The University of the State of New York

The State Education Department
State Review Officer
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No. 19-113

Application of a STUDENT WITH A DISABILITY, by her parents, for review of a determination of a hearing officer relating to the provision of educational services by the East Ramapo Central School District

Appearances:
Law Offices of Lauren A. Baum, P.C., attorneys for petitioners, by Susan Fingerle, Esq.

Harris Beach PLLC, attorneys for respondent, by Howard J. Goldsmith, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioners (the parents) appeal from the decision of an impartial hearing officer (IHO) which denied their request to be reimbursed for their daughter's tuition costs at the IVDU Marilyn David Upper School (IVDU) for the 2016-17 and 2017-18 school years. The appeal must be dismissed.

II. Overview—Administrative Procedures

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

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

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

III. Facts and Procedural History

Due to developmental delays, the student began receiving speech-language therapy, occupational therapy (OT), and physical therapy (PT) at age three (Joint Ex. 3 at p. 2; Dist. Ex. 49 at p. 2).[1] She has received diagnoses of an autism spectrum disorder, attention deficit hyperactivity

[1] The hearing record contains multiple duplicative exhibits (compare Joint Exs. 1-6, with Parent Exs. A; B; I; J; K; N; Dist. Exs. 10; 16; 23; 25; IHO Exs. A; D). For purposes of this decision, the joint exhibit is cited in instances where multiple identical or similar copies of an exhibit were entered into evidence. The IHO is reminded that it is his responsibility to exclude evidence that he determines to be irrelevant, immaterial, unreliable, or unduly repetitious (8 NYCRR 200.5 [j][3][xii][c]).

disorder (ADHD), mixed receptive and expressive language disorder, and a specific learning disability of reading disorder (Joint Ex. 3 at p. 1-2; Dist. Ex. 49 at p. 6-7). The student is affected by the medical conditions of asthma and scoliosis and struggles with anxiety and "OCD like behavior" (Joint Ex. 3 at p. 1-2; Dist. Ex. 18 at p. 2).[2]

The student attended a religious nonpublic school within the district, Bais Shifra Miriam, from first grade to ninth grade and received special education services pursuant to an individualized education services plan (IESP) while attending (Tr. pp. 97-98, 1428-29; see Dist. Ex. 9 at p. 1). For the 2015-16 school year the student attended the Individualized Vocational Development Unit (IVDU), a division of Yachad (Tr. p. 1013; Dist. Ex. 9 at p. 1). In a letter to the district dated March 25, 2016, the parents requested that the CSE reconvene and recommend an appropriate special education program for the student for the remainder of the 2015-16 school year, as well as for the 2016-17 school year (Dist. Ex. 9 at p. 1). The parents consented, in advance, to any evaluations or assessments needed to recommend an appropriate program for the student and advised the district that until an appropriate program was recommended, the student would remain at IVDU and the parents would seek tuition reimbursement and transportation to and from the school (id. at pp. 1-2). In April 2016, the district conducted a PT evaluation, which indicated that the student was able to negotiate the school environment in a safe manner; an OT evaluation, which indicated that the student exhibited legible handwriting skills; a psychological evaluation, which revealed the student's variable cognitive skills suggestive of uneven cognitive development; a speech-language evaluation, which highlighted the student's receptive language difficulties; and an educational evaluation, which indicated that the student had difficulty comprehending what she read (Dist. Exs. 3 at p. 2; 4 at pp. 2-4; 5 at pp. 3-5; 6 at pp. 3-4; 7 at p. 1-2). A May 11, 2016 progress report from the student's nonpublic school teacher described the student as motivated, on-task, and an active member of her class (Dist. Ex. 8 at pp. 1-2). The report indicated that the student had difficulty during the "prewriting stage" of writing and lacked confidence in her ability to start a writing assignment independently (id. at pp. 1-2).

On May 17, 2016 the CSE convened, at the parent's request, to conduct the student's annual review (Dist. Ex. 2 at p. 1).[3] Finding the student eligible to continue to receive special education and related services as a student with a learning disability, the CSE developed an IEP which recommended the student attend a 15:1 special class at her home public school and receive the related service of counseling in a small group (5:1) once weekly (id. at pp. 1, 8, 11). Additionally, the May 2016 CSE recommended that the student be provided testing accommodations of extended time (1.5) and a special location that allowed "for the use of other accommodations" (id. at p. 9). For "supplementary aids and services/program modifications/accommodations" the CSE recommended "check for understanding," noting that the student "require[d] assistance in

[2] In 2005, the student's mother completed a Home Language Questionnaire She in which she indicated that Yiddish was spoken at home and was the language the student understood (id.).

[3] The parents were both listed on the due process compliant notices and the request for review; however, predominantly the student's mother attended CSE meetings, wrote letters, and testified as a part of the proceedings. For clarity, when the decision references the parent in the singular, it is in reference to the student's mother.

attending to classroom activities" (id. at p. 8). The IEP had a projected implementation date of September 7, 2016 (id.).

In a letter to the district dated August 23, 2016, the parents expressed their "significant concerns" regarding the appropriateness of the "program and placement" recommended for the student for the 2016-17 school year (Joint Ex. 1 at p. 1). They stated that the 15:1 special class would be too large for the student and would not provide her with a sufficient level of individualized assistance and support (id.). In addition, the parents asserted that the CSE failed to conduct a vocational assessment of the student and consequently the recommended vocational goals were inadequate and insufficient (id.). The parents also stated that "little to no attention was paid to [the student's] need for a program that addressed her social, emotional, and behavioral issues" (id.). The parents noted that despite their concerns they visited the CSE recommended "placement"; however, they found that the students in the proposed class were much higher functioning than the student and the school was "large, loud, and crowded" which would have been overwhelming for the student (id.). The parents also expressed concern regarding the level of support the student would be provided during the less structured times of the day and noted that they were not able to get information regarding this during their visit (id.). The parents indicated that because the composition of the recommended class would differ in September, they could not make a decision at the time of their letter as to whether the offered class would be appropriate for the student for the 2016-17 school year (id.). They indicated that they would revisit the classroom in the fall and advise the district of their decision at that time (id. at pp. 1-2). The parents stated that they were "willing to consider any appropriate program or placement recommended by the CSE" but until they determined that an appropriate program and placement had been identified and recommended they would continue to send the student to IVDU and seek funding/tuition reimbursement for the IVDU program (id. at p. 2). The parents also requested transportation for the student beginning in September 2016 (id. at p. 2).

