and experts recommended" based upon the student's demonstrated "deficiencies in executive functioning and poor attendance" (id.). In addition, the IHO found that the June 2016 IEP did not sufficiently address the student's needs related to his executive functioning, social interactions, and PTSD diagnosis (id. at p. 36).

The IHO opined that the student's "reactions to the [district school] itself represented an insurmountable obstacle" and the CSE "should have paid more heed" to the recommendations it received that emphasized "the [student's] need for a smaller, more flexible and socially supportive setting than could be provided at [the district school]" because the school itself was "a cause, a 'trigger' of the student's problems" and that fact "clearly suggested an alternative placement for him" (IHO Decision at 36). The IHO noted that the June 2016 IEP referenced the CSE's willingness to consider placement at a BOCES program but that the CSE never made that recommendation in any IEP (id. at p. 37). The IHO stated that if the CSE believed that BOCES was the appropriate placement for the student, it should have made that his placement, and the placement should not have been dependent upon parental consent (id.). The IHO further reasoned that, alternatively, the CSE should have found another suitable, out-of-district high school placement; however, the IHO found that the CSE was persistently focused on returning the student back to the district high school (id.).

With respect to the 2017-18 school year, the IHO noted that, overall, the district failed to offer the student a FAPE because it failed to perform follow-up assessments to determine if the student could reenter the public school environment and because the IEPs, while both noting the student's continuing fatigue and personal frustrations that needed ministering to, the student continued to have attendance issues and some of his debilitating symptoms remained (IHO Decision at p. 38). The IHO also faulted the district for failing to offer the student assurances that a return to the district's schools would not trigger his PTSD reactions (id.).

The IHO noted that both the June 2017 annual review and the August 2017 program review provided for the student's return to the district (IHO Decision at p. 37). The IHO noted that both resource room and individual counseling services and essentially the same list of accommodations that were provided for in the student's previous IEPs were also included in the August 2017 IEP, although the August 2017 IEP did add a study skills goal to address executive functioning (id.). The IHO further noted that, according to the reports available to the CSE at that time, it appeared that the student had made improvement in his emotional, social, and academic circumstances, including that the staff at NYMA reported him to have good self-esteem, to be able to get along with his peers, and to perform better academically (id.). The IHO also noted the student's testimony during the hearing of feeling significantly better from the outset of his attendance at NYMA (id.). The student also testified his confusional migraines disappeared during the initial time he spent at NYMA from mid-May 2016, through the end of the 2015-16 school year (id.). The IHO also noted that, at some point during the 2016-17 school year the student was able to drive himself from home to NYMA, and that he felt comfortable with his fellow students and was not the subject of the bullying that he said he had experienced at the district's school (id.). Despite the reported progress, the IHO found that the district had not met its burden to demonstrate that the student had recovered from the debilitating symptoms of his TBI such that reentry into the previously forbidding environment of the district's high school would be successful (id. at pp. 36-37). The IHO also found that despite "some real improvements" in the student's condition, he

continued to have some attendance issues and some debilitating symptoms remained (id. at p. 38). The IHO noted that the August 2017 IEP documented that the student continued to demonstrate fatigue and personal frustrations, which still needed addressing, and further that there was no assurance offered in the record that would indicate that a return to the district's high school would not trigger PTSD reactions within the student (id.). The IHO further noted that although, once again, the August 2017 IEP indicated that the CSE would consider a BOCES placement, the CSE did not recommend BOCES in the IEP (id.).

With respect to the appropriateness of NYMA as a unilateral placement, the IHO found that the parents had demonstrated that, despite not having a special education program "as such," and not having any special education teachers, the placement was appropriate for both school years (IHO Decision at p. 39). In so finding, the IHO noted that, upon the student's initial placement, the school was undergoing a reorganization and the resulting small student population was welcoming and non-threatening to the student (id.). The IHO further found that the teacher/student ratio was also very favorable to the student (id.). Another aspect of NYMA that the IHO noted favorably was the student's long-standing attraction to "things military," including that the student wanted a career in either the military or in law enforcement, which made the student "very favorably disposed" to NYMA's environment (id.). The IHO also found that NYMA's faculty were available to its students on a practically full time basis, and lieu of a resource room it provided what it called tutorial sessions that were available at the end of the school day and that were required in the event that a student fell below an expected grade point or failed a test or did not complete an assignment (id.). The IHO also noted that the tutorial sessions were frequently individual sessions in which a teacher would go over any troublesome work (id.). The IHO further indicated that NYMA provided students with flexible scheduling and testing accommodations (id.). The IHO also found that NYMA provided the student educational instruction in the least restrictive environment (LRE) (id.). Finally, the IHO found that the environment, flexibility, and accommodations provided to the student allowed him to graduate and enter college (id.).

With respect to equitable considerations, the IHO found that, contrary to the district's assertions, the parents had not withheld the PTSD diagnosis, withholding the name of the student's doctor did not significantly disadvantage the district, and any other failures to immediately notify the district of events did not rise to the level that would warrant a reduction or a denial of an award of tuition reimbursement (IHO Decision at pp. 40-41). With respect to the issue of the parents not producing the student on the date of the BOCES intake, the IHO found that the parents credibly testified that they were not placed on notice that the student's appearance was required, that they acted in good faith, and further that the parents' lack of knowledge that the student was required to accompany them to BOCES negated any intent on their part to disrupt the district's placement plans (id.).

The IHO ordered the district to reimburse the parents for the costs of the student's tuition at NYMA for the 2016-17 and 2017-18 school years; however, the IHO also determined that since the student was able to drive himself to and from NYMA, transportation costs should not be reimbursed (IHO Decision at p. 42).

IV. Appeal for State-Level Review

The district appeals. The district asserts that the IHO erred in determining that it failed to offer the student a FAPE for the 2016-17 and 2017-18 school years, that NYMA was an appropriate unilateral placement for both school years, and that equitable considerations weighed in favor of the parents' request for an award of tuition reimbursement for both school years.

With respect to the IHO's FAPE determinations, the district asserts that the IHO: (a) incorrectly applied outdated information and relied on outdated recommendations when determining that the student required an out-of-district program and placement and erroneously found that the district was obligated to pay "more heed" to the student's private evaluators; (b) ignored the district's accommodations that were specifically designed to address the student's TBI-related cognitive fatigue; (c) incorrectly found that contents of a health care plan and safety plan referenced in the student's IEP should have been delineated in the IEPs; (d) ignored the student's successful academic record prior to the assault on the student at school that led to the student's refusal to return to the school; (e) erroneously concluded that supports for the student's executive functioning deficits that were carried over from the prior IEPs were insufficient for the 2016-17 school year; (f) incorrectly found that the district program could not address the student's bullying and safety concerns; (g) incorrectly implied that the district could have placed the student at BOCES even if BOCES had not accepted the student due to the student's failure to appear for an intake interview; and (h) imposed an "impossible burden" on the district by finding that it was "the district's burden to demonstrate that [the student] ha[d] recovered from the debilitating symptoms of the TBI so that reentry into the forbidding environment [of the district high school] would be successful."

With respect to the IHO's determinations regarding the unilateral placement, the district asserted that the IHO: (a) incorrectly found that NYMA was an appropriate unilateral placement for the student even though NYMA failed to provide specially designed instruction to meet the student's unique needs; (b) incorrectly relied on the general programmatic advantages available at NYMA such as small class size and close faculty contact to determine that NYMA was an appropriate placement for the student; (c) erred by giving evidentiary weight and/ or legal significance to the student's satisfaction with the "military academy lifestyle" afforded by NYMA; (d) erred by relying on the testimony of the NYMA witness who did not provide instruction to the student and was not personally knowledgeable about the particulars of the student's instruction; (e) failed to take into account that the student received special education services from the district of location while attending NYMA; and (f) incorrectly found that the equitable considerations weighed in favor of awarding tuition reimbursement notwithstanding that the parents "withheld or delayed providing significant information to the district regarding the student's present level of functioning and refused to produce the student for an intake [for a BOCES placement] notwithstanding the fact that an intake was a required component of the placement search process."

The district also argues that the IHO improperly gave evidentiary weight to the fact that the student's father was displeased with the district's program and failed to address that the student also experienced bullying while at NYMA. The district further alleges that the IHO did not take into account that the parents failed to present information or make the student available to the district after the student contacted the suicide hotline or that the parents failed to provide the district

with requested documentation that his medical team had cleared him for physical activity at NYMA.

The district requests that the SRO: (a) reverse the IHO's findings that the district denied the student a FAPE for both the 2016-17 and 2017-18 school years; (b) reverse the IHO's finding that NYMA was an appropriate unilateral placement for both the 2016-17 and 2017-18 school years; (c) reverse the IHO's determination that equitable considerations weighed in favor of an award of tuition reimbursement for both the 2016-17 and 2017-18 school years; and (d) vacate the IHO's award of tuition reimbursement for the 2016-2017 and 2017-2018 school years.

In their answer, the parents generally responds to the district's request for review and requests that the IHO's decision be upheld in its entirety. In addition, the parents assert that the district's request for review should be dismissed for failing to comply with the regulatory pleading requirements.

In a reply, the district responds to the parent's procedural defenses.

V. Applicable Standards

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

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

alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245).

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

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).⁵

⁵ The Supreme Court has stated that even if it is unreasonable to expect a student to attend a regular education setting and achieve on grade level, the educational program set forth in the student's IEP "must be appropriately ambitious in light of his [or her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives" (Andrew F., 137 S. Ct. at 1000).

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. Compliance with Practice Regulations

The parents assert the request for review should be rejected as it fails to comply with State regulation governing the form and content requirements for pleadings (see 8 NYCRR 279.8[c][3]; 279.7[b]).

First, the parents assert that the request for review cites to the record sparsely and that, for most of the issues raised, the district only cites to the IHO's decision and not to the evidence in the hearing record. The parents allege that, as a result, it was unfairly difficult for them to frame a response to the request for review. The parents also assert that the request for review should be dismissed as it was not verified.

In describing content requirements, section 279.8 of the State regulations requires that a request for review shall set forth:

- (1) the specific relief sought in the underlying action or proceeding;
- (2) a clear and concise statement of the issues presented for review and the grounds for reversal or modification to be advanced, with each issue numbered and set forth separately, and identifying the precise rulings, failures to rule, or refusals to rule presented for review; and
- (3) citations to the record on appeal, and identification of the relevant page number(s) in the hearing decision, hearing transcript, exhibit number or letter and, if the exhibit consists of multiple pages, the exhibit page number

(8 NYCRR 279.8[c][1]-[3]). The regulation further states that "any issue not identified in a party's request for review, answer, or answer with cross-appeal shall be deemed abandoned and will not be addressed by a State Review Officer" (8 NYCRR 279.8[c][4]).

Additionally, the practice regulations provide that "[t]he request for review shall be verified by the oath of at least one of the petitioners" (8 NYCRR 279.7[b]). State regulation requires that when an appeal is taken by the "trustees, the board of trustees, or the board of education of a school district, [the request for review] shall be verified by any person who is familiar with the facts underlying the appeal, pursuant to a resolution of such trustees or board authorizing the commencement of such appeal on behalf of such trustees or board" (8 NYCRR 279.7[b]).

Generally, the failure to comply with the practice requirements of Part 279 of the State regulations may result in the rejection of the submitted documents or the dismissal of a request for review by an SRO (8 NYCRR 279.8[a]; 279.13; see M.C. v. Mamaroneck Union Free Sch. Dist., 2018 WL 4997516, at *23 [S.D.N.Y. Sept. 28, 2018] [upholding dismissal of allegations set forth in an appeal to an SRO for "failure to identify the precise rulings presented for review and [failure] to cite to the pertinent portions of the record on appeal, as required in order to raise an issue" for review on appeal]; T.W. v. Spencerport Cent. Sch. Dist., 891 F. Supp. 2d 438, 440-41 [W.D.N.Y. 2012] [upholding dismissal of a petition for review that was untimely and exceeded page limitations]). However, "judgments rendered solely on the basis of easily corrected procedural errors or 'mere technicalities,' are generally disfavored" (J.E. v. Chappaqua Cent. Sch. Dist., 2015 WL 4934535, at *4-*6 [S.D.N.Y. Aug. 17, 2015], quoting Foman v. Davis, 371 U.S. 178 [1962]).

In this case, the district's request for review sufficiently cites to the IHO's decision and the hearing record. The request for review includes a section titled background, which sets forth a statement of facts with citations to the transcripts and exhibits (see Req. for Rev. ¶¶ 4-16). The section of the request for review setting forth the district challenges to the IHO's decision generally cites to the pages of the IHO's decision challenged, along with some cites to the exhibits in the hearing record (see id. ¶¶ 17-18). Finally, under the heading "Additional Grounds for Reversal," the district cites to the IHO's decision and several pages of the transcript to support its allegations (id. ¶¶ 19-24). Moreover, the district includes extensive citations to the hearing record in its memorandum of law (Dist. Mem. of Law). The parents' conclusory allegation that they found it difficult to respond to the request for review is insufficient to warrant a dismissal of the district's request for review, particularly since the parent did respond in turn to each of the district's arguments.

As to the parent's second argument, a verification did not accompany the request for review in this case.⁶ However, with its reply to the parent's answer, the district provides a verification of the request for review, thereby curing the original deficiency. Accordingly, there is no basis for a finding that the original lack of verification should result in a dismissal of the request for review.

⁶ Accompanying the request for review is a certification of the record, signed and dated the same day as the request for review. It seems likely that the parent's counsel intended to verify the request for review but signed and dated the wrong form.

B. June 2016 IEP

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

1. Needs and Progress

The district asserts that, in finding that the district should have offered the student a program outside of his home school, the IHO took into account outdated information, including older recommendations from private evaluators, and ignored superseding recommendations and information that the student had been successful in the district for the 2014-15 and 2015-16 school years, including up to February 2016 when he was assaulted by a classmate and refused to return to school.

a. Information from 2013 and 2014

Initially, a review of the IHO's decision shows that the IHO relied on the older documentation for the purposes of both background and to show that the district was on notice of the student's TBI and those recommendations made at the time by the student's treating medical professionals and evaluators (see IHO Decision at pp. 30-34).