In a response dated August 29, 2016, the district acknowledged the parents' concerns as detailed in their letter (Dist. Ex. 11). The district noted that the programs and services recommended by the CSE, "in which [the student's mother] was present as a critical member of the committee," were developed as a result of consideration of extensive evaluations and assessments of the student (id. at p. 1). The district further noted that the CSE carefully reviewed the evaluations, as well as test results and input from the parent and other CSE members when making its recommendations (id.). The district noted the parent's concerns that a vocational assessment was not conducted and explained that the IEP included a transition plan based on the student's preferences, interests, and present levels of performance (id.). The district informed the parents that since they did not believe the recommended program and services were appropriate for the student and "in order to promote further dialogue and engagement" a CSE meeting to discuss the parents' concerns, adjust the IEP as may be appropriate, and verify the parents specific requests was tentatively scheduled for September 1, 2016 (id. at p. 2).[4]

[4] In an email to the district dated September 1, 2016 the parents indicated that they would not be able to attend the meeting scheduled for September 2, 2016 and asked that it be rescheduled (Dist. Ex. 12).

On September 14, 2016 the district school psychologist sent the parent, via email, a prior written notice (consent for evaluation), release form (to allow the district to speak with IVDU), and social history update to be completed (Dist. Ex. 14; see Tr. p. 243).[5] The consent, signed by the parent on September 23, 2016, gave the district permission to conduct additional assessments of the student via observation, work samples, teacher progress reports, and report cards (Dist. Ex. 13). The social history update, completed by the parent on September 23, 2016 described the student as loving but also impulsive and lacking social skills (Dist. Ex. 18 at p. 2). The social history identified Yiddish and English as the languages spoken in the home (id.).

In October 2016, the parent obtained a private neuropsychological evaluation (see Joint Ex. 3). The evaluators indicated that cognitively the student presented with strengths in visual spatial skills and fluid reasoning, and with relative weaknesses in sustained attention, social emotional understanding, memory, and processing speed (id. at pp. 1, 8). Additionally, the student exhibited poor social interactions, low adaptive skills and rigid behavior that significantly impacted her ability to function (id. at p. 8). The evaluators opined that the student presented with problems with emotional symptoms including trouble adapting, anxiety, and difficulty regulating her emotions at home (id.). The evaluators concluded that the student met the criteria for an autism spectrum disorder, which the evaluator determined accounted for the student's "low adaptive functioning scores, rigid behavior, and poor social/emotional function" (id.).

By email dated November 3, 2016, the parent advised the district that she did not "sign a release form for exchange of information" as she did not feel comfortable with the school psychologist speaking with IVDU staff regarding the student (Dist. Ex. 14). A classroom observation was subsequently completed by the school psychologist on November 21, 2016; however, did not include input from IVDU staff (Dist. Ex. 19 at p. 1; see Tr. pp. 377-78). The written observation report indicated that overall the student appeared attentive, focused, and cooperative, and that she worked mostly independently (Dist. Ex. 19 at p. 1). The CSE reconvened on January 24, 2017 and, based on a review of the latest teacher report, work samples, classroom observation, parent information, and committee discussion, changed the student's eligibility category to other health impairment (Dist. Ex. 21 at p. 1). The CSE recommended that the student attend a district 15:1 special class for English, math, social studies, science, and reading (id. at p. 10). Additionally, the CSE recommended that the student receive one 30-minute session per week of small group (5:1) counseling services (id.).

In a letter dated March 1, 2017, the parent sent a letter raising concerns regarding the conduct of members of the January 2017 CSE (Joint Ex. 4). Specifically, the parent asserted that she was "forcefully and aggressively" pressured "to write verbatim and sign" a letter that she was going to unilaterally place the student in a private school for the 2017-18 school year (id. at p. 1). Moreover, the parent asserted that English was not her first language and that she struggled with understanding and expressing her ideas in English (id.). The parent claimed that she was not given the opportunity to effectively participate in the CSE discussion, that the team was "dismissive," and the tone of the meeting "condescending, aggressive and argumentative" (id. at p. 2). The parent reported that following the meeting she was contacted by the school psychologist who apologized for the way the meeting was handled and offered to schedule a new meeting, which the

[5] The parent executed an agreement to enroll the student at IVDU on September 15, 2016 (Parent Ex. E at p. 2).

parent now requested in her letter (id.). The parent advised the district that on or about February 15, 2017 she received a letter, prior written notice, IEP, and IESP (id.). The parent asserted that the IEP addressed goals and needs not discussed at the CSE meeting, as well as a recommendation for a public school placement that was not discussed at the CSE meeting, and that much of the IEP was the same as the 2016-17 IEP (id.). The parent noted that no one from the student's then-current placement participated in the CSE meeting and questioned whether the CSE's knowledge of the student was sufficient or adequate to recommend an appropriate program for the 2017-18 school year (id.). The parent requested that the CSE reconvene immediately to develop an IEP for the 2017-18 school year (id.).

In a response dated March 13, 2017, the district acknowledged the parent's concerns detailed in her March 1, 2017 letter (Dist. Ex. 24). The district explained that the January 2017 CSE meeting was held at the request of the parent and as such the parent was given the opportunity to "express all of [her] concerns and explain to the committee why [she] had asked for the meeting" (id.). The district noted that while the parent had signed consent for the district to receive the (private school) reports it had requested, the parent specifically declined to give the district permission to speak or exchange information with IVDU (id.). The district further noted that the parent had given the school psychologist permission to observe the student but "it was clear she was not to speak or interview with staff in any meaningful way" (id.). The district stated that the parent was concerned that the CSE had not reviewed the neuropsychological evaluation but reported that the CSE had reviewed the evaluation, listened to the parent's concerns and reviewed the IEP (id.). According to the district, the parent expressed her disappointment that IVDU would not be funded but indicated that she would visit the recommended placement (id.).

In a subsequent letter dated April 20, 2017, the parent disagreed with the district's characterization of the January 2017 CSE meeting (Joint Ex. 5 at p. 1). The parent reiterated that she had difficulty understanding and expressing her ideas in English and repeated her claim that she was intimidated and bullied at the CSE meeting into signing a letter (id.). The parent stated that she "may have misunderstood" the district's request to speak with the student's teacher and noted that she wanted to have the chance to speak with IVDU staff before anyone spoke to them and she did not mean to prevent the district from speaking with the teacher at all (id.). The parent indicated that the district was free to speak to IVDU staff regarding the student and thanked the district for arranging for an interpreter at the next CSE meeting (id. at pp. 1-2).

The CSE reconvened on April 24, 2017 with the student's IVDU teacher in attendance by phone (Dist. Exs. 27 at p. 1; 28). For the 2017-18 school year, the CSE recommended that the student attend a Board of Cooperative Educational Services (BOCES) 12:1+1 special class at Tappan Zee High School (Dist. Ex. 27 at pp. 1, 10, 13). Additionally, the CSE recommended that the student receive one 30-minute session per week of small group (5:1) counseling services (id. at p. 10).

The student's IVDU report card for the 2016-17 school year indicated that the student received grades of A, A-, and B+ for the first semester of the 2016-17 school year and A+, A, and A- for the second semester (Dist. Ex. 33 at pp. 1-2). The student's teachers reported that the student "made good progress in all areas of study," had a strong work ethic, and had blossomed socially (id. at p. 1).

In a letter dated August 21, 2017, the parents notified the district that they did not agree with the recommendations of the April 2017 CSE (Dist. Ex. 29). The parents stated that the April 2017 CSE came to the conclusion that a "regular public school program" was not appropriate for the student and instead recommended that she attend a BOCES program; however, at the time of the CSE meeting the student's class size was smaller than the class sizes available at BOCES (id. at p. 1). The parents asserted that a class with 12 students and one teacher "would be much too large for [the student] and would not provide her with a sufficient level of individualized teacher instruction, assistance and support" (id.). The parents also noted that at IVDU the student was enrolled in a functional academic program that emphasized both academic instruction and job training skills (id.). They stated that the options available at BOCES "were either classes with lower functioning students that did not follow a Regents curriculum and instead emphasized life skills over academic instruction, or with higher functioning students that who followed a Regents curriculum but who did not receive any life skills instruction" (id.). The parents emphasized that the student required a program that offered strong academic instruction in Regents and life skills instruction and that the recommended BOCES class did not offer both (id.). In addition, the parents asserted that the "schools" were too large for the student and would overwhelm her and that the other students in the recommended programs were not appropriate peers (id.). As in previous letters, the parents indicated that they were willing to consider any appropriate program or placement recommended by the CSE but until they determined that an appropriate program had been identified and recommended, they would be sending the student to IVDU and seeking tuition reimbursement/funding for that program (id.). The parents also requested that the district provide transportation for the student (id. at p. 2).

In a response dated August 29, 2017, the district recognized the parents' concerns outlined in their August 21, 2107 letter, reviewed the topics discussed at the April 2017 CSE meeting and the recommendations made by the committee, and noted that the parent was provided with an interpreter and was "fully engaged with all members of the committee" (Dist. Ex. 30 at p. 1). In response to their concerns regarding BOCES, the district advised the parents that the student was on track to receive a Regents diploma and had the academic abilities to earn a diploma aligned with the New York State learning standards (id.). The district informed the parents that "[p]roviding each student with an opportunity to achieve full potential in light of the student's circumstances [wa]s a state and federal requirement" and asserted that the student had been properly placed in a BOCES program on track to earn a Regents diploma and would receive appropriate transition services to meet her postsecondary goals as indicated in her IEP (id.). The district further indicated that in light of the parents' belief that the recommended program was not appropriate for the student, and in order to promote further dialogue and engagement, the CSE would reconvene to discuss the parents' concerns, adjust the IEP as appropriate, and verify the parents' special requests for educationally appropriate services (id. at p. 2). The district tentatively scheduled a CSE meeting for September 9, 2017 and advised the parent that it would be requesting authorization to contact IVDU to arrange for a school representative to participate in the CSE meeting and requesting the student's end-of-year report card, transcript, and updated evaluations (id.). Lastly, the district stated that the parents' letter would serve as their notice of parental placement and that transportation to IVDU would be approved (id.).[6]

[6] By email sent from the district's supervisor of case management and nonpublic services to the parent dated

On September 10, 2017, the parent executed a contract to enroll the student at IVDU (Parent Ex. Q at p. 2).

By emails to IVDU dated September 11 and 19, 2017, the district requested the student's end-of the year report card, updated teacher progress report, and any relevant evaluations completed after April 24, 2017 (Dist. Ex. 32 at pp. 1-2). On September 27, 2017, the district advised IVDU that it had received the student's transcript but that it did not have any grades or credits listed (id. at p. 4). The district inquired as to whether the student had received any high school credits from IVDU (id.). That same day, the district contacted the parents to ascertain if they wanted to reconvene the CSE (Dist. Ex. 34).