In support of its argument that the IHO incorrectly relied upon outdated information when determining the student required a program outside of his home school, the district cites to four exhibits: an August 23, 2013 letter from a pediatric neurologist, an August 27, 2013 neuropsychological evaluation, a June 26, 2014 letter from a psychologist at the Brain Injury Association of New York State, and an August 1, 2014 letter from the pediatric neurologist (see Parent Exs. A, B, C, J). The August 2013 letter from the student's pediatric neurologist appears to have been written in response to a request for information regarding the student's need for door-to-door transportation and a large part of the letter addresses the transportation accommodations required by the student (Parent Ex. A at p. 1). However, with respect to the student's condition and needs at that time, the pediatric neurologist reported that the student suffered an extremely serious concussion and was "hospitalized with the potential risk of ischemic brain injury, stroke and hemorrhage or vessel disease given his presentation which included severe retrograde and anterograde amnesia, vestibular injury, nystagmus, and oscillopsia" (id.). The pediatric neurologist stated that "in principle this indicate[d] actual brain injury with ischemia and disruption of brain function" and stated that the student was at "extremely high risk" for exacerbation of symptoms or even permanent brain damage if he sustained certain types of injuries (id.). The August 2013 letter did not include a recommendation that the student attend a program outside his home school. (see Parent Ex. A).

The August 27, 2013 neuropsychological evaluation provided an overview of the student's medical history and TBI (Parent Ex. J at pp. 1-2). In addition to a review of the student's medical records, the evaluation included a clinical interview with the student and his mother, behavioral

observations of the student, administration of standardized testing, and the completion of behavior rating scales by the student and parent (*id.* at pp. 3-4). According to the evaluating psychologist, the student immediately impressed as being very personable with a great sense of humor and the student's eye contact was well maintained (*id.* at p. 3). The student visibly sustained attention to task within the individual testing setting (*id.*). The psychologist described the student's expressive language as fluent and comprehensible and noted that his language comprehension was adequate for test instructions and conversation (*id.*). The psychologist reported that throughout testing the student was friendly, cooperative and well-motivated but when frustrated he became a little animated and agitated (*id.*). She stated that the student seemed to put forth his best effort on the tests and given his compliance she judged the results of the evaluation to be an adequate reflection of the student's then-current cognitive abilities (*id.*). Given the lack of distractions and peer competition usually found in the classroom, the psychologist suggested that behavior and cognitive skills demonstrated by the student during testing may be considered optimal rather than typical (*id.*).

Based on the results of her evaluation, the psychologist offered a diagnosis of post-concussive syndrome with residual sensitivities, vestibular disturbance, irritability, and cognitive decline in executive and visuospatial functions (Parent Ex. J at p. 6). She reported that the student's attention, language, and memory skills remained within age appropriate ranges, with his verbal memory skills exceeding expectations (*id.* at pp. 4-5, 6). However, the psychologist indicated that the student demonstrated significant difficulties in various executive functions, specifically multi-tasking, abstract reasoning, and screening out distractions (*id.* at p. 6). The psychologist noted that the student demonstrated difficulty with some visuo-perceptual skills, such as visual scanning and matching puzzle details, and commented that visual speed processing difficulties were also evidenced during testing conducted by the school over the summer (*id.*). According to the psychologist, a behavioral rating form completed by the student's mother was suggestive of new problems with hyperactive/impulsive behaviors, attention problems, anxiety, and atypical behaviors (*id.* at pp. 5-6).⁷ The student reported milder concerns such as disliking school and feeling inadequate (*id.* at p. 6). The psychologist concluded that the student's neuropsychological profile demonstrated that the student's post-concussive syndrome included significant cognitive disturbance in addition to the common physical symptoms of light and noise sensitivity and vestibular issues (*id.*). The psychologist explained that executive dysfunction was very common in traumatic head injuries and in addition to the student's difficulties with abstract reasoning, multi-tasking and resisting distractions, the student tended to perseverate and his family reported hyperactive and impulsive behaviors, as well as "somewhat of a personality change in the form of lost motivation and verbal disinhibition" (*id.*). The psychologist stated that all of these seemingly unrelated cognitive skills and behaviors were commonly seen as part of a dysexecutive syndrome after a head injury (*id.*). The psychologist opined that the student would need some assistance in school as he continued to recover as he may have difficulty learning new material, organizing himself when he had multiple tasks to accomplish, staying focused in the face of distractions and managing frustration (*id.*). She further opined that visuo-perceptual difficulties might result in the student having difficulty managing visually based tasks or test formats (*id.*). The psychologist

⁷ The evaluator reported that the parent's responses yielded a score on the validity scale that indicated the results should be interpreted with caution as the scales might slightly overestimate malfunctioning in those domains (Parent Ex. J at p. 5).

concluded that the student's 504 Plan remained appropriate (id. at p. 7). She did not recommend that the student attend an out-of-district placement (see id.).

In a "To Whom it May Concern" letter dated June 26, 2014, a TBI specialist indicated that she had been asked to consult on the student's behalf on several occasions (Parent Ex. B at p. 1) She noted that to date, the information she had provided generally related to the student's TBI and its resulting "physiological intolerance and cognitive deficits in the areas of processing, retaining, and producing curriculum content" but that her then- current letter presented information regarding its emotional/behavioral effects on the student as well (id.). The TBI specialist opined that the student's "serious episode of emotional dysregulation during graduation exercises" dismayed her but did not overly surprise her, and she noted that the severity of the student's brain injury did not produce his physiological and cognitive deficits in isolation of behavioral and/or personality changes (id.). According to the TBI specialist, the student's life had changed "across the continuum of his world" and the student compensated when performing routine activities that had been "heretofore unconscious" (id.). Further, the specialist noted that the student's "brain fatigue" was an everyday occurrence that was related to "cognitive overload" from incoming stimuli and that his serious brain injury "redefined his life from being a kid to being a patient" (id.). The specialist commented that the unavoidable consequence of this total impact on the student's life was emotional dysregulation stemming from both neurological and psychological effects (id.).

The specialist commented that brain injury, particularly in a young child and/or adolescent, results in greater than normal emotional regulation difficulties and that adolescents with brain injury often displayed significant impairments in perspective, reasoning, and emotional hyperreactivity (Parent Ex. B at p. 1). According to the TBI specialist, when both environmental and emotional overstimulation occurs, "the outcome will be emotional flooding and disinhibited response/s" and further, when presented with severe stressors such as overwhelming emotions, it may be the only available response (id.).

The TBI specialist noted that it was her understanding that the school district already had the student's "confidential file, extensive medical documentation attesting to the nature and severity" of the student's TBI, "as well as the very clear diagnoses of brain injury and [PTSD]" (Parent Ex. B at p. 2). She opined that the student's behavior was "most definitely concordant with his brain injury" (id.). In considering the student's behavior at graduation, the specialist opined that "perhaps the greatest error was in not adequately predicting" the extreme emotional flooding that his participation in graduation would present to him (id.). The TBI specialist commented that in addition to the "loud noise levels" and "frenetic energy," the student was confronted with the "faces of his peers whose lives had continued on in ways that his had not" and further, there was grave uncertainty for his immediate future and what lay beyond that (id.). The specialist noted that the school year had been filled with "tense encounters between parents and school officials" and these variables "formed the components of a perfect storm" (id.). The TBI specialist indicated that, with the student perceiving one person as the controlling force behind his current status, he translated that into publicly inappropriate behavior with poor perception of its outcome (id.). The specialist requested that all of the variables and their interrelated connection be fairly weighed when judging the student's behavior and resulting consequences (id.). The TBI specialist did not address the issue of placement in her letter (see Parent Ex. B).

Lastly, in an August 1, 2014 summary of a follow-up visit with the student, the pediatric neurologist reaffirmed that the student had severe TBI since December 2012 (Parent Ex. C at p. 1). He noted that the TBI had resulted in substantial cognitive impairment including disruption in sleep and that, despite multiple attempts to treat the student, his reemergence back to school had been difficult (*id.*). The pediatric neurologist noted that "despite good intentions or not" in some circumstances "the situation in school ha[d] been an adverse experience for [the student]" and the pediatric neurologist believed there was the potential that the student had developed a post-traumatic stress reaction (*id.*). The pediatric neurologist cited an example where the student became overwhelmed with emotion during a graduation ceremony and responded inappropriately, reflecting the severe distress inside of him (*id.*). The pediatric neurologist explained that he was writing the August 1, 2014 letter in the strong support of the student attending an alternative school, possibly a public school where the parent was a teacher, noting that he thought it would be ideal for the student to "have a fresh start in a program where appropriate accommodations c[ould] be made with flexible scheduling (*id.*). He noted that the student was starting to make progress and he wanted to capitalize on that (*id.*). Thus, the August 2014 letter from the student's pediatric neurologist was the only exhibit specifically cited by the district from the 2013-2104 time period that recommended an out-of-district placement for the student.

b. Progress during the 2014-15 School Year

The district also asserts that IHO erred in disregarding evidence that the student successfully completed the 2014-15 school year and most of the 2015-16 school year at the district high school, after the reports heavily relied upon by the IHO were written. However, the hearing record does not support this claim, rather it shows that during the 2014-15 school year the student had poor attendance and struggled to complete school assignments and his emotional state deteriorated.

For the 2014-15 school year the student transitioned to the district's high school for ninth grade (Parent Exs. L at p. 1; M at pp. 1, 6; N at pp. 1, 6). A November 18, 2014 letter from the student's pediatric neurologist stated that the concussion suffered by the student in December 2012 had resulted in severe impairments in cognition and adaptation (Dist. Ex. 6 at p. 1). He noted that sensitivity to environmental stimuli such as light, sound, and activity had been hard on the student and worsened his cognitive efficiency such that doing long work projects had been very hard (*id.*). The pediatric neurologist explained that returning to school and other activities had been hard for the student and resulted in a other "serious consequences" characterized by the family as "'spike[s] and crashes'" wherein when the student's workload increased he became overwhelmed and sensitive to sound and noise, "drift[ed] away cognitively," and then might need to sleep excessively and be hard to arouse from sleep (*id.*). The pediatric neurologist indicated that it was his understanding that this occurred one day a week and the student was able to attend school four days a week (*id.*). The pediatric neurologist opined that the student needed "an entire educational therapeutic treatment plan" that included special education teachers, the availability of flexible scheduling to allow cognitive rest, remediation, and non-punitive approaches to missed classes and time missed due to cognitive rest (*id.*).

A January 2015 psychological evaluation of the student indicated that between the time student returned to school in September 2014 and the time of the evaluation the student had increased his school attendance from two to three days per week to four days per week (Parent Ex.

D at p. 4). According to the psychologist, the student continued to show wide variability in his academic functioning - at times reaching his premorbid level (90s) and other times receiving 40s and 50s (id.). The psychologist reported that "frequently" after (attending school) Monday the student would collapse and remain home for Tuesday and Wednesday and then return to school for Thursday and Friday (id.). The student's performance was better if he was not required to write (id.). According to the psychologist, the student reported doing better in English and having more difficulty in science and math where he was "barely passing" (id.). The student also reported that his attention depended on the day and how tired he was, and tasks involving memorization and visual scanning were very hard for him (id.). The psychologist reported that the student questioned how much he retained on a daily basis and organization remained a problem for the student, as did sensory sensitivity (id.).

According to the January 2015 psychological evaluation report, the student was referred for the evaluation by the district's CSE chairperson to help clarify the student's need for special education services (Parent Ex. D at p. 1). The evaluation included a record review, behavioral observations during testing, teacher and classroom observations, and assessment of the student's intellectual, memory, executive, motor, achievement, and personality functioning using standardized and projective tests (id. at pp. 1-14). In his behavioral observations, the psychologist noted that the student required five sessions to complete the evaluation instead of the typical four sessions; he testified that the student was evaluated over five days due to "the length of time or the lessened period of time that he could respond to the assessment as it was administered" (Tr. pp. 817-20; see Parent Ex. D at p. 4). Further, the psychologist noted that the student experienced "cognitive impediments" that were "obvious even to the naked eye, under conditions of fatigue or non-fatigue, though particularly when he [was] tired" (Parent Ex. D at p. 4).

As part of his evaluation, the psychologist observed the student in two of his classes, English and math (Parent Ex. D at p. 4). The psychologist reported that in English the "class was preparing to perform a brief skit which was largely complete, and only required some final preparations" (id. at pp. 4-5). The student was observed in the computer lab where students were engaged in a small group discussion (id. at p. 5). The psychologist reported that, although a female student had taken charge of the group, he observed the student to be an active participant in the group, "openly sharing his thoughts and ideas in a comfortable, reciprocal interaction" with classmates (id.). The psychologist indicated that the student appeared to be in good spirits, moved about the room performing word-processing tasks, and easily shifted to an alternate computer when the computer he was using would not print (id.). The student also offered script formatting suggestions to the leader of the group, listened to her rebuttal, and "gave a smile of combined acceptance and resignation" when it appeared his suggestions would not be accepted (id.). According to the psychologist, the student's English teacher reported that, although the student was a bright, verbally articulate young man who actively engaged in class and performed most academic tasks in a manner "completely consistent with his ability," he evidenced some reluctance with longer writing assignments and struggled to complete all of the assigned tasks (id.). The English teacher opined that accommodating the student through a reduced workload was "impractical and potentially harmful" to the student, leaving him in jeopardy of being graded on too few assignments (id.).

With regard to math, the psychologist reported that the student arrived a few minutes late to class and took a seat in the back of the class, which his teacher indicated was atypical, as the

student was usually well integrated and engaged with his classmates (Parent Ex. D at p. 5). However, the psychologist reported that the student appeared attentive and engaged throughout the class and asked questions and sought special assistance from the teacher when necessary (id. at pp. 5-6). The psychologist opined that the student's questions and requests for assistance made his "relatively fragile understanding" of some of the math procedures apparent (id. at p. 6). The math teacher indicated that, contrary to what he typically observed, the student used the worksheet provided to him to transcribe the mathematical steps needed to solve the instructional problem detailed on the board (id. at p. 5). The teacher indicated to the psychologist that it was "not entirely clear whether [the student] underst[ood] the concepts being taught" as the assessment of his conceptual abilities was compromised by the fact that he did not frequently use the worksheet offered to him to transcribe the detailed steps printed on the board (id. at p. 6). The psychologist reported that, according to the results of an informal assessment conducted by his math teacher, the student was "missing certain fundamental[]" skills necessary for him to be successful in his then-current placement and he had not sufficiently mastered necessary formulas (id.). Because the curriculum was cumulative and required mastery of previous knowledge in order to be successful with later tasks, the student's difficulties were exacerbated by his absences (id.). According to the psychologist, the math teacher indicated that the student put little effort into word problems and was inclined to make "silly" mistakes, such as computing a multiplication problem as an addition problem, possibly due to ineffectively attending to or incorrectly processing the arithmetic sign (id.). The teacher indicated that there were no obvious problems with the student's "attentional capacities" during class (id.). Further, as recalled by the psychologist, the math teacher reported that the student was not taking advantage of the assistance that was provided by the other teaching staff during seventh period and, consistent with English, the student failed to complete "a host of assignments" in math as well as continued "to remain behind in his completion of various examinations" which were out of sync with the current instructional material (id.). According to the math teacher, an acceptable accommodation to the student was one where he was given an earlier missed exam while his peers took an exam on current material (id.). The math teacher commented that even providing the student with "double time" to complete exams was often not a sufficient accommodation and was further complicated by the structuring of the make-up exams (id.). With respect to math, the psychologist's report indicated that, as the semester proceeded, the student appeared increasingly "shutdown" and less motivated to perform, often voicing his complaints about the common core (id.). Although the psychologist did not observe the student in his science class, he noted that the student's teacher reported that the student was "placed in a class with students whose abilities and skills f[e]ll substantially below" his own (id.). According to the psychologist, the teacher opined that, even though the science work was well within the student's ability, the student was not exerting the necessary effort to perform the tasks he was "clearly capable of performing" and was "taking advantage of his disability to escape his academic responsibilities" (id.). In addition, the science teacher commented that he did not see the student "tiring during the end of the day " when he was in his class and suggested that the student was not completing tasks because he found them boring (id.).

With respect to cognitive functioning, the psychologist noted that his findings from the administration of the Wechsler Intelligence Scale for Children-Fourth Edition (WISC-IV) were consistent with prior findings from 2013 and that the student evidenced significant variability in

his cognitive and intellectual functioning (Parent Ex. D at pp. 7-8).⁸ The psychologist commented that the two most prominent findings of his assessment of the student's intellectual ability were that the speed with which he processed visual material fell significantly below his ability to process auditory/sequential material as well as his higher conceptual abilities (*id.* at p. 7). The psychologist indicated that the gap between the student's processing speed and his verbal/conceptual abilities was "a nearly unheard-of discrepancy of over 50 points" ranging from the fifth to the ninety-sixth percentile (*id.*). In addition, the psychologist noted that there was a significant discrepancy between the student's verbal and visual conceptual abilities (*id.*). Specifically, the student demonstrated a strong vocabulary, and a superior capacity to think abstractly within the verbal modality, which allowed him to gain a wealth of information and articulate the underlying reasons for various social conventions (*id.*). In contrast, with respect to visual/conceptual abilities, the student struggled to identify relevant details of his visual environment or organize and integrate his visual/spatial environment, the latter of which was so pronounced, it was easily observable (*id.*). With respect to memory functioning, the psychologist reported that, despite the student's weakened visual/spatial abilities, his capacity to learn and retain visual as well as verbal material remained strong and his ability to retain highly complex visual material such as people's faces, was superior (*id.* at p. 8). The psychologist noted that, while the student's immediate recall of verbal information fell significantly below his recall of visual information, over time the difference was not apparent and the student's verbal learning remained commensurate with his verbal comprehension and visual recall (*id.*).

With respect to attention and executive functioning, the psychologist indicated that the student demonstrated significant variability, "revealing his susceptibility to mental fatigue, and causing significant deterioration in his functioning" (Parent Ex. D at p 8). The psychologist reported that, when the student was administered one test immediately following another (the first test taking approximately one hour), the student's capacity to attend, inhibit previously learned responses, and move flexibly from one cognitive realm to another fell significantly below other processing capabilities (*id.* at pp. 8, 9). As a result of this, basic attentional tasks proved daunting and easily understood directions confusing; under specific conditions, the student's attention reached no higher than the first percentile (*id.* at pp. 8-9).⁹ The psychologist noted that, during the administration of the initial subtest of the second test, which occurred approximately 60 minutes into the overall testing session, the student was observed shaking his head, "as if he was attempting to clear the 'cobwebs' from his mind," as he tried to identify two identical five and six digit numbers from an array of six (*id.* at p. 9). In contrast, the psychologist indicated that, when the student was less fatigued, there was only limited evidence of attentional difficulties (*id.*). Further, the psychologist reported that, when administered a test of sustained attention, the student performed in a manner that revealed limited attentional or inhibitory dysfunction (*id.*). The student's performance on the test revealed that he exhibited "a mild impairment in his ability to respond, reliably, to auditory material" whether he was actively or intermittently engaged in a task and that there were times when the student's attention was "erratic" and he would "tune out" (*id.* [emphasis

⁸ Although the psychologist characterized that the findings were consistent, his evaluation indicated that the student's full-scale IQ was 118 in 2014 and 97 in 2013 (Parent Ex. D at p. 7).

⁹ The psychologist noted that while the student recognized his exhaustion and asked to have the testing terminated, his verbal request was "delayed beyond the point when his mental fatigue had begun to affect his performance" (Parent Ex. D at p. 9).

in the original]). Likewise, the student exhibited momentary lapses in his response to designated visual material and the evaluator opined that these lapses were likely to manifest "only in highly distracting environments," and when the student was feeling stressed (*id.*). The psychologist further noted that this response occurred when the student was under low demand conditions and was not actively engaged in a task; however, when more actively engaged, the student was less likely to miss designated material (*id.* at pp. 9-10). The evaluator expressed that the student remained vigilant to his environment, responded, and showed a general capacity to inhibit his response as needed; the evaluator emphasized that, even under highly demanding situations, when not overly fatigued, the student responded in a timely fashion and sustained this throughout the course of his work (*id.* at p. 10).

With respect to emotional regulation and behaviors, the psychologist commented that, based on the student's self-observation, he did not experience excessive problems regulating his emotions and/or behavior, nor did he feel that he lacked the capacity to be as productive as he could be (Parent Ex. D at p. 10). Rather, the student's perception was largely that he had "intermittent difficulty in all of these areas" and rated as "sometimes" the frequency with which he was able to inhibit his response to internal and external stimuli, adapt to changing circumstances, control his emotions, or monitor his behavior (*id.*). The same was true for metacognitive skills such as remaining focused on one's work, planning tasks, and/or organizing oneself (*id.*). However, according to the psychologist, the student felt he "often" failed to complete tasks or assignments in a timely manner; and noted a high frequency of problems finishing tasks and long-term projects and of being slower than others when completing work (*id.*). The psychologist commented that this, along with some observed difficulty keeping his materials organized, placed the student "at a level consistent with other students who exhibit significant clinical symptomology in this area of 'metacognitive functioning'"(*id.*). The evaluator opined that this was probably "widely apparent to those closely involved with [the student], he clearly had been unable to use his abilities to be productive in the manner that he[wa]s capable "(*id.* at pp. 10-11). The psychologist reported that the student's capacity to plan a series of steps to arrive at a specified goal fell significantly below his general intellectual abilities and the speed with which the student made such plans and the accuracy of the plans fell in the low end of the average (*id.* at p. 11). In addition, the student's ability to generate visual or verbal material quickly and efficiently was relatively weak (*id.*). The psychologist concluded that, for the student, completing tasks in a timely manner was significantly compromised and was associated with a relatively weak capacity to plan his work effectively and efficiently, as well as to initiate tasks in a timely fashion (*id.* at p. 15).

The psychologist stated that, with respect to academic achievement, the student's academic skills were largely in line with his intellectual ability, except in the area of numerical operations where his performance fell significantly below expectation and in word reading where he surpassed his ability level (Parent Ex. D at p. 12). The psychologist reported that the student's reading was consistent with his superior verbal abilities and that, consistent with teacher reports, writing was also an area of strength for the student (*id.*). The psychologist deemed the student's language usage to be strong and his linguistic structure complex but noted that the student's writing mechanics were lacking (*id.*). The psychologist also reported that the student showed "significant decrement in his knowledge of, and efficient completion of, numerical operations (*id.* at p. 15). According to the psychologist, the problem-solving aspect of mathematics gave the student less trouble than the procedural aspects of performing calculations (*id.* at p. 13). During the evaluation

the student made simple calculation errors, confused procedures of borrowing, and lacked the knowledge or confidence to complete complex multiplication and division problems (id.).

With respect to personality functioning, the psychologist opined that despite the student's efforts to maintain a positive attitude, his attitude was "invariably compromised by the underlying trauma of his injury and resulting disability" (Parent Ex. D at p. 14). The psychologist noted that the student, who was once the leader of the pack, was being surpassed by others, which left him feeling embarrassed and humiliated and unable to find effective strategies to regain his place in the group (id. at p. 13). With his competitive standing threatened, the student was inclined to avoid such situations or apply unsuccessful mechanisms to regain his social standing (id.). According to the psychologist, due to the student's desire to maintain his social standing, he found himself more susceptible to peer pressure which caused him to act in ways he knew were wrong and would result in untoward consequences (id.). These efforts to adapt or cope proved unsuccessful and impaired the student's judgement, causing him to make decisions that often made matters worse (id.). The psychologist noted that the student viewed "his evolving story as a personal tragedy gone terribly wrong" and despite his desire to do "the right thing," in the face of his resentment and anger, the student saw himself eventually reaching a boiling point (id. at pp. 13-14). Likewise, the student reported that he imagined others' threshold of calm and tolerance may be exceeded, despite their best intentions, in the face of the frustrations presented by his then-current situation (id. at p. 14). According to the psychologist, at times the student saw escape as the only option and he envisioned it as allowing him to carve a new path, apart from the people and conflict which had become such a part of his life (id.). The psychologist reported that the student saw himself as a passive victim and the sense of damage that the student suffered remained a central concern for him and created increased tension and anxiety to which the student applied a variety of defensive and adaptive mechanisms (id.). The psychologist opined that the student's ability to see the world in a more differentiated fashion diminished as he attempted to escape his intense and frightening emotions (id.).

Based on his assessment of the student, the psychologist diagnosed him as having a mild neurocognitive disorder due to TBI (Parent Ex. D at p. 15). To address the student's needs, the evaluator recommended a flexible schedule adapted to the length of time the student could work without tiring and his physiological state; 1:1 support to help keep the student abreast of his current instructional level and protect him from becoming overwhelmed by make-up work; adjustment to the pace of the student's learning; an adjusted workload to protect the student from cognitive exhaustion; testing accommodations including consideration of waiving test requirements, except when absolutely necessary; additional time for tests and assignments; testing in stages; careful attention to when, where, and how executive impairments affected the students learning; reduced environmental stimulation; graphic organizers; and support for the development of study skills (id. at pp. 15-17). In addition, the psychologist recommended transportation that considered the student's cognitive and social/emotional needs; occupational and physical therapy services; careful analysis of the student's learning in the context of the neuropsychological results; indirect teacher consultation by a TBI specialist; and specialized assistance in mathematics (id. at pp. 17-19).

On January 21, 2015 the district developed an IEP that reflected the executive functioning and metacognitive skill deficits and social/emotional struggles identified by the psychologist in his January 2015 psychological evaluation report (compare Parent Ex. N at pp. 5-6, with Parent Ex.

D). The CSE reconvened on February 26, 2015 to discuss a medical plan for the student and agreed to conduct an FBA with regard to the student's attendance (Parent Ex. M at pp. 1-2).

The district requested that an outside agency conduct an OT evaluation of the student to address district and parental concerns regarding the student's OT needs and to develop an improved accommodation plan for the student (Parent Ex. L at p. 1). In her March 2015 report, the evaluating occupational therapist reported that she used clinical observation of the student's task performance, along with interviews with the student and parent; a phone interview with the district's occupational therapist; parent, teacher, and case manager responses to the Sensory Profile; and medical reports to inform her evaluation (*id.* at p. 2). The occupational therapist evaluated the student's fine motor, gross motor, vision, and sensory processing skills and commented on the student's school accommodations (*id.* at pp. 2-4). With respect to fine motor skills, the occupational therapist reported that the student demonstrated functional fine motor coordination but noted the student's decreased legibility when writing his name and address as well as decreased precision/control of his pencil (*id.* at p. 2). With respect to gross motor skills, the occupational therapist indicated that the student was able to participate in a variety of sensory motor tasks with success for 15 minutes (*id.*). She noted that the student was motivated by and enjoyed drumming but that the parent reported that the student had difficulty with maintaining drumming for more than 15 minutes before needing a rest (*id.*). With respect to visual needs, the occupational therapist reported the student's eyes did not track smoothly across midline during a visual tracking activity (*id.*). The occupational therapist summarized a report from the student's developmental optometrist that indicated the student had convergence insufficiency, a condition that made it difficult to sustain visual attention for extended periods and engage in sustained near-visual tasks (*id.*). In addition, the student displayed decreased accommodating skills such as inadequate focusing ability, light sensitivity, and visual sensory overload which could cause his nervous system to become overwhelmed by too much information at once (*id.*). The occupational therapist cited portions of a developmental optometrist's report that noted if a student's eye movements were slow or clumsy the amount of information obtained by the student would be reduced and that if the student's problem was clinical in nature the observable difficulties and confusions would become more obvious over time on paper tasks (*id.*). Further, the developmental pediatrician explained that visually demanding materials would be avoided [by the student], there would be an increase in head turning while reading, attention span for visual materials would shorten, and an increase in fatigue and restlessness may occur (*id.* at p. 3). According to the occupational therapist, the developmental optometrist recommended that the student receive 1:1 instruction for short periods of time (20 to 40-minutes) to accommodate his significant visual impairment (*id.*). With respect to the student's sensory processing skills, the occupational therapist indicated that certain consistencies were noted in staff responses on the Sensory Profile questionnaire (*id.*). In the category of classroom behavior, staff indicated that the student demonstrated poor frustration tolerance, inefficiency in doing things, and difficulties with changes/inflexibility (*id.*). Further, three responders agreed that the student's "executive skills" such as the ability to efficiently plan, organize, initiate, and complete tasks were "decreased" and the occupational therapist noted that attending difficulties were consistently reported by the responders and were noted to be dependent on the student's "mental/physical, visual fatigue level" (*id.*). The occupational therapist referenced information from the student's self-assessment found in the January 2015 psychological evaluation report summarized above and further indicated that difficulties in the student's vestibular system had been noted in various reports (*id.*). The occupational therapist opined that the student would benefit from a multi-sensory/sensory integrative approach incorporating a variety of "sensory

inputs" into the student's activities to enhance sensory processing/sensory regulation (id.). The occupational therapist noted that the "greatest area of concern" at the time of the evaluation was the student's schedule and his "very inconsistent attendance" and, further, opined that the then-current schedule did "not appear to accommodate [the student's] medical condition" and then-current needs (id. at p. 4). According to the occupational therapist, the consequences impacted the student's ability to attend school on a regular basis and created a backlog of schoolwork and impaired the student's ability to "keep up with his peers" (id.). To address the student's needs, the occupational therapist recommended "a collaborative team approach," direct OT services twice weekly for 40 minutes, OT consultation with team members two to four times monthly, an assistive technology evaluation, vision services, and "accommodation recommendations made by the medical professionals cited in" the OT report (id. at p. 5).