A fall 2017 student progress report indicated that the student was making steady progress toward her IVDU academic and therapy goals (Parent Ex. S).

The CSE reconvened on December 18, 2017 and continued to recommend the student attend a BOCES 12:1+1 special class for the 2017-18 school year (Dist. Ex. 39 at p. 1, 12, 15).[7] Further, the CSE recommended one 30-minute session per week of small group (5:1) counseling services, one 30-minute session per week of individual counseling services, and two 30-minute sessions per week of small group (3:1) speech-language services (id. at p. 12). By prior written notice dated December 18, 2017 the district advised the parents of the actions taken by the December 18, 2017 CSE (Dist. Ex. 38).

A. Due Process Complaint Notice

By amended due process complaint notice dated January 3, 2019, the parents requested a hearing regarding the 2016-17 and 2017-18 school years (Joint Ex. 6 at p. 1).[8]

For both school years, the parents alleged that they were denied the ability to meaningfully participate in the development of the student's IEPs (Joint Ex. 6 at pp. 1-5, 7-9). Specifically, the parents asserted that the services of an interpreter were required at the CSE meetings; however, the CSE failed to provide one (id. at p. 4-5, 8). Additionally, the parents asserted that the CSE continually referred to the student as "parentally placed" despite the parents' request that she be placed in a public-school setting (id. at pp. 5, 7).[9] The parents alleged that the district failed to

September 6, 2017, the parent was advised that a September 7, 2017 CSE meeting was canceled at the request of the parent (Dist. Ex. 31).

[7] While the April 2017 IEP and the December 2017 IEP recommended placement in a BOCES class in a public school, the comments included in the meeting information sections of the IEPs identified the specific school the student would attend, referring to placement in the BOCES program at Tappan Zee High School (Dist. Exs. 27 at pp. 1, 13; 39 at pp. 1, 14).

[8] The original due process compliant notice was dated August 22, 2018 (Joint Ex. 2 at p. 1). The allegations raised in the first due process complaint notice were repeated in the January 3, 2019 amended due process complaint notice (compare Joint Ex. 2 pp. 1-5, with Joint Ex. 6 at pp. 1-4, 9-10).

[9] As noted above, the parents asserted that they received IEPs and IESPs following the January 2017 CSE meeting and during the 2017-18 school year (Joint Ex. 6 at pp. 5, 7).

fully evaluate the student in all areas of suspected disability and failed to consider current, sufficient, and appropriate evaluative and documentary material to justify its recommendations and goals (id. at pp. 3, 7). Specifically, the parents contended that the CSE failed to conduct a vocational assessment of the student (id. at pp. 3-4, 8). The parents further argued that the IEPs were not reasonably calculated to provide meaningful educational benefit and failed to offer an appropriate educational program that was reasonably calculated to enable the student to make academic and social progress in light of her circumstances (id. at p. 3, 8). More specifically, the parents argued that the IEPs failed to adequately describe the student's present levels of academic and social/emotional performance and needs, and were not tailored to meet the student's unique needs (id. at p. 3, 8). The parents asserted the management needs listed in the IEPs were inadequate and insufficient, the "Special Factors" section of the IEPs indicated that the student required a device or service to address her communication needs; however, the CSE failed to recommend a device or service, and the goals were insufficient and not measurable, but were broad, vague and generic, as well as unrealistic and not achievable (id.).

For the 2016-17 school year, the parents argued that the CSEs were not properly composed as representatives from IVDU were not in attendance (Joint Ex. 6 at p. 3-4). The parents also asserted that the IEPs did not contain a math goal despite the student's deficit in that subject (id. at p. 4).[10] Regarding the program recommendation for the 2016-17 school year, the parents contended that the 15:1 class size could not provide the student with a sufficient level of individualized support to enable the student to make progress (id.). The parents argued that the student required the level of attention she received in her then current 8:1+1 program, that the student "would have difficulty coping in the larger setting," and that they asked about a possible 12:1+1 program but were told it was not appropriate "because it was a 'behavior' class" (id. at p. 3). The parents further argued that the school location was not appropriate as the school was too large and would not have been capable of appropriately implementing the IEP (id. at pp. 3-4). The parents asserted that the student required a small class size in order to make progress and the recommended program for the 2016-17 did not offer this (id. at p. 3).

Turning to the 2017-18 school year, the parents argued that the recommended BOCES 12:1+1 special class at Tappan Zee High School was not appropriate as the class size was too large and the school would have been unable to implement the student's IEP (Joint Ex. 6 at p. 8). The parents also asserted that the school was too large for the student and would not have provided the appropriate academic and social support (id.). More specifically, the parents alleged that the student required a program that offered strong academic instruction combined with life skills instruction, while the school only offered programs that focused on one or the other (id.). Moreover, the parents asserted that the student would not have been placed with similarly functioning peers at Tappan Zee High School (id.).

[10] Specific, to the January 2017 CSE meeting, the parent asserted that she was forced and pressured to write and sign a letter that stated she was going to unilaterally place her daughter for the 2017-18 school year regardless of the outcome of the meeting (Joint Ex. 6 at p. 4-5). Moreover, the parents alleged that the January 2017 CSE failed to adequately consider the October 2016 neuropsychological evaluation (id. at p. 5).

The parents argued that for the above reasons, the district failed to offer the student a FAPE for the 2016-17 and 2017-18 school years and requested tuition reimbursement/funding for the cost of the student's placement at IVDU for the 2016-17 and 2017-18 school years as well as the provision of transportation (Joint Ex. 6 at p. 9).