The district subsequently conducted an FBA of the student in March 2015 (Dist. Ex. 48). By the date of the FBA report, March 20, 2015, the student had accumulated approximately 36 absences, 68 instances of illegal tardiness, and 13 illegal dismissals (id. at pp. 3-5). In emails dated March 27, 2015 and April 2, 2015 the student's mother advised the district that the student had a break down the evening of March 26, 2015 (Parent Exs. S; T). The parent reported that between being bullied at school and having his schedule changed the student had become distraught and did not want to live anymore (Parent Exs. S; T). The parent noted that the student hated the new school and hated himself for the anxiety he felt (Parent Exs. S; T). She further reported that the student felt unsafe, violated, angry, and depressed (Parent Ex. S). The parent reported that she brought the student to his therapist and he had been placed on 24/7 suicide watch (Parent Ex. T).

In a letter to the district dated April 8, 2015, the treating psychologist (therapist) who provided counseling to the student as well as "neurofeedback" following his December 2012 TBI provided an update on the student's treatment (Dist. Exs. 7 at pp. 1-3). According to the therapist's April 2015 report, a topographic map of the student's brain, created by the therapist, showed "hot spots" of cortical dysregulation, "implying" both cervical problems and visual processing problems and resulting in the student having difficulty processing sensory information correctly or as quickly as needed for academic focusing (Dist. Ex. 7 at p. 1). In addition, the "bullseye" on the student's brain map implied unusual environmental sensitivities, which was consistent with "damage" identified by the student's ophthalmologist (id.). However, the therapist also reported that the map showed little damage or dysregulation which implied that the student had retained a large part of his executive functions and many cognitive functions at a "fairly high level" (id.). The therapist stated that the brain mapping results were consistent with the findings of other professionals who had evaluated the student in that there was a significant difference between the student's verbal and visual abilities; the student was able to retain both, but he could not always connect them (id. at p. 2). The therapist also highlighted the student's mental fatigue and processing speed "problem" (id.). The therapist noted that a "major factor" that seemed to be at the core of the student's problems was the disruption to his sleep cycle; he was unable to fall asleep when needed and unable to awaken when required (id. at pp. 2-3). The therapist opined that the student was not "willfully" staying asleep in the morning or "avoidantly" failing to keep up with his peers in cognitive tasks, he simply could not (id. at p. 1). To address the student's needs, the therapist recommended offering the student "every accommodation necessary" "because of his compromised neurological condition" and, further, suggested a referral to a special facility for those with a TBI, special accommodations within the school district, or simple schedule changes to accommodate the student's special needs (id. at p. 3).

With respect to the student's educational performance during the 2014-15 school year, the meeting information summary from the student's June 11, 2015 CSE meeting, and the student's IEP, indicated that the committee received updates about the student's progress in all of his core subjects and that the student was progressing in English, science and social studies (Dist. Ex. 9 at p. 2). However, the meeting summary and IEP did not provide specific information regarding the student's progress (see Dist. Ex. 9). Moreover, the IEP stated that the student's transition to high school had been difficult due to high absenteeism as a result of his failing to follow the medical plan in place (id. at p. 6). According to the IEP, the student made limited connections with peers and his impaired social decision making resulted in negative peer interactions and consequences thus causing further frustration and anxiety during the school day (id.).

The hearing record does not contain report cards or reports of the student's academic progress during the 2014-15 school year. Nor does it contain session notes for the OT and counseling services that the CSE recommended the student receive beginning in January 2015. The lack of information regarding the student's educational performance, combined with evidence of the student's poor attendance, inability to complete schoolwork, and deteriorating emotional state, does not support the district's claim that the student had a successful 2014-15 school year.

c. Progress from September 2015 to February 2016

The district also asserts that the student successfully completed most of the 2015-16 school year in its school. On November 12, 2015 the CSE met for a review of the student's program (Dist. Ex. 10 at p. 1). According to the meeting information summary, the student's teachers stated that he was doing well academically but that the student was not staying at school for the ninth period and was not accessing his related services of OT and counseling (Dist. Ex. 10 at p. 1). The meeting information summary reflected committee discussion of the FBA and BIP developed the previous school year and parent agreement that an FBA and BIP was not warranted because the student was attending school on a regular basis (id. at pp. 2, 8). The present levels of performance of the student's November 2015 IEP indicated that the student was meeting with success in the regular education setting for English 10 and excelling in the regular education setting for social studies (id. at p. 5). According to the present levels of performance, the student's teachers reported that he was interested and enthusiastic about learning (id.). The IEP noted that the student had "around a 90 percent average in social studies and a mid-high 80's average in English (id.). With respect to mathematics, the IEP indicated that the student was meeting with success in the regular education setting for geometry and his average was hovering between 80-85 (id. at p. 6; see Dist. Ex. 39).¹⁰ The IEP noted that the student's attendance and participation in math class was good but that the student was missing a few assignments that if not completed would affect the student's grade for the quarter (Dist. Ex. 10 at p. 6; but see Dist. Ex. 39). The IEP indicated that all of the student's academic classes were scheduled in the middle of the day, most days he arrived at school at "the top" of fourth period, and his late arrival resulted in him missing morning study hall and resource room – 20 days in the first quarter (Dist. Ex. 10 at p. 6; see Dist. Exs. 39; 40). The student also left school early on many days and missed his afternoon study hall and physical education class (Dist. Ex. 10 at p. 6; see Dist. Ex. 40).

¹⁰ According to the student's report card, his geometry grades were in the low to mid 70s (Dist. Ex. 39).

A January 22, 2016 letter to the district from the student's therapist indicated that although the student had made progress with neurofeedback the student continued to experience memory, cognitive, and orientation problems and required accommodations for his mid-term exams, particularly extra time, isolation to provide a quiet environment, and enlarged print font (Dist. Ex. 11).

For the first three quarters of the 2015-16 school year the student's quarterly average ranged between 77 and 83 (Dist. Ex. 39).

The student testified that he was doing better academically during tenth grade (2015-16 school year) than he did in ninth grade (Tr. p. 1499). He reported that he had not reached his goal in terms of academics because he was still suffering from TBI and emotional stress (*id.*). The student acknowledged that the beginning of tenth grade was "going okay" and noted that he had made some friends, which was very helpful socially (Tr. pp. 1499-1500). He reported that emotionally he was "doing alright" (Tr. pp. 1500-01). In terms of his physical state, the student reported that he continued to experience confusional migraines and fatigue (Tr. p. 1500).

Based on the above, the hearing record supports the district's assertion that the student was successful during the first part of the 2015-16 school year. However, the district asserts that the student was successful during the 2014-15 and 2015-16 school years in an effort to bolster its argument that the IHO relied on outdated reports to determine that the student required an out-of-district placement for the 2016-17 and 2017-18 school years and failed to consider his success in the intervening years. Consistent with the district's assertion, the evaluations and clinician letters generated during the 2014-15 and 2015-16 school years did not recommend an out-of-district placement for the student (*see* Parent Exs. D; L; Dist. Exs. 6; 7; 11). However, the district fails to take into account that the IHO's finding that the June 2016 IEP did not provide the student with a FAPE "came into sharper relief" when considering the "events of February and March 2016" (IHO Decision at p. 34), and his FAPE determination focused extensively on the district's failure to recommend an appropriate program and placement to address the impact of the February 2016 incident and his resulting diagnosis of PTSD on the student's functioning and ability to attend the district school. It is to this time-period, after February 2016, that I now turn.

d. February 2016 to May 2016

Following the February 24, 2016 incident, the student returned to school for approximately four days (Dist. Ex. 40 at p. 2). In a "To Whom it May Concern" letter dated March 9, 2016, the student's therapist recounted the effects of the student's head injury from 2012 and indicated that the February 2016 punch to the head by another student had exacerbated the student's TBI and "now occasioned" PTSD because of the suddenness of the attack, on school property, with no warning (Dist. Ex. 15).¹¹ The therapist reported that the student had "acute stress disorder and high anxiety and panic every time he [went] into the school – despite his high motivation to return to classes" (*id.*). The therapist compared the student to a combat veteran who was triggered by anything that reminded him of his wartime trauma (*id.*). The therapist concluded that "under these

¹¹ The therapist stated that he agreed with the diagnosis of the student's treating physician, PTSD (Dist. Ex. 15).

circumstances it would be wisest for [the student] to be sent to Homebound Instruction indefinitely" (id.).

According to a prior written notice dated on the same day as the March 31, 2016 program review, the CSE requested information regarding the treating physician referenced in the therapist's March 9, 2016 letter, but the parents did not provide it (Dist. Exs. 17 at p. 1; 18 at p. 1: see Tr. pp. 79-80). In a subsequent letter dated April 6, 2016, the student's therapist stated that without a coherent alternative to homebound instruction the student remained in an anxious state that seemed to grow worse because of his traumatic experience (Dist. Ex. 20). He reported that he was willing to talk to district staff about the student's PTSD diagnosis and indicated that he had confirmed the diagnosis that day through a clinical evaluation of the student (id.). According to the therapist, the thought of returning to the school "where he was twice traumatized" terrified the student (id.). The therapist reiterated that under the circumstances it would be wisest for the student to be approved for homebound instruction or an appropriate educational placement (id.).

In a telephone call with the student's therapist on April 11, 2016, the director of pupil personnel services attempted to clarify the therapist's March 9, 2016 and April 6, 2016 letters (Tr. p. 81; see Dist. Ex. 23). According to the director of pupil personnel, the therapist reported that he had been treating the student had for over a year and had "done a [b]rain map" of the student and it showed progress (Tr. p. 85; Dist. Ex. 23 at p. 1). The student's migraines and sleep disorder had gotten better (Tr. p. 85; Dist. Ex. 23 at p. 1). With respect to the PTSD symptoms exhibited by the student, the therapist stated that the student "'was anxious about [the] program'" and suggested that "the school itself" acted as a trigger for the student (Tr. p. 92; Dist. Ex. 23 at p. 2). The therapist also reported that the student's PTSD manifested itself as a panic attack (Tr. p. 102; Dist. Ex. 23 at p. 3). The director of pupil personnel services recalled that he asked the therapist if he had any other recommendations for the student and he stated "other schools that are not Wallkill" (Tr. p. 95; Dist. Ex. 23 at p. 2; see Tr. pp. 309-11). The director of pupil personnel services explained that the two had a talk about other schools that were not Wallkill, specifically a BOCES program, and the therapist indicated that he thought "that was the answer" (Tr. pp. 95-96; Dist. Ex. 23 at p. 2). According to the director of pupil personnel services, he then asked about the student's prognosis, and the therapist recommended that the student continue with psychotherapy and noted that the student felt he was in a struggle with the school (Tr. pp. 107-08).

The CSE convened on May 5, 2016 for a review of the student's program (Dist. Exs. 32; 33). According to the meeting information summary, the CSE "took into account all of the [student's therapist's] statements" (Dist. Ex. 33 at p. 2). In addition, the CSE indicated that it would consider other placement options for the student, including a BOCES program that was designed to meet the needs of students with clinical issues such as anxiety disorders and thought disorders (id.; see Tr. pp. 123-24). However, the May 4, 2016 IEP also stated that the CSE had not identified any condition that prevented the student from coming to school (Dist. Ex. 33 at p. 9).

e. Summary

Based on the above, and as discussed more fully below, the hearing record shows that the IHO based his decision that the student required an out-of-district placement on the information before the CSE in June 2016 and not on evaluations and letters from 2013 and 2014.

It is clear that, in finding that that the June 2016 CSE had "a considerable amount of information about the profile of [the student]," the IHO cited letters and reports from 2013 and 2104 that detailed the student's TBI and "the effects that it had on his school performance and emotional circumstances" (IHO Decision at p. 30; see Parent Exs. A, B, C, J). The IHO also noted that the reports were received by the district "two and three years before the CSE meeting of June, 2016" but stated that, "[n]evertheless, they represent a significant amount of background information about [the student] that would have had to inform any decision made at that meeting" (IHO Decision at p. 32). The IHO reiterated that the CSE "clearly knew" the extent to which the TBI impacted the student's academic performance and social/emotional profile (id.). Moreover, in addition to the letters and reports from 2013 and 2014, the IHO noted that the district had information about the student's emotional state from emails exchanged with the student's parents during the 2014-15 school year (id.). The IHO acknowledged that the emails predated the school year in question but opined that they served to alert the district to the student's vulnerability and the continued effects of his December 2012 head injury (id. at pp. 32-33).

But the IHO further noted that the June 2016 CSE had the results of the January 2015 psychological evaluation, the March 2016 letter from the student's therapist, information supplied by the student's parents and teachers, and the district's own records of the student's academic performance and attendance (IHO Decision at p. 30). The IHO indicated that the psychological evaluation "alerted the CSE to problems associated with the [student's] brain injury" including sleep issues, cognitive fatigue, and poor executive functioning, due in part to a significant deficit in processing speed (id.). The IHO also indicated that the March 2016 letter from the student's therapist discussed the consequences of the student's head injury in December 2012 and referred to the worsening of the student's TBI and to PTSD that developed as a result of having been punched by another student in February 2016 (id. at p. 31). The IHO cited a March 2016 letter in which the student's therapist indicated that the student had an acute stress disorder, high anxiety, and panic when he entered the school (id.). He also noted that district staff who attended the June 2016 CSE meeting were aware of the student's sensitivity to light and sound, sleep difficulties and fatigue, suicidal ideation, vision problems, and poor attendance (id. at p. 33). The IHO then determined that based on the totality of information available to the CSE at its June 2016 meeting it was his view that the IEP did not provide a program sufficiently tailored to meet the student's needs and provide for him to make sufficient educational or emotional progress (id. at p. 34). Thus, a review of the IHO's decision, does not support the district's contention that the IHO relied on outdated information in determining the student required an out-of-district placement.

2. Program and Placement Recommendations

Having reviewed in depth the information about the student leading up to the June 2016 CSE meeting, including which information the IHO relied upon and why, the IEP itself remains to be examined.

Before turning to the recommendations made by the June 2016 CSE, a review of the student's present levels of performance as set forth in the June 2016 IEP informs the issue to be determined. The present levels of performance of the June 2016 IEP included information about the student's academic performance provided by the student's former special education teacher (Dist. Ex. 38 at pp. 1. 5-6). With respect to study skills, although the student was no longer in attendance in the public school, his teacher reported that the student had a "very strong start" to

the 2015-16 school year, made great gains in the past year in study skills and organization, and was motivated to succeed (id. at p. 5). She noted that the student struggled to prioritize long term assignments and to complete his work on time, and he became overwhelmed when completing a lot of work at once (id.). The special education teacher indicated that the student benefitted from a folder to organize his materials in order of importance and due date, as well as from separating packets and completing one page at a time (id.). The student's then-current teachers at NYMA reported that the student was getting all of his assignments completed and turned in on time (id.). With respect to reading, the student's teacher noted that the student read with fluency and was able to extrapolate information from what he read (id.). According to the IEP, the student's English and social studies teachers noted that the student's reading abilities were a great advantage for his learning in those subject areas and the student retained and used vocabulary specific to those courses consistently (id.). With respect to writing, the student's teacher described the student as an articulate person with a broad vocabulary and noted that these traits were expressed in his writing (id. at p. 6). She indicated that the student was able to support his ideas with evidence from the text and was skilled at proofreading and editing his work, and he did best when he was able to say what he wanted to write out loud, then type it (id.). The student's teacher from NYMA reported that the student's writing was creative and included appropriate use of grammar and sentence structure (id.). The June 2016 IEP stated that the student's handwriting could be difficult to read at times when he was tired and suggested that a word processor would be a better option for the student when he was fatigued (id.). The student was passionate about his interests and loved the outdoors and law enforcement (id.). In math, the student's former special education teacher indicated that, as reported by the student, geometry was a difficult subject; the IEP further indicated that this was evidenced by the student's performance in the class (id.). The student had difficulty when similar shapes were positioned in different directions and he was asked to compare them (id.). He understood the concept of similar sides but struggled when the shapes were not presented at the same transformation (id.). The teacher noted that the student had made gains understanding similar shapes and corresponding angles but that time away from the classroom impacted his grade (id.). According to the IEP the student was able to solve multistep algebraic equations in relation to geometry and in isolation (id.). With respect to needs of the student, including concerns of the parents, the IEP stated that the student struggled in the area of executive functioning, with attending school regularly, and with completing assignments in a timely fashion (id.). The IEP also indicated that the student needed regular reteaching of new material taught in school (id.).

With respect to social development, information provided by the student's former special education teacher indicated that the student appeared to be well liked by those around him and thrived in the company of individuals who liked to discuss and debate certain topics (Dist. Ex. 38 at p. 6). However, the June 2016 IEP also noted, as reported by the teacher, that the student expressed that he had difficulty connecting with same age peers as well as he connected with adults (id.). The student's most recent district social worker characterized the student as personable, observant, and thoughtful and indicated that he was persistent and highly motivated to achieve his goals (id. at pp. 1, 6). She noted that the student benefitted from surrounding himself with peers who were engaged in activities/hobbies that he enjoyed in order to foster social acceptance and self-confidence (id. at p. 6).

With respect to physical development, the June 2016 indicated that the student wore corrective lenses and had been diagnosed with convergence insufficiency and accommodative

deficits (Dist. Ex. 38 at p. 7). With respect to OT, the IEP further indicated that the student received OT services on an inconsistent basis during the 2015-16 school year due to a shortened day schedule; that, when he attended, he worked to his highest potential; and that he was given frequent breaks (id.). According to the IEP, the student's OT focused primarily on visual tracking, scanning and visual motor integration (id.). The IEP stated that a re-evaluation conducted in November 2015 yielded scores in the average range and indicated gains in all areas (id.). Finally, with regard to physical development, the IEP indicated that the student demonstrated potentially average visual motor and visual perceptual skills but that these could be affected by fatigue (id.). The IEP also indicated that the student would benefit from continued service with the long-term goal of increasing consistency in occupational performance (id.).

To address the student's need as identified in the present levels of performance, the June 2016 CSE recommended the student attend a 10-month general education classroom in a public school and receive one 42-minute session daily of group resource room, one 30-minute session per six-day cycle of individual OT, and three 30-minute sessions per month of individual (or as needed) counseling (Dist. Ex. 38 at pp. 2, 9).¹² According to the district's June 2016 prior written notice, the CSE "agreed" to remove the program modifications of study guides, special seating arrangements, and additional time to complete assignments; in addition, the CSE "agreed" to remove access to speech recognition software and reviewed and discussed the annual goals (Dist. Ex. 37 at p. 1). The June 2016 CSE recommended three post-secondary goals, a coordinated set of transition activities, and identified transition as well as management needs including that the student required a moderate amount of teacher redirection to stay on task, that he benefitted from a structured learning environment, and that he needed to continue to improve punctuality to school (Dist. Ex. 38 at pp. 7-9). For "Supplementary Aids and Services/Program Modifications/Accommodations," the CSE recommended: modified homework assignments (reduced by 75 percent); provision of copies of class notes as needed for math and science; frequent breaks if the student or a teacher recognized that the student was fatigued; refocusing and redirection; checks for understanding as needed; modified reading assignments (enlarged text) as needed; dismissal from class early (specifically, the student would receive a three-minute pass between classes and a pass to the nurse to be used as needed, and which could be extended to five minutes after a test); use of a marker to hold his place in reading, and staggered tests (providing that the student would not be required to take more than one test per day) (id. at pp. 9-11). For testing accommodations, the CSE recommended: extended time (times two); provision of breaks as needed; for scantron tests, allowing the student to record answers on the test; and provision of a separate location with minimal distractions (id. at pp. 11-12). The IEP recommended assistive technology for the student in the form of an iPad with a keyboard for use in school and at home (id. at pp. 8, 11).¹³

¹² Although the section designated for the CSE's "Placement Recommendation" states that the "Student [wa]s Parentally Placed in a Nonpublic School," it appears that this language was intended to convey the student's attendance at NYMA at the time, but it is undisputed that the June 2016 CSE intended the recommendations to be implemented at a district public school if the student returned to the district (see Dist. Ex. 37 at p 1; 38 at p. 13).

¹³ On appeal, the district also challenged the IHO's findings related to the sufficiency of accommodations to address the student's cognitive fatigue, executive functioning, and his need for flexibility in scheduling and

To the extent the district asserts that the IHO erroneously concluded that it should have "paid more heed" to the reports of private evaluators, the hearing record shows that the district appeared to doubt that the student's PTSD diagnosis, and the director of pupil personnel services spent a considerable amount of time questioning the student's therapist in order to determine if the student's treating physician had offered such a diagnosis, as the therapist reported (Tr. pp. 81-110; Dist. Ex. 23 at pp. 1-3). However, there is no record of the district attempting to contact the physician directly to confirm a PTSD diagnosis. In his August 2014 "To Whom it May Concern" letter, the student's pediatric neurologist indicated that there was the "potential that the student had developed a post-traumatic stress reaction" related to school (Parent Ex. C at p. 1). In addition, the June 2014 "To Whom it May Concern" letter from the TBI specialist who consulted with the student, which predated the pediatric neurologist's letter, also mentioned that the student had a diagnosis of PTSD; however, the source of the diagnosis is unclear (Parent Ex. B at p. 2). Regardless of whether the student met the clinical criteria for PTSD,¹⁴ the student's treating therapist, who was a licensed mental health counselor, reported that the student experienced panic attacks that were triggered by the district's school (Tr. pp. 92, 95, 310; Dist. Exs. 15 at p. 1; 20 at p. 1; 23 at pp. 2-3). In addition, the therapist had opined to the director of pupil personnel services that a plan that included the student's return to the district's school would not work because the student may not attend (Tr. pp. 310-11). The district failed to include this information in the student's June 2016 IEP. Moreover, the June 2016 CSE removed a statement found in the March and May 2016 IEPs, attributed to the student's mother, that the student had been diagnosed with PTSD which was affecting his ability to go to school (compare Dist. Ex. 38 at p. 6, with Dist. Exs. 18 at p. 7; 33 at p. 9). The CSE also removed an annual goal designed to target the student's PTSD (compare Dist. Ex. 38 at pp. 8-9, with Dist. Exs. 18 at p. 10; 33 at p. 11). Further, while the March and May 2016 IEP referenced a safety plan for the student, as discussed further below, no such reference was included in the June 2016 IEP (compare Dist. Exs. 18 at pp. 1, 7; 33 at p. 9, with Dist. Ex. 38 at pp. 1-13).

The hearing record shows that the district did not consider any other options during the June 2016 CSE meeting before recommending that the student attend a general education class placement in the district public school (Dist. Ex. 37 at p. 1; see, Dist. Ex. 38).¹⁵ In contrast, in May 2016, just one month earlier, the CSE had discussed the possibility of a placement for the student outside of the district, specifically a BOCES program (see Dist. Ex. 33 at p. 2). While the

spacing. The IHO seemed to find that these accommodations were the same accommodations that had been in place in the past and that, since the student had not overall met with success in the district program, the accommodations without more were not appropriate (see IHO Decision at p. 34). To the extent that the student made some progress during the beginning of the 2015-16 school year, prior to the February 2016 incident, as discussed above, there is some merit to the district's argument that these accommodations met many of the student's needs and, therefore, remained appropriate. However, it is unnecessary to further discuss this nuance since, as noted herein, the June 2016 IEP, as a whole, failed to acknowledge or include supports to address the student's PTSD and anxiety.

¹⁴ As noted above, in his April 6, 2016 letter, the therapist indicated that he diagnosed the student with PTSD on March 9, 2016 and further that it was supported by a review of the record of all of the student's treating doctors (Dist. Ex. 20).

¹⁵ The IEP does contain a statement that, if the student were to return to the district, the CSE would then reconvene to discuss whether the student still required a placement at the BOCES program (Dist. Ex. 38 at p. 2).

district's argument amounts to a plea that its hands were tied due to the parents' failure to ensure the student's attendance at an intake appointment for the BOCES program, there is no evidence in the hearing record that the parents' cooperation in this regard was broached with the parents leading up to or during the June 2016 CSE meeting, that an additional intake appointment was scheduled with the BOCES program after the student's nonattendance at the first appointment, or that any other placement options outside of the district public school were considered.¹⁶ Further, there is no indication in the hearing record that the district had new information about the student between May and June, which would have warranted the removal of certain supports from the IEP (i.e., the annual goal targeted to address the PTSD or the reference to a safety plan) or the decision to abandon a search for an out-of-district option. The testimony from the district director of pupil personnel services that the CSE would have reconvened to "adjust" the IEP based on information gathered once the student was attending the district school or "send referral packed out to . . . BOCES" if the student was "not making appropriate progress" is unavailing (Tr. pp. 362, 365). The parents were entitled to rely on the June 2016 IEP in assessing whether or not the district had offered the student a FAPE.

In summary, the June 2016 CSE failed to acknowledge the student's PTSD and the effect it had on the student's ability to return to the district's school, failed to include goals to address the student's anxiety and PTSD as it related to school, and failed to recommend adequate services to address the student's social/emotional needs. As a result, the district failed to offer the student a FAPE for the 2016-17 school year.

3. Other Claims Pertaining to the June 2016 IEP

In its appeal, the district also asserts that the IHO erred in making several other findings relating to the June 2016 CSE's recommendations, including findings related to the lack of inclusion of a health or safety plan on the student's IEP and supports to address the student's experiences with bullying. In light of the above findings, it is unnecessary to discuss these other allegations in great detail as, even if the IHO erred in these discrete findings, the district would still be found to have failed to offer the student a FAPE for the 2016-17 school year. However, they will be given brief attention before moving on to review the district's appeal related to the 2017-18 school year.

As for bullying, under certain circumstances, if a student with a disability is the target of bullying, such bullying may form the basis for a finding that a district denied the student a FAPE (Dear Colleague Letter: Bullying of Students with Disabilities, 61 IDELR 263 [OSERS 2013] [stating that bullying that results in a student with a disability not receiving meaningful educational benefit constitutes a denial of a FAPE and that districts have an obligation to ensure that students who are targeted by bullying behavior continue to receive a FAPE pursuant to their IEPs]; see Smith v. Guilford Bd. of Educ., 226 Fed. App'x 58, 63-64 [2d Cir. June 14, 2007] [indicating that

¹⁶ Given that the hearing record supports the IHO's finding that the district denied the student a FAPE, it is unnecessary to address the district's argument that the IHO incorrectly determined that the district had the authority to simply place the student in a BOCES program. Ultimately, the district's position about the parents' failure to ensure the student's attendance at the intake appointment for the BOCES program may have weighed in a review of equitable considerations; however, since the parents failed to show that the unilateral placement was appropriate, it is unnecessary to reach such considerations.

bullying might, under some circumstances, implicate IDEA considerations]; M.L. v. Fed. Way. Sch. Dist., 394 F.3d 634, 650-51 [9th Cir. 2005] [finding that "[i]f a teacher is deliberately indifferent to teasing of a disabled child and the abuse is so severe that the child can derive no benefit from the services that he or she is offered by the school district, the child has been denied a FAPE"]; Shore Reg'l High Sch. Bd. of Educ. v. P.S., 381 F.3d 194, 199-201 [3d Cir. 2004] [reviewing whether the district offered the student "an education that was sufficiently free from the threat of harassment to constitute a FAPE"]; Dear Colleague Letter: Responding to Bullying of Students with Disabilities, 64 IDELR 115 [OCR 2014]; Dear Colleague Letter: Harassment and Bullying, 55 IDELR 174 [OCR 2010] [stating that "a school is responsible for addressing harassment incidents about which it knows or reasonably should have known"]; Dear Colleague Letter: Prohibited Disability Harassment, 111 LRP 45106 [OCR/OSERS 2000]).^{17, 18} In determining whether allegations related to bullying rise to the level of a denial of FAPE, the United States Department of Education has clarified that:

A school should, as part of its appropriate response to the bullying, convene the IEP Team to determine whether, as a result of the effects of the bullying, the student's needs have changed such that the IEP is no longer designed to provide meaningful educational benefit. If the IEP is no longer designed to provide a meaningful educational benefit to the student, the IEP Team must then determine to what extent additional or different special education or related services are needed to address the student's individual needs; and revise the IEP accordingly.