B. Impartial Hearing Officer Decision

The parties proceeded to impartial hearing which concluded on July 9, 2019 after ten days of proceedings.[11] The IHO, in the decision dated October 4, 2019, found that the educational programs created by the district for the 2016-17 and 2017-18 school years were appropriate (IHO Decision at pp. 30-32).

With respect to the parent's contention that she required an interpreter at the CSE meetings, the IHO found that the lack of an interpreter did not inhibit the parent's ability to meaningfully participate in the CSE meetings (IHO Decision at pp. 17, 27). The IHO found that there was extensive credible testimony that the parent had a "sufficient command of the English language to meaningfully participate at the various CSE meetings" held during the school years in question (id. at p. 17). Further, the IHO indicated that he observed the parent's testimony and over the course of that testimony, the parent "would replace or add an English statement" to the translation; the IHO noted that the parent did this at least six times (id.). The IHO further noted that the IDEA does not require a district to "ensure that parents perfectly comprehend every aspect of their children's IEP" (id.).

The IHO rejected the parents' claim that the failure to conduct a classroom observation prior to the May 2016 CSE meeting was a denial of FAPE (IHO Decision at p. 27). The IHO noted that the parent withdrew authorization for the district to communicate with IVDU and the parent did not invite IVDU to participate in the CSE meetings, therefore, the IHO dismissed the argument that the CSE meetings were not properly composed during the 2016-17 school year (id.).

The IHO held that the lack of a formal vocational assessment was not a denial of FAPE (IHO Decision at p. 27). The IHO found that a vocational assessment was not required for either a tenth or eleventh grade student and that as the student was a Regents track student, the IHO determined a vocational assessment was not necessary (id.).[12]

[11] At the parent's request an interpreter fluent in English and Italian was present on the first hearing date; however, as the parents' attorney believed the interpreter "had been skipping over portions and words, and not explaining some things," the attorney requested a certified or more experienced interpreter (Tr. pp. 18, 20-21). The hearing began on March 12, 2019 with an interpreter present (see Tr. pp. 82, 95). During the hearing on March 27, the district moved to have the interpreter dismissed from the proceedings (Tr. pp. 1186-93). The district followed up with a motion to dismiss the interpreter on April 19, 2019 (the first page of which was incorrectly dated October 19, 2019) (IHO Ex. G). The parent also submitted opposition to the district's motion on April 19, 2019 (IHO Ex. H). The IHO denied the district's motion to dismiss the interpreter in an interim decision dated April 29, 2019 (IHO Ex. J).

[12] The IHO held that he was unable to determine whether the student would have been properly grouped in the BOCES programs at Tappan Zee High School as the student never attended the program and evidence on the issue was not presented by either party (IHO Decision at p. 28).

As to the parents' argument regarding the district's description of the student as parentally placed instead of unilaterally placed, the IHO indicated that "a review of communication from the State Education Department show[ed] numerous reference[s] to a parental placement" and reflected a more recent change of the language to "unilaterally placed" (IHO Decision at p. 29).

The IHO found that the parent "self segregated" the student, thereby limiting her participation in the greater school and community (IHO Decision at p. 30). He also found that the parent's "main focus was to have her daughter develop domestic type skills" of the variety that she was working on at IVDU "and lesser importance on actualizing her academic abilities" (id.). The IHO found that the CSE believed that parent had underestimated the student's ability to attain a Regents diploma and perhaps continue her academic or vocational education beyond high school, and he agreed with that assessment (id.).

In regard to the 2016-17 and 2017-18 IEPs, the IHO held that they "were ambitious and consistent with providing special education to address the student's unique needs" (IHO Decision at p. 30). The IHO found that the annual goals were reasonably calculated to afford the student a reasonable opportunity to achieve the goals within one school year (id.).[13] Additionally, the IHO determined that the parents' concern regarding class size was without merit as the student was enrolled in a class of up to 25 students while she attended Bais Shifra Miriam (id.). The IHO also found that small group instruction was available within the BOCES high schools and that staff at BOCES were highly qualified and certified in their respective areas (id.).[14]

Turning to the unilateral placement at IVDU, the IHO indicated that the IVDU staff required an academic coach to provide support to the student and Regents results were mixed for the student (IHO Decision at p. 31). Further, the IHO noted that at IVDU the student's only mainstream experience was with a select group of students, while the program proposed at the district high school was a mainstream program (id.). The IHO further found that the IVDU "dual mandate to provide a Regents level curriculum and a vocational track diluted instruction for the former" (id.).[15] The IHO held that "IVDU did not administer any reliable and valid assessments

[13] The IHO acknowledged that none of the IEPs in question had math goals for the student, but determined that the omission could have been readily corrected and was not a material loss of benefits that would affect the student's progress (IHO Decision at p. 32).

[14] The IHO held that the 2016 private neuropsychological evaluation was conducted by a predoctoral intern with limited experience in conducting these evaluations and the evaluation report was under the supervision of a psychologist who was not licensed at the time; therefore, the IHO determined that the report could not be given "equal weight with the other evaluations" in the hearing record (IHO Decision at p. 29).

[15] The IHO determined that the student only received 340 minutes of a Regents curriculum at IVDU while she would have received 900 minutes at the district high school (IHO Decision at p. 31).

to monitor the student's progress on her goals" (id.).[16] Therefore, the IHO concluded "that IVDU did not provide the student with educational benefit" (id.).[17]

Overall, the IHO found that although the IEPs were "not perfect," the IEPs "would have met the student's unique needs as identified from reports and evaluative instruments that were both valid and reliable" (id. at p. 32). The IHO denied the parents' request for tuition reimbursement for the 2016-17 and 2017-18 school years (id.).

IV. Appeal for State-Level Review

The parents appeal. Initially, the parents assert that the IHO erred in that his findings are largely unsupported, noting that the IHO rarely cited to the law, regulations, case law or the hearing record. Further, the parents argue that the IHO did not apply the correct burden of proof as he stated that the "burden of presentation rests with the School District and the burden of persuasion rests with the Petitioner" citing to Schaffer v. Weast, 546 U.S. 49 (2005), rather than State law which places the burden of proof on the district.