(Dear Colleague Letter, 61 IDELR 263).

Here, regardless of whether the student's needs arose in some part from his negative experiences with his peers, for the reasons set forth above, the district did not establish that the June 2016 IEP offered the student a FAPE and, therefore, it is not necessary to review whether the hearing record sufficiently established that the student had experienced "bullying" at the district

¹⁷ New York State has addressed bullying in schools through the Dignity for All Students Act, which imposes specific obligations on school districts with regard to the prevention and investigation of harassment and bullying (Educ. Law §§ 10-18). The law defines bullying as "the creation of a hostile environment by conduct or by threats, intimidation or abuse" that, among other things, interferes with a student's educational performance, mental, emotional, or physical well-being, causes a student to fear for his or her physical safety, or causes physical or emotional harm (Educ. Law § 11[7]).

¹⁸ One district court in New York has found that "students have a right to be secure in school" under the IDEA and that bullying may constitute the denial of a FAPE if "it is likely to affect the opportunity of the student for an appropriate education" (T.K. v. New York City Dep't of Educ., 779 F. Supp. 2d 289, 308, 316-17 [E.D.N.Y. 2011]). The District Court in T.K. developed a test to determine whether bullying resulted in the denial of a FAPE as follows: "(1) was the student a victim of bullying; (2) did the school have notice of substantial bullying of the student; (3) was the school 'deliberately indifferent' to the bullying, or did it fail to take reasonable steps to prevent the bullying; and (4) did the bullying 'substantially restrict' the student's 'educational opportunities?'" (T.K., 779 F. Supp. 3d at 316, 318; see T.K. v. New York City Dep't of Educ., 32 F. Supp. 3d 405, 417-18 [E.D.N.Y. 2014], aff'd, 810 F.3d 869 [2d Cir. 2016]).

school, which the IEP failed to address.¹⁹ Whether the student's negative experiences with peers were characterized as bullying or as corollary of the student's anxiety or social/emotional needs, it would not change the finding that the district failed to address the student's needs.

Further, with regard to the district's claim on appeal that "the IHO incorrectly implied that the health care plan and safety plan developed for the student—both of which were explicitly referenced on the IEP—had to be 'delineated' on the IEP itself," the IHO did not make such a finding. The IHO found that the "medical or health plan" that the district developed in January and February 2015 "had not appeared to stem the tide of [the student's] symptoms or school attendance" and that "[t]hese plans never made their way into any IEP" (IHO Decision at p. 34).

While perhaps a "health care plan" or "safety plan" need not be delineated on an IEP (but see T.K. v. New York City Dep't of Educ., 32 F. Supp. 3d 405, 421-22 [E.D.N.Y. July 23, 2014] [finding that "where there is a substantial probability that bullying will severely restrict a disabled student's educational opportunities . . . an anti-bullying program is required to be included in the IEP"]), if a student requires the supports outlined in such plans in order to receive a FAPE, the plans or supports should be described or at the very least referenced in the IEP, else a district may be hard-pressed to defend an IEP with evidence outside of its four-corners (see R.E., 694 F.3d at 185-86).

The district asserts that the health care plan and the safety plan were referenced on the IEP (Req. for Rev. at p. 4). The June 2016 IEP includes a special alert that indicates that the student had a health care plan on file on the nurse's office (Dist. Ex. 38 at p. 1); however, there is no reference to a "safety plan" on the June 2016 IEP and there is no document titled a health plan or a safety plan in the hearing record. The director of pupil personnel services testified that the district created a safety plan for the student after the February 2016 assault, and identified district exhibit 25 as the plan (Tr. pp. 308-09, 319-20; see Dist. Ex. 25). That plan, dated April 22, 2016 and identified as an "entry plan," was designed to assist the student in his transition back into the high school (Dist. Ex. 25). The plan was designed as an intermediate plan to allow the student to "access[] his program" until the CSE reconvened in May (id.).

The April 2016 entry plan provided that the student: would use his three-minute pass to leave classes prior to bell, which would allow the student to maneuver the hallways without other students present; would be assigned a teacher's aide, who would escort the student to his classes and reassure him that he was safe in the hall; and would meet with the school social worker whenever he felt anxious (Dist. Ex. 25).

According to the May 4, 2016 prior written notice, the May 2016 CSE proposed "[r]eworking the safety plan to address the [student's] diagnosis of PTSD," involve the student "in

¹⁹ However, review of the hearing record does not support the district's claim that the student "conceded he had not been bullied in high school" (Req. for Rev. at p. 5; see Dist. Mem. of Law at p. 15 [alleging that the student "did not testify that he was being bullied"]). To the contrary, the student testified he had "always been bullied in [the district]" (Tr. p. 1476). The specific pages of the transcript of the student's testimony cited by the district do not present a different characterization: the student discussed that he was "doing all right" emotionally at the beginning of tenth grade until the incident in February 2016 (Tr. pp. 1500-01) and that the student was compelled to call the suicide hotline in March 2016 because of "everything in [the district]" (Tr. pp. 1507-08).

developing a comprehensive plan for him while he is at school," make sure the student knew "how to fully utilize the 3 minutes pass," have someone walk with the student between classes if necessary, and have the student "come to the school environment on a Saturday or after school," this last suggestion which was rejected by the parent (Dist. Ex. 32 at p. 2).²⁰ The present levels of social development section of the May 2016 IEP referenced that the student could access "a safety plan . . . to assist with symptoms of the medical diagnoses as well" (id. at p. 9).

In contrast, the June 2016 IEP, the operative IEP for the 2016-17 school year, makes no reference to a safety plan (see Dist. Ex. 38).

Further, the district does not directly challenge the IHO's determination that the "medical or health plan" that the district developed in January and February 2015 "had not appeared to stem the tide of [the student's] symptoms or school attendance" (IHO Decision at p. 34). Indeed, on the May 2016 IEP, the CSE acknowledged that the health plan was not being followed and, therefore, there had not been improvement in the student's attendance as a result (Dist. Ex. 33 at p. 9).²¹ Accordingly, even though the health plan is referenced in the medical alerts, if, as the IHO found, it was not working to address the student's absenteeism, the reference thereto on the June 2016 IEP does not help the district's case.

Based on all of the foregoing, there is no basis in the hearing record to modify the IHO's determination that the district failed to offer the student a FAPE for the 2016-17 school year.

C. August 2017 IEP

The hearing record indicates that the June 2017 CSE convened to develop a program for the student in the event that he returned to the district (Dist. Ex. 43 at p. 1). According to the meeting information summary, the CSE received updated information from NYMA, the district of location's IESP, and the student's parents (id.). The resultant IEP indicated that the student had made "great gains" at NYMA in the area of student skills and organization and that the student had successfully completed all of his class assignments for the 2016-17 school year. (id. at p. 5). With respect to academics, the IEP maintained language from the June 2016 IEP that noted the student read with fluency and was able to extrapolate information from what he read and that the student was an articulate person with a broad vocabulary, traits that were expressed in the student's writing (compare Dist. Ex. 38 at p. 5 with Dist. Ex. 43 at p. 5). The June 2017 IEP indicated that the student struggled with math and that NYMA had "made the math course a four semester course" for the student (Dist. Ex. 43 at p. 5). The IEP stated that, in order to accommodate the student's

²⁰ According to the meeting information summary, the "safety plan" was discussed at the March 2016 CSE meeting (Dist. Ex. 18 at p. 1). The March 2016 CSE meeting information summary indicated that "[t]he purpose of the plan was to put systems in place to meet [the student's] emotional needs, make the school staff involved in [the student's] education[,] aware of [the student's] suicidal ideation[s] as well as giving [the student] a chance to express what he needs to feel safe in the school environment" (id. at pp. 1-2).

²¹ The June 2015 CSE meeting information summary indicated that the student was "not following the health plan when he [wa]s not feeling well and [wa]s immediately calling home to get picked up without going to the nurse's office to rest and see if he c[ould] go back to his classes" (Dist. Ex. 33 at p. 3).

math needs, he would be in an Algebra II course (id.). The IEP reflected a statement by NYMA that during its tutorial sessions it would reinforce content area lessons (id. at p. 6).

With respect to social development, the June 2018 IEP indicated that the student was able to develop and maintain appropriate relationships with both peers and adults (Dist. Ex. 43 at p. 6). The IEP stated that the student was often cautious about sharing personal information but once he developed a trusting relationship was forthcoming with thoughts and feelings (id.). The IEP characterized the student's self-esteem as "fair" and indicated that the student could express feelings of frustration and sadness regarding personal relationships (id.). It noted that the student had made "a nice adjustment" to NYMA and developed relationships with the students and staff (id.). According to the IEP, the student's mother reported that the student continued to see his therapist "a couple of times a year" (id.). She also reported that the student saw a "Behavioral Health Therapist" (id.). The IEP noted that no updated documentation was submitted for review (id.). The IEP described the student as friendly, polite, and having a good sense of humor and noted the student had a strong sense of self and focused interests and hobbies (id.). However, the IEP also indicated that the student benefitted from counseling to provide support for feelings of frustration and sadness and that he had some difficulty regulating his sadness during the school day and relied on support staff for help (id. at pp. 6, 7).

Turning to the student's physical development, the June 2018 IEP recounted information from the June 2016 IEP which indicated that the student wore corrective lenses and had been diagnosed with convergence insufficiency and accommodative deficits (Dist. Ex. 43 at p. 6). The IEP stated that the student participated in OT sessions consistently throughout the school year but often requested that the sessions be shortened due to cognitive fatigue (id.). The student indicated that he would prefer to feel good the rest of the day than to be tired from the strain of therapeutic activities (id.). According to the reporting occupational therapist, the student's performance on activities was consistently age appropriate and there were not quantifiable gains in the student's ability; she recommended that the student's direct therapy be changed to an OT consult with a focus on the use of assistive technology in the school setting (id.). The IEP noted that by parent report the student was wearing glasses with a darker tint and still carried ear buds with him (id.). The IEP indicated that a scanning pen was not an effective assistive technology device for the student and due to wi-fi difficulties recommended that the student's iPad be changed to a Chromebook (id. at pp. 6, 10). In terms of student strengths, the IEP stated that the student demonstrated average visual motor and visual perceptual skills and that he gave a good effort during tasks, which could result in fatigue later in the day (id. at p. 6; see Tr. pp. 1097-98). The student enjoyed participating in physical education and sporting events (Dist. Ex. 43 at p. 6). The occupational therapist indicated that the student needed assistive technology for vision-based tasks such as reading and writing in order to reduce the effects of cognitive fatigue (id. at p. 7).

The June 2017 IEP indicated that, according to the parent, the student did not need special education but did require special education accommodations (Dist. Ex. 43 at p. 7). The IEP stated that "NYMA did not articulate any specific management needs that they have done to meet [the student's] learning needs besides the tutorial class," which was described as being similar to a resource room (id.). The IEP noted that the tutorial was not taught by a special education teacher and was more for content support (id.).

The June 2017 IEP indicated that the student needed positive behavioral interventions and supports, but not a BIP (Dist. Ex. 43 at p. 7). It also indicated that the student needed assistive technology (id.). With respect to post-secondary goals, the IEP stated that following high school the student's goal was to attend a four-year college or enter the military and the student's goal was to be employed in law enforcement or the military (id. at p. 8).

The June 2017 CSE developed two annual goals for the student. (Dist. Ex. 43 at p. 8). The first goal targeted the student's ability to identify his emotions, the intensity of the emotions and strategies for dealing with them (id.). The second goal required the student to research and analyze the requirements for a degree in law enforcement (id.).

Based on the information provided, the CSE recommended that the student receive group resource room services one time daily for 42 minutes and counseling one time in a six-day cycle for 30 minutes (or as needed) (Dist. Ex. 43 at p. 9). Recommended supplementary aids and services remained the same as in the prior, June 2016 IEP, as did the recommended testing accommodations (compare Dist. Ex. 38 at pp. 9-12, with Dist. Ex. 43 at pp. 9-11). The CSE also recommended a twice monthly OT consultation as a support for school personnel on behalf of the student (Dist. Ex. 43 at p. 10).

The coordinated set of transition activities indicated that the student would communicate medical support and needs to teachers (instruction), receive counseling sessions to help him identify his own feelings and emotions (related services), participate in a county sheriff cadet's program and would explore colleges to study criminal justice programs (community experiences), and attend college fairs and visit schools with law enforcement programs (development of employment and other post-school adult living objectives); the IEP further noted that a vocational assessment had had not been done by NYMA or the district of location (functional vocational assessment) (Dist. Ex. 43 at p. 12).

The meeting information summary indicated that the CSE would "meet to develop a transition plan if [the student] were to attend" (Dist. Ex. 43 at p. 2). The CSE also recommended that a five-week review be scheduled to assess the student's progress (id.). According to the meeting information summary, the parents advised the CSE that the student could not go to the district's high school due to his PTSD (id.). In response the district indicated that it could send referral packets to BOCES if the student did not make appropriate progress (id.). The parents advised the district at the June 2017 CSE meeting that they intended to file a "10 day notice of placing the student at public expense" (id.; see Dist. Ex. 44). A prior written notice dated June 8, 2017 indicated that in its decision-making process "the [c]ommittee considered the reports and evaluations listed under the Evaluations/Reports section of the IEP as well as information previously received from NYMA, [the district of location's] IESP and parent information" (Dist. Ex. 42 at p. 2). According to the prior written notice, the parents did not present any new medical documentation to the CSE (id.). A review of the evaluations/reports section of the June 2017 IEP shows that the CSE considered the same evaluations it considered when it developed the student's prior IEP in June 2016, with no new evaluations or reports listed (compare Dist. Ex. 38 at pp. 3-5, with Dist. Ex. 43 at pp. 3-5). The June 8, 2017 prior written notice also indicated that the CSE considered sending a referral packet to BOCES but felt the program was more restrictive (Dist. Ex. 42 at p. 2). In addition, the CSE considered recommending the student for a special class for English but felt that the student did not need it (id.).

Following their receipt of the June 8, 2017 prior written notice, in a letter dated July 12, 2017, the parents wrote to the district to clarify their understanding of the actions proposed and refused by the June 2017 CSE (Dist. Ex. 45). The parents stated that they did not agree with the district's position that the meeting was held to develop a program "if [the student] returned to Wallkill" and noted that they had consistently requested that the student receive a FAPE through his home district of Wallkill and that they were continuing to request an appropriate placement (id. at p. 1). The parents asserted that the June 8, 2017 prior written notice did not provide a description that was factually grounded or informative for each of the recommendations proposed (id.). The parents stressed that they spoke extensively at the meeting about the student's documented PTSD as well as his triggers and aversion to Wallkill high school (id.). They recounted how they asked the CSE how it would get the student to go to the high school and expressed concern about returning a child diagnosed with PTSD to the environment that triggered it (id.). The parents stated that they disagreed with the CSE's determination that "if [the student] were to return to the high school he w[ould] be fine once we get him through the door" (id. at pp. 1-2). The parents noted that the student had "expressed suicidal ideation twice when he was forced to return to the high school in grades 9 and grades 10" and that the CSE "posed many red flag as to the efficacy of the proposal and ignores the potential psychological and physical harm" linked to PTSD (id. at p. 2). The parents questioned how and why the CSE could predetermine a specific therapeutic program in the event the student did not make progress (id.).

The parents asserted that they requested consideration of the placement at NYMA based supporting data presented to the CSE that showed the appropriateness of the placement and gains made by the student (Dist. Ex. 45 at p. 2). Further, the parents reported that NYMA staff participated in the meeting and provided the CSE with factual descriptions of how they were addressing the student's unique learning, emotional, and management needs (id.). The parents noted that the prior written notice stated that NYMA did not provide this information but that a recording of the meeting showed otherwise (id.). The parents requested that the district clarify their position, or they would assume it was an error in the prior written notice (id.).

The parents questioned the district's determination that it could meet the student's needs based on the CSE chairperson's request for support recommendations from NYMA (Dist. Ex. 45 at p. 2). The parents pointed out that they had provided the district with "a myriad of medical documentation and therapist letters" and that the student's therapists and medical providers had participated in CSE and indicated that they "were perplexed as to what updated medical documentation they could provide that would be valued or followed by the CSE" as it had historically not followed or implemented the recommendations provided (id.).

The parents indicated that they were asking for the district's rationale for placing the student back into an environment where he was not successful, and knowingly placing the student at risk for such regression that the CSE predetermined he would then go to a highly restrictive therapeutic program, identified at the time as too restrictive for the student (Dist. Ex. 45 at p. 3). The parents opined that it would be negligent and harmful to agree to the district's recommendations (id.). The parents stated that there was not support in the recording of the CSE meeting to support the statement that the student's mother indicated that he did not require special education, just accommodations (id.).

The parents disagreed with the district's statement in its prior written notice that indicated there were no other factors relevant to the proposed or refused actions (Dist. Ex. 45 at p. 3). They noted that they expressed "relevant needs in the areas identified as impacting his educational performance due to TBI" including executive functions, processing speed, anxiety, emotional regulation, and cognitive inflexibility, among others (id.).

The parents closed their letter by welcoming "any new consideration on the part of the district to work cooperatively to reach a consensus to provide the student with a FAPE" (Dist. Ex. 45 at p. 3).

The CSE reconvened on August 21, 2017 (Dist. Ex. 47). The meeting information summary indicated that the student's mother advised the CSE at the June 2017 meeting that the student was seeing an outside counselor who did not recommend that the student return to the district's high school (Dist. Ex. 47 at p. 1; see Tr. pp. 176-77). The district sought consent from the parent to speak with the counselor, which the parent provided on August 20, 2017, the day prior to the August 21, 2017 CSE meeting (Dist. Ex. 47 at p. 1). The meeting information summary indicated that no outside service provider participated in the CSE meeting and the parents did not bring any additional information to the meeting (id.).

The August 2017 CSE discussed whether any additional goals were needed on the student's IEP and the district suggested adding a study skill goal to address the student's executive functioning needs, which the parent agreed to (Dist. Ex. 47 at p. 2).²² The CSE discussed "the transition plan" and how it would systematically desensitize the student to returning to the high school environment (id.).²³ According to the meeting information summary, due to the lack of new information from the parents, the CSE did not make changes to the program (id.).

As noted above, in determining the student's needs for the 2017-18 school year the June and August CSE's appeared to rely largely on the same evaluations and reports as the June 2016 CSE (compare Dist. Ex. 38 at pp. 3-5, with Dist. Ex. 43 at pp 3-5; 47 at pp. 1-2). In addition, although the CSEs indicated that they also relied on "information received from NYMA and [the district of location's] IESP," the hearing record contains no documentary evidence, other than report card grades, related to the student's attendance at NYMA during the 2016-17 school year (Dist. Exs. 42 at p. 2; 46 at p. 2; see Parent Exs. H, I). With respect to the district of location's IESP, the hearing record contains a May 1, 2017 IESP that indicates an annual review was held on March 16, 2017 (Dist. Ex. 41 at p. 1). The meeting information summary from that date indicated that at the time the student was struggling in math due to a significant turn over in staff (id.). The IESP also indicated that overall the student was making progress with classroom accommodations (id.). According to the IESP, the student fully participated in counseling sessions, sought out his guidance counselor for support and was able to work through situations that arose (id.). However,

²² The study skill goal focused on the student learning and demonstrating new strategies for remembering and prioritizing tasks and for combating cognitive fatigue (Dist. Ex. 47 at p. 8).

²³ The hearing record does not include a copy of a transition plan, and the meeting information summary from the June 2017 CSE seemed to indicate that a transition plan would be developed only if the student "were to attend" the district school (Dist. Ex. 43 at p. 1).

the student at times struggled with modulating his emotions, especially when fatigued (*id.*). The IESP indicated that the student had the ability to complete all tasks presented to him in OT and that he requested the OT sessions be discontinued due to fatigue after completing tasks (*id.* at p. 2).²⁴ The June and August 2017 IEPs show that the district adopted most of the description of the student's social development (detailed above) from the district of location's May 2017 IESP and recommended a similar program of daily resource room services with counseling, and an OT consult (*compare* Dist. Ex. 41 at pp. 4, 7 *with* Dist. Ex. 47 at pp. 6, 9-10). This suggests that district thought the student's needs would be the same whether he attended NYMA or the district's high school and fails to account for the student's PTSD, which was triggered by attending the district's school.

In light of the determinations set forth above relating to the June 2016 IEP, there is no indication in the hearing record that the student's needs changed to such a degree that similar recommendations in the August 2017 IEP warrant a different result; that is, the August 2017 IEP also failed to address the student's anxiety and PTSD-related needs.²⁵ Further, as with the June 2016 IEP, representations by the July 2017 CSE that the CSE would reconvene to adjust recommendations if the student attended the district public school can not serve to avoid a finding that the district failed in its obligations to the student. The parents were entitled to rely on the June and August 2017 IEPs as written in determining whether or not to unilaterally place the student.

Based on all of the foregoing, there is no basis in the hearing record to modify the IHO's determination that the district failed to offer the student a FAPE for the 2017-18 school year.

D. Unilateral Placement

The district asserts that the IHO erred in finding that NYMA was an appropriate unilateral placement for the student for both the 2016-17 and 2017-18 school years.

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

²⁴ A review of the academic and a portion of the physical development sections of present levels of performance in the May 2017 IESP indicates that they are the same present levels of performance articulated by the June 2016 CSE (*compare* Dist. Ex. 38 at pp 5-7, *with* Dist. Ex. 41 at pp. 3-4).

²⁵ In its appeal, the district also asserts that the IHO applied an incorrect and overly burdensome standard on the district with respect to the CSE's recommendations for the 2017-18 school year. Specifically, the district asserts that the IHO erred in expecting the district to show that the student had recovered from the symptoms of his TBI before recommending that he attend the district high school. In finding that the district had not demonstrated that the student had recovered from the debilitating symptoms of his TBI so that reentry into the previously forbidding environment of the district's high school would be successful, the IHO specifically noted that the district had not done a follow-up assessment of the student's in an effort to determine if such a placement was feasible for a successful outcome (IHO Decision at pp. 37-38). The IHO's finding was more a statement about the district's failure to properly assess the student's ability to safely reintegrate into its buildings, than it was a placing of an improper burden on the district to show that the student had medically recovered (*id.*).

not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (Carter, 510 U.S. at 13-14). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ. of the City Sch. Dist. of Yonkers, 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement'" (Gagliardo, 489 F.3d at 112, quoting Frank G. v. Bd. of Educ. of Hyde Park, 459 F.3d 356, 364 [2d Cir. 2006]; see Rowley, 458 U.S. at 207). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). When determining whether a unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether the placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see Gagliardo, 489 F.3d at 115; Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] ["evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]). A private placement is appropriate if it provides instruction specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; Educ. Law § 4401[1]; 34 CFR 300.39[a][1]; 8 NYCRR 200.1[ww]; Hardison v. Bd. of Educ. of the Oneonta City Sch. Dist., 773 F.3d 372, 386 [2d Cir. 2014]; C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 836 [2d Cir. 2014]; Gagliardo, 489 F.3d at 114-15; Frank G., 459 F.3d at 365).

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

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

The NYMA dean of academics (NYMA dean)²⁶ testified that NYMA was a private military boarding school, where they were "not trying to create soldiers" but offer opportunities for peer

²⁶ When the student entered NYMA at the end of 2015-16 school year and for the 2016-17 school year, the NYMA

leadership, self-reliance, character education, and development of greater personal accountability (Tr. pp. 1067-68).²⁷ The dean noted that, even as NYMA's numbers grew, to the extent possible, they maintained small class sizes and "tr[ie]d to really cater to individual needs of students" (Tr. p. 1068). In addition to academics, each student participated in drill and ceremony and was required to choose a sport and participate in physical activity for 90 minutes four days per week and for two hours on Wednesdays and Saturdays (Tr. pp. 1090-92).

With respect to the profile of students who attended NYMA, the NYMA dean testified that the students varied significantly and had different backgrounds and that, although the school was "starting to niche in a couple of different areas," overall, the school was made up of students that were very similar to public school or "other private school" students (Tr. p. 1071). The dean explained that, during the 2015-16 school year, the school was "in the process of rebuilding" and began the year with 10 students and grew to 12 students; in the 2016-17 school year, there were 44 students; and in the 2017-18 school year there were 77 students (Tr. pp. 1071-72). Further, she testified that NYMA's grade levels had "varied over the years," consisting of either seventh through twelfth grades or eighth through twelfth grades (Tr. p. 1072). The dean reported that, for the 2015-16 school year, there were "probably ten to 12" teachers employed by NYMA, as opposed to the "roughly 20" teachers employed at the time of the hearing, and, further, that all of the teachers for the 2015-16 through 2017-18 school years had "degrees in the subject area they're teaching" but were not necessarily certified to teach by the State (Tr. pp. 1074-75).

With respect to the student's acceptance into NYMA, the dean testified that there was nothing in the student's file to indicate that he was not a good fit and that there were no "major red flags" (Tr. pp. 1080, 1083). As a member of the admissions committee, the dean noted that, except for "IEP paperwork," that the student's mother brought to an open house at NYMA, she could not recall specifically what she had reviewed in the student's educational record (Tr. pp. 1075-76). The dean testified that she recalled that the student was "receiving resource room" and she explained to the parent that NYMA did not "have a specific resource room" but that they had "a tutorial program" (Tr. p. 1077). The dean reported that the student entered NYMA towards the end of his tenth-grade year (2015-16 school year) and was one of two tenth graders (Tr. pp. 1072-74). The student continued at NYMA in the 2016-17 school year as one of six students in the eleventh grade, and he was one of seventeen twelfth-grade students in the 2017-18 school year (Tr. p. 1074).

The IHO acknowledged that the district raised sound objections to the appropriateness of NYMA, including that it "ha[d] no special education program as such, and it ha[d] no special education teachers," but found that it was nevertheless an appropriate unilateral placement, based on several circumstances, including that the NYMA reorganization resulted in a small student body and "favorable" ratio of teachers to students and "[t]his small group turn[ed] out to have been welcoming and non-threatening to [the student]" (IHO Decision at pp. 38-39). As noted above, to

dean worked in the roles of guidance counselor, director of college counseling, and assistant dean (Tr. p. 1066). For the 2017-18 school year, she became the dean of academics (Tr. pp. 1064, 1066).

²⁷ According to the NYMA dean, the school is affiliated with the Army and Junior ROTC program (the hierarchy of student leadership), and it offers a way for cadets "to excel in a completely different area other than academics" (Tr. pp. 1068-70).

qualify for reimbursement under the IDEA, parents must demonstrate that the unilateral placement provides educational instruction specially designed to meet their child's unique needs, supported by services necessary to permit the child to benefit from instruction (Gagliardo, 489 F.3d at 112; see Frank G., 459 F.3d at 364-65). However, small class size is the sort of support from which any student would receive benefit and, without more, is insufficient to establish that NYMA offered instruction specially designed to meet the student's needs (see Gagliardo, 489 F.3d at 115 [noting that reimbursement for a unilateral placement should be denied if "the chief benefits of the chosen school are the kind of educational and environmental advantages and amenities that might be preferred by parents of any child, disabled or not"]; see also Frank G., 459 F.3d at 365 [declining to determine whether small class size alone constituted special education]; J.B. v. Bd. of Educ., 2001 WL 546963, at *7 [S.D.N.Y. May 22, 2001] [finding that "[w]hile placement in small classes would provide [the student], or any other child, with an education superior to that available in public school, it is well established that the IDEA does not guarantee the best possible education or require that parents be compensated for optimal private placements."]). Moreover, while the student's needs showed that the student would benefit from a new environment, a unilateral placement may not be deemed appropriate simply because it removes the student from an anxiety-provoking environment, as avoiding a need does not serve the same purpose or have the same effect as addressing it; rather, the placement must be tailored to address the student's specific needs to qualify for reimbursement under the IDEA (see W.A. v Hendrick Hudson Cent. School Dist., 927 F.3d 126, 147 [2d Cir. 2019]; John M. v Brentwood Union Free Sch. Dist., 2015 WL 5695648, at *9 [E.D.N.Y. Sept. 28, 2015]). In this case, there is little evidence describing how NYMA addressed the student's unique special education needs (L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 489-90 [S.D.N.Y. 2013]).