The parents contend that the IHO should have found that they were entitled to interpreter services and that the district's failure to provide these services was a denial of FAPE. The parents argue that the IHO improperly made his decision based on the perceptions of the district witnesses rather than relying on the parent's testimony and the IHO failed to provide a reason or explanation as to why he did not find the parent credible.

The parents assert that the IHO erred by not finding that procedural violations taken together resulted in a denial of FAPE. The parents referred to six procedural violations that, taken together, they argue cumulated in a denial of FAPE: the CSEs were not appropriately composed; the district evaluations were inadequate and no vocational assessment was conducted; the "Special Factors" section of the IEP indicated that the student required a particular device or service to address communication needs, but there was no recommendation or explanation; the student was below grade level in math, but the IEPs did not include math goals; the January 2017 and May 2017 IEPs recommended a 15:1 class for special education classes only, but the IEPs did not indicate what supports the student would receive during the general education portion of the day; and the district failed to meaningfully consider the private neuropsychological evaluation.

The parents assert that the IHO erred regarding the district's obligation to conduct a classroom observation prior to the May 2016 CSE meeting. The parents argue that the IHO improperly relied on the parents' concerns regarding the district contacting the student's private school because the parents did not raise those concerns until after the May 2016 CSE meeting and they could not alleviate the district's obligation to conduct a classroom observation before the May 2016 CSE meeting. The parents further contend that the IHO erred by not acknowledging that the

[16] The IHO noted that informal assessments were used; however, "in the three years [the student] was educated at IVDU, no effort was made to verify her progress towards her goals through reliable and valid assessments" (IHO Decision at p. 31).

[17] Additionally, the IHO found that the distant location of IVDU and the length of the student's school day hampered the student's ability to have peer relationships in her home community (IHO Decision at p. 31).

parents gave the district consent for any required evaluation or assessment in a letter dated March 25, 2016.

The parents further argue the IHO should have found that the district deprived the student of a FAPE because the district continually addressed the student as "parentally placed" rather than "unilaterally placed." The parents contend that the district repeatedly disregarded the parents' intentions by continuing to treat the student as parentally placed and creating both IEPs and IESPs after the January 2017 and December 2017 CSE meetings, all of which the parents contend were inappropriate.

The parents assert that the IHO should have found that the district did not meet its burden of proof regarding the provision of FAPE to the student for both the April 2017 and December 2017 CSE meetings; according to the parents, the IHO entirely failed to address these IEPs in his decision. Moreover, the parents assert that the BOCES "hybrid" program described in testimony during the hearing was not written on the IEP, as the IEP did not indicate that the student would have received both Regents academic classes and a life skills program. The parents contend that the district cannot rely on subsequent testimony/evidence to justify or explain what was written on the IEP, that testimony may not support a modification that is materially different from the IEP, and that a materially deficient IEP may not be cured during the impartial hearing.

The parents argue that the IHO's comparison of the size of the student's prior private school placement and the district's program was inappropriate as the prior school year was not at issue and the IHO disallowed testimony about the prior school.

Finally, the parents contend that the "IHO erred in addressing the appropriateness of the unilateral placement and additionally erred in his conclusions about the private school placement." The parents request that the IHO decision be vacated and the district be directed to fund the student's tuition for the 2016-17 and 2017-18 school years at IVDU.

In its answer, the district denies the allegations material to the dispute that are raised in the request for review. Additionally, the district contends that the parents failed to raise several issues in their due process complaint notice and therefore, these issues were precluded from being raised on appeal. The district asserts that the parents are barred from arguing that the "hybrid" BOCES program was not on the April 2017 and December 2017 IEPs and that a classroom observation should have been performed prior to the May 2016 CSE meeting. Further, the district argues that the parents failed to properly raise that the IHO erred in his decision that the district provided a FAPE for the 2016-17 school year, that IVDU was an appropriate placement, or that the equities favor the parents and therefore, these issues are abandoned.[18]

In their reply, the parents argue that the "IHO did not issue a ruling on Prongs 2 and 3 of the 'Burlington-Carter' test and therefore there were no issues regarding these aspects of the test

[18] Although the district's answer indicates that the IHO Decision found that IVDU was an appropriate placement for the student, as noted above the IHO concluded "that IVDU did not provide the student with educational benefit" (compare Answer ¶35, with IHO Decision at p. 31). Additionally, the district specifically denies the parents' allegations that "the IHO erred in addressing the appropriateness of the unilateral placement and erred in his conclusions about the private school placement" (Answer ¶12).

on which to appeal." Notably, the parents contend that since the IHO found the district offered the student a FAPE for the school years in question, he did not have to make a finding on Prongs 2 or 3 and the parents were not required to appeal a non-adverse decision to preserve its reviewability. The parents also contend that they did not raise issues outside of the scope of the hearing, as the due process complaint notice included allegations regarding the appropriateness of the district's evaluations and the BOCES program.

V. Applicable Standards

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

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

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support

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

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).[19]

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

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

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. Preliminary Matters

Initially, I will turn to the parents' arguments that the IHO decision should be reversed because it failed to sufficiently cite to law, regulation, case law, or the hearing record and that the IHO incorrectly applied the burden of proof in the parties' dispute.

Upon review, these arguments do not warrant a reversal of the IHO's findings in this particular case. First, the IHO summarized the facts in this matter, writing over 23 pages prior to making his conclusion regarding FAPE (see IHO Decision pp 3-26). Additionally, the IHO cited to the hearing record, case law, and regulations throughout his findings (IHO Decision at pp. 26-32). While the IHO might have ideally offered some additional citations in spots in his decision, it was based upon evidence in the hearing record overall or reasonable inferences drawn therefrom and consequently the parents' allegation of error on this point is rejected.

As to the IHO's statement on the applicable burden of proof, the parents are correct in that the IHO, citing to Schaffer v. Weast, 546 U.S. 49, 59-62 (2005), stated "the burden of presentation rests with the School District and the burden of persuasion rests with the Petitioner" (IHO Decision at p. 1). While under federal law, the burden in IDEA due process proceedings rests with the party seeking relief, the parents are also correct that the IHO erred because under State law, the burden of proof has been shifted to school districts 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 Hardison v. Bd. of Educ. of the Oneonta City Sch. Dist., 773 F.3d 372, 386 [2d Cir. 2014]; C.F. v. New York City Dep't of Educ., 746 F.3d 68, 76 [2d Cir. 2014]; R.E., 694 F.3d at 184-85; see also Application of a Student with a Disability, Appeal No. 18-015; Application of a Student with a Disability, Appeal No. 18-058; Application of a Student with a Disability, Appeal No. 16-028; Application of a Student with a Disability, Appeal No. 11-091). Accordingly, the IHO enunciated the Schaeffer ruling in his decision, but in discussing the applicable legal standards, failed to reference State law that placed the burden of proof on the school district during an impartial hearing to establish that it offered a FAPE (id. at p. 1, 4-6; see Educ. Law § 4404[1][c]).

The parties nevertheless conducted themselves during the hearing in a manner consistent with the State's burden of proof statute with the district presenting evidence in support of its arguments that it offered a FAPE and the parent presenting evidence to support the claim that IVDU was appropriate. While the IHO erred in stating the law with respect to the burden of proof, an examination of the IHO's decision reveals that the IHO nevertheless weighed the evidence in the hearing record and made his decision based on his assessment of the relative strengths and weakness of the parties respective evidence rather than by relying on the burden of persuasion

allocated to one party or the other in order to reach a decision in the matter (see IHO Decision at pp. 26-32). Although the parent disagrees with the conclusions reached by the IHO, such disagreement does not demonstrate that the IHO failed to give effect to the State's burden of proof statute when conducting his analysis. Additionally, even assuming the IHO misallocated the burden of proof to the parent, the error would not require reversal insofar as the hearing record does not support a finding that this was one of those "very few cases" in which the evidence was in equipoise (Schaffer, 546 U.S. at 58; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 225 n.3 [2d Cir. 2012]). Furthermore, reversal is not warranted because I have conducted an impartial and independent review of the entire hearing record, and as further described below, reach the conclusion, based upon the State's allocation of the parties' respective burdens, that the district prevails (34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]).

B. Parent Participation

The parents challenge the IHO's determination that the parent did not require the services of an interpreter at the CSE meetings during the 2016-17 and 2017-17 school years as she had sufficient command of the English language (IHO Decision at p. 17). The parents contend that the district's failure to provide the student's mother with an interpreter was a denial of FAPE and that the IHO should have found she was entitled to an interpreter (Req. for Rev. at pp. 1, 7-8).

The IDEA sets forth procedural safeguards that include providing parents an opportunity "to participate in meetings with respect to the identification, evaluation, and educational placement of the child" (20 U.S.C. §1415[b][1]). Federal and State regulations governing parental participation require that school districts take steps to ensure that parents are present at their child's IEP meetings or are afforded the opportunity to participate (34 CFR 300.322; 8 NYCRR 200.5[d]). In addition, the district "must take whatever action is necessary to ensure that the parent understands the proceedings of the [CSE] meeting, including arranging for an interpreter for parents [who are hearing impaired] or whose native language is other than English" (34 CFR 300.322[e]; 8 NYCRR 200.5[d][5]; see also Application of a Student with a Disability, Appeal No. 13-136).[20]

The parent testified that her native language was Italian and that as a child her family spoke Italian and Swiss German at home and she spoke Italian in elementary school and high school (Tr. pp. 1414-15, 1530). The parent reported that she also spoke German, French, English, Spanish, Yiddish, and a little bit of Hebrew (Tr. pp. 1415, 1550). She did not begin speaking English until

[20] Although the IDEA defines "native language" for an individual of limited English proficiency, who is not a student, as "the language normally used by that individual" (20 U.S.C. § 1401[20]; 34 CFR 300.29[a]; 8 NYCRR 200.1[ff][1]), the pertinent laws and regulations defining "limited English proficiency" only apply to students (see 20 U.S.C. § 9101[25]; 34 CFR 300.27; 8 NYCRR 200.1[iii]). Of some relevance, in order to be considered of limited English proficiency a student must have difficulties in speaking, reading, writing, or understanding the English language that deny the student, the ability to meet the State's proficient level of achievement on State assessments; the ability to successfully achieve in classrooms where the language of instruction is English; or the opportunity to participate fully in society (20 U.S.C. § 9101[25]). In addition, the United States Department of Education's Office of Civil Rights has issued guidance indicating that a parent with limited English proficiency is one "whose primary language is other than English and who ha[s] limited English proficiency in one of the four domains of language proficiency (speaking, listening, reading, or writing)" (Dear Colleague Letter: English Learner Students and Limited English Proficient Parents at p. 37 (OCR 2015).

she came to America when she was fifteen years old (Tr. pp. 1415-16, 1551-52). The parent testified that she was in America for "a year or two" and attended school for half a year before returning to Switzerland (Tr. pp. 1416, 1551-52). The parent later returned to America and has been living here for approximately twenty years (Tr. p. 1553).