With respect to reviewing the hearing record for evidence of specially designed instruction, the district argues that the IHO ignored the fact that any specialized instruction delivered to the student while attending NYMA was provided by the district in which NYMA is located pursuant to section 3602-c of the Education Law and that such services should not be considered in evaluating the appropriateness of the unilateral placement.²⁸ According to the NYMA dean, the school contacted the district of location to "transfer[]" the student's IESP to them for the 2016-17 and 2017-18 school years (the student's eleventh and twelfth grade years) and services included OT, until it was deemed too fatiguing for the student, and a "psychologist" coming to NYMA three times per month (Tr. pp. 1096-98, 1114-15, 1166-67; see Dist. Ex. 41 at p. 1-1). The hearing record does not include a copy of an IESP for the student for the 2016-17 school year. The May 2017 IESP developed by the district of location for the 2017-18 school year reflected

²⁸ Under State law, parents of a student with a disability who have privately enrolled their child in a nonpublic school may seek to obtain educational "services" for their child by filing a request for such services in the district of location where the nonpublic school is located on or before the first day of June preceding the school year for which the request for services is made (Educ. Law § 3602-c[2]). "Boards of education of all school districts of the state shall furnish services to students who are residents of this state and who attend nonpublic schools located in such school districts, upon the written request of the parent" (Educ. Law § 3602-c[2][a]). In such circumstances, the district of location's CSE must review the request for services and "develop an [IESP] for the student based on the student's individual needs in the same manner and with the same contents as an [IEP]" (Educ. Law § 3602-c[2][b][1]). The CSE must "assure that special education programs and services are made available to students with disabilities attending nonpublic schools located within the school district on an equitable basis, as compared to special education programs and services provided to other students with disabilities attending public or nonpublic schools located within the school district (*id.*).

recommendations that the student receive daily 45-minute sessions of resource room services and one 30-minute psychological counseling session per week, as well as an OT consult "direct/indirect" twice monthly (Dist. Ex. 41 at pp. 1, 7). The May 2017 IESP included one social/emotional annual goal that addressed the student's ability to identify emotions and strategies for dealing with them (id. at p. 6). The IESP also provided for several "Supplementary Aides and Services/Program Modifications/Accommodations" including modified homework assignments, provision of a copy of class notes, frequent breaks, refocusing and redirection, check for understanding, modified reading assignments, early dismissal from class, use of line markers to hold his place in reading, access to "bookshare," enlarged text, and staggered tests, as well assistive technology in the form of a Chrome Book (id. at pp. 5, 7-8).

However, the hearing record includes very little evidence that the supports set forth in the IESP(s) were implemented at NYMA. According to the hearing record, the parent declined the recommended resource room services, which were offered at the district of location public school (Tr. pp. 1151-52). Further, with the exceptions noted below, there is little evidence that the student's teachers at NYMA implemented the strategies set forth in the IESP, and there is no testimony from the occupational therapist or the social worker or psychologist²⁹ who delivered services to the student; and no progress reports indicating the manner in which the OT (for the 2016-17 school year) or counseling (for both school years) addressed the student's identified needs. Accordingly, it is unnecessary to reach the broader question of whether the IESP services should be taken into account in evaluating the appropriateness of the unilateral placement, since, in this instance, even taking them into account, the parents did not meet their burden to establish the appropriateness of the unilateral placement.

Turning to the evidence regarding what NYMA did offer, the district asserts that the IHO failed to consider whether the tutorials the student received at NYMA delivered specialized instruction or whether they were offered in a manner so as not to exacerbate the student's symptoms. The NYMA dean explained that any student could go to a tutorial period "which [wa]s specific portion of time at the end of [the] academic day each day where teachers [we]re in their classrooms" and a "student c[ould] voluntarily go for extra help" (Tr. p. 1077; see Tr. pp. 1098-99). The dean added that, if any "student f[ell] below a certain grade, [he or she] w[ould] be assigned so that tutorial then w[ould] become mandatory" (Tr. pp. 1077-78). The dean remembered the student's parent "actually thinking that this particular situation would probably benefit [the student] even greater because it would specifically help in the specific subject area that he needed" (Tr. pp. 1077-78). The student testified that "[i]f you ha[d] one or more assignments missing, even if you miss[ed] just one sheet of paper of class work, they ha[d] a specific period of time before sports where you c[ould] go work on it with your teachers" (Tr. pp. 1520-21).

Later, however, the NYMA dean testified that, while for the 2015-16 school year the tutorials took place at the end of the day, for the 2016-17 school year, with the exception of a 25-minute block on Wednesdays, the tutorials were shifted to be "incorporate[d] time within the class period for extra help" and for that purpose, the classes were lengthened by ten minutes each (Tr.

²⁹ According to the NYMA dean the counseling services were initially delivered to the student at NYMA by a social worker (Tr. p. 1252); elsewhere in her testimony, she indicated that a psychologist would come to NYMA (Tr. p. 1098).

pp. 1272-73, 1283-84). For the 2017-18 school year, the tutorials were made part of an "H block," whereby, instead of the usual seven periods, an eighth 45-minute period was added to every student's schedule and some students would be assigned to tutorial, whereas others might be assigned to a different class (Tr. pp. 1273-74, 1285-86). Although she initially testified that the student "definitely would have been assigned [to a tutorial] for math" for the 2017-18 school year (Tr. p. 11116), she later acknowledged that the student took a health class twice weekly during the H block and a Leadership Education Training ("LET class")³⁰ on the opposite days (Tr. p. 1286; see Parent Ex. I).

Based on the foregoing, there is insufficient evidence in the hearing record to show that the tutorials were even available to the student for both the 2016-17 and 2017-18 school years, let alone if the student attended them, and if he did, at what frequency and what occurred during those periods beyond the student's testimony about working on missed assignments.³¹

The IHO also cited NYMA's response to the student's struggles in math as evidence of specially designed instruction (see IHO Decision at p. 39). According to the NYMA dean, because the student "had not done really very well" in geometry during the 2015-16 school year, he began the 2016-17 school year taking geometry for a second time on an optional basis to provide the student a "stronger foundation" (see Tr. pp. 1257-61). However, the dean indicated that the student's mother "pretty quickly" asked that the student instead be placed in Algebra II (Tr. p. 1260). According to the dean, the student experienced a "real struggle in math" and, further, the student's mother "was unhappy with . . . what she perceived the level of instruction to be from" the student's math teacher (Tr. pp. 1108-09, 1263-64). Accordingly, as of March 2017, the student was assigned a 1:1 teacher for instruction in Algebra II who worked with him for approximately "two and half months" through the end of the 2016-17 school year (Tr. pp. 1267, 1288-89). The dean testified that the 1:1 teacher tried to "identify the gaps" in the student's math knowledge (Tr. pp. 1290-91). The student indicated that during "the brief period of time" when he worked with "the 1:1 math" teacher, he met "with success" (Tr. p. 1521).³² According to the dean, the plan was to "determine at the end of the year whether or not he completed the course with the 1:1 teacher, but ultimately the student did not complete the course, so he was given a grade for what he did complete (called "Algebra IIA"), and for the 2017-18 school year, the student took Algebra II again in a regular class (Tr. pp. 1109, 1111-12, 1291).

While the IHO characterized the student's taking Algebra during both years as evidence of NYMA offering "flexibility in the pacing of [the student's] education" (IHO Decision at p. 39), it does not appear that the instruction was delivered to the student at a slower pace; rather, with the exception of the approximately two and half months that the student worked with the 1:1 teacher,

³⁰ According to the dean, NYMA students participated in a "Leadership Education" program within the structure of the day, which was a mandatory graduation requirement (Tr. pp. 1068-69).

³¹ The IHO's reasoning relating to the restrictiveness of a resource room offered by the district compared to the tutorial sessions was also flawed (see IHO Decision at p. 39), in that neither the district program or the program offered at NYMA limited the student's access to nondisabled peers.

³² However, a notation in the meeting information summary section of the May 2017 IESP indicated that the student was "struggling in math, due to a significant turn over in staff" (Dist. Ex. 41 at p. 1).

there is no evidence that the pace of instruction was any different from that delivered to the other students or that the student didn't simply repeat the course. Further, with regard to the 1:1 instruction the student received, there is no evidence in the hearing record as to the nature of that instruction or any testimony as to what the instructor discovered about the gaps in the student's math knowledge and what, if anything, was done to address such gaps.

The IHO also cited "flexible scheduling" at NYMA as evidence of specially designed instruction, specifically noting that "the same courses were not taught every day" (IHO Decision at p. 39). The dean and the student testified that the student benefitted from school-wide "block scheduling," which consisted of "longer periods on certain days" and different classes from day to day (Tr. pp. 1099, 1176, 1517). However, according to the dean and the student, the block scheduling, which was in effect when the student began at NYMA at the end of the 2015-16 school year, was not part of his schedule as of September 2016 (Tr. pp. 1176, 1281-83; 1543-44).

The student also testified that NYMA offered "flexible scheduling when [he] needed it" (Tr. p. 1515). He described that "while on paper" his schedule appeared normal, for the student "it wasn't really like that" in that if he needed to leave one class to work on another subject with another teacher, that would be permitted (Tr. pp. 1544-45). The student also testified that, if he needed a break, he was allowed to "take as long as [he] need[ed]" (Tr. pp. 1521-22). However, the dean's testimony about flexible scheduling was less generous; the dean testified that there were "scheduling limitations when you have such a small school" where there was just one section of each course so it could not be moved (Tr. p. 1190).

With respect to the student's attendance issues and difficulty completing assignments, the hearing record contains minimal evidence of modifications made by NYMA for the student. The dean reported that, in twelfth grade, the student's attendance became "a little problematic" and he missed more first period classes due to medication adjustments and waking in the morning (Tr. pp. 1113, 1119-20; see IHO Exs. III; IV). With respect to accommodations for attendance issues, the dean reported that the student was ultimately "responsible for the work" and "as long as he would meet with the teacher and complete the required work, we were okay with it" (Tr. p. 1121). As for homework, rather than assigning the student modified homework, the dean's testimony reflected that, instead, expectations were shifted and the student "at his discretion" would be "allowed to" do less than the total assigned (Tr. p. 1117).

As for other evidence about the academic-related supports available to the student at NYMA, the hearing record indicates that, to address the student's testing needs, test "accommodations" were put in place at NYMA at the end of tenth grade, including large font on the student's tests, and extra time to take all of his tests (including his SATs and ACTs), which continued into his next two years, along with staggering his tests to address his fatigue (Tr. pp. 1085-86, 1100-02, 1118). Further, according to the dean, to address the student's visual issues, the district of residence provided the student with large print books when they were available, and if a large print book was not available, the student used an iPad to "zoom in on the reading" or make the font larger (and a larger font test book was used for SATs and ACTs) (Tr. pp. 1099-1100, 1118). However, these sorts of supports were available to the student in the district and, as discussed above, they alone were not sufficient to confer educational benefit on the student. Further, although the NYMA dean testified that staff engaged in biweekly staff meetings to discuss "any students concern" and that NYMA utilized "a system," which consisted of "a share[d]

document," on which the guidance counselor and/or teachers could document "if a student needs accommodations for a course," no minutes of such meetings or copies of such shared document were included in the hearing record (Tr. pp. 1088-89).

For the student's social/emotional needs, while the student described that he "got a lot stronger" and made friends (Tr. pp. 1520, 1523), the dean testified that, the student experienced some depression or emotional upset reportedly linked to "rough points" in his personal relationship with a girlfriend, which may have affected his attendance at times (Tr. pp. 1105-07). The dean also described that there were "a couple of times" (maybe four during the 2016-17 school year) when the student demonstrated difficulty regulating his emotions, wherein inappropriate laughter would "yield to crying," at which times "the teacher would handle it" by taking the student to a vacant room next door and then alerting the guidance counselor (which for the 2016-17 school year was the dean) to go speak to him or "move him downstairs if need be" (Tr. pp. 1105-07). As for supports for the student's social/emotional needs, the dean described that staff at NYMA had an "open door policy," which allowed students generally to "just com[e] into our office and talk[] about" any problems (Tr. p. 1087). The dean stated her impression that the student experienced this "open door policy" as "very different for him" (*id.*). With respect to incidents of bullying, there is some evidence that another student targeted the student, although the student characterized the incidents as a "prank[] go[ne] too far" (Tr. pp. 1247-48, 1546-48, 1553-54). There was no evidence in the hearing record as to what actions staff at NYMA took, if any, after the incidents.

In summary, while the student testified that, while at NYMA, for "pretty much all three years [he] got individualized attention [from] all [his] teachers and staff," which he described as having "a direct line to all [his] teachers" (Tr. pp. 1515, 1525, 1543), there is insufficient evidence in the hearing record as a whole to conclude that NYMA provided the student with specially designed instruction to address the student's needs. Without further evidence, a determination cannot be made regarding whether the services the student received at NYMA addressed the student's needs (*see Hardison*, 773 F.3d 372, 387 [finding a unilateral placement inappropriate where the hearing record lacked "more specific information as to the types of services provided to [the student] and how those services tied into [the student's] educational progress," and additionally stressing the importance of "objective evidence" in determining whether a parent's placement is appropriate]; *see also L.Q.*, 932 F. Supp. 2d at 490 [rejecting parents' argument that counseling services met student's social/emotional needs absent the counselor's testimony or evidence about the counselor's "qualifications, the focus of her therapy, or the type of services provided" or how the services related to the student's unique needs]; *R.S. v. Lakeland Cent. Sch. Dist.*, 2011 WL 1198458, at *5 [S.D.N.Y. Mar. 30, 2011] [rejecting the parents' argument that speech-language therapy services met student's needs where parents "did not offer any evidence as to the qualifications of the provider of the therapy, the focus of the therapy, or when and how much therapy was provided"], *aff'd sub nom.*, 471 Fed. App'x 77 [2d Cir. Jun. 18, 2012]).

VII. Conclusion

The evidence in the hearing record supports the IHO's determinations that the district failed to offer the student a FAPE for the 2016-17 and 2017-18 school years. However, the parents failed to establish the appropriateness of the student's unilateral placement at NYMA. Therefore, the necessary inquiry is at an end and there is no need to reach the issue of whether equitable considerations support an award of tuition reimbursement (see M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 66 [2d Cir. 2000]). In light of these determinations, I need not address the district's remaining contentions.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision, dated July 23, 2019, is modified by reversing those portions which found that the parents established the appropriateness of the student's unilateral placement at NYMA and which ordered the district to fund the costs of the student's attendance for the 2016-17 and 2017-18 school years.

Dated: **Albany, New York**
 November 8, 2019

SARAH L. HARRINGTON
STATE REVIEW OFFICER