The parent testified that at home she spoke English and Yiddish (Tr. p. 1417). She reported that she spoke to her sons in Yiddish more often, while she spoke with her daughters more often in English (Tr p. 1553). The parent indicated that she communicated with her husband in English and a little bit of Yiddish (Tr. p. 1554). Also, she was able to read books in English, when they were not too complicated (Tr. pp. 1427, 1557-58). The parent testified that the district supervisor of case management and nonpublic schools (supervisor) spoke slowly to her during CSE meetings and if she did not understand something the supervisor sometimes put it into Yiddish or Hebrew to help her understand better (Tr. p. 1547; see Tr. p. 186).

The district staff testified that they communicated with the parent in English, the parent did not ask for an interpreter or indicate a lack of understanding during CSE meetings, they did not experience communication issues with the parent, and the parent was engaged during the CSE meetings (Tr. pp. 100-01, 114-115, 356-57, 453-54, 546). The social history update completed by the parent in September 2016 indicated that she was born in Switzerland and spoke English and Yiddish at home (Dist. Ex. 18 at p. 1).

The district supervisor testified that she had many conversations over the years with the parent and at some point in the past had learned the parent's native language was Italian (Tr. p. 546). She further testified that in the distant past she had obtained an Italian interpreter for one of the student's meetings but the parent preferred to have the meeting in English because the interpreter was speaking a different dialect (Tr. pp. 545-46).

As noted above, in a March 2017 letter objecting to the conduct of the January 2017 CSE meeting, the parent expressed that English was not her first language and that she struggled with understanding and expressing her ideas in English (Joint Ex. 4 at p. 1). The parent explained that she had a friend help her write the letter (Tr. p. 1424-26, 1508-09). She reported that following the letter, the district offered the parent a Yiddish interpreter at the CSE meetings (Tr. pp. 1426-27). In a letter dated April 20, 2017, the parent thanked the district for arranging for an interpreter at the upcoming CSE meeting (Joint Ex. 5 at p. 2). The district supervisor testified that she intended to have an Italian interpreter available at the next CSE meeting in April 2017; however, the interpreter unexpectedly cancelled and instead she arranged for a district staff person fluent in Yiddish to attend the meeting (Tr. pp. 544-45, 548). She explained that she knew the parent was familiar with Yiddish and that, at previous meetings, if the parent did not understand something in English, she repeated the word to the parent in Yiddish (Tr. pp. 548-49; see Tr. p. 1547). She also testified that she did not recall the parent making a specific request for an Italian interpreter (Tr. pp. 546-47). The parent recalled that she explained to the district that Yiddish was not her primary language (Tr. p. 1427). She testified that she did not understand Yiddish well enough to have a CSE meeting in Yiddish (Tr. p. 1547).

The IVDU teacher and social worker both testified that they spoke with the parent in English (Tr. pp. 1175, 1396-97). More specifically, the student's IVDU special education teacher for the 2016-17 school year testified that she spoke to the parent in English, but slowly, and if

something needed to be repeated, she repeated it and she used simple English (Tr. pp. 1396-97; see Tr. p. 1301). The teacher indicated that sometimes she needed the parent to repeat something, but for the most part she was able to understand her (Tr. pp. 1396-97). The IVDU social worker testified that there was no struggle to understand the mother nor did it seem the mother struggled to understand her (Tr. p. 1175). She opined that her conversations with the student's mother were meaningful (Tr. p. 1175). The student's IVDU special education teacher for the 2017-18 school year testified that she had trouble understanding the parent's "language" as she spoke very slowly and "low" which hindered her understanding of what the parent was saying (Tr. p. 1276; see Tr. pp. 1194, 1197-98). She further reported that when she communicated with the parent, she would sometimes have to reiterate what she said using a more basic vocabulary so that the parent could understand her (Tr. p. 1276-77). The IVDU special education teacher testified that the parent did not require an interpreter and at school she spoke English (Tr. p. 1278). She noted that the parent spoke English well and was overall fluent; however, when it came to academic language or more sophisticated language, communication became more difficult and the parent struggled with English sometimes (Tr. p. 1278). She opined that it was possible for her to have meaningful engagement with the parent (Tr. p. 1279).

Based on the hearing record as a whole, the lack of an Italian interpreter did not deprive the parent of her ability to participate in the CSE meetings and express her concerns regarding her child's IEPs. The hearing record demonstrates that the parent was able to communicate in English and even if her communication was not perfect, she was able to express her concerns, indicating the parent was not impeded by the lack of an interpreter. The IHO's decision on this issue was based on multiple factors, which included his own observations of the parent as she testified. A review of the parent's testimony demonstrates that she had the ability to communicate in English as the IHO found. Notably, the parent stopped speaking in Italian and spoke in English at least fifteen times during the course of her testimony (Tr. pp. 1413, 1421, 1423, 1429, 1442, 1485, 1487, 1488, 1499, 1518, 1520, 1537, 1539, 1559, 1576, 1608, 1617). In this context, a finding that the student did not receive a FAPE could only be found if procedural inadequacies involving an Italian interpreter significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the student (20 U.S.C. §1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]), but that is not the circumstances of this case, especially where the evidence described above shows that the parent prefers English over a nonpreferred dialect of Italian and when the evidence shows that the parent relies on English in the home to carry on her family life. The hearing record supports the IHO's finding that the parent was not impeded by the lack of an Italian interpreter and that the parent was able to engage and participate with the CSE.[21]

[21] As further discussed below, regarding the parent's allegation that prior to the January 2017 meeting she was forced to sign a document that stated she was "parentally" placing her daughter at IVDU (Tr. pp. 1422-25, 1494-95, 1502-04, 1511-12, 1558-59, 1627-29; Joint Ex. 4 at p. 1), the district's CSE chairperson testified that she did not recall this happening; however, noted that the district did request that if a parent placed their child in a private school that they indicate it in writing (Tr. pp. 759-62). If the incident occurred as the parent testified to this action by the district is unfortunate and not best practice; however, it did not deny the parents' ability to participate in the meeting or have the student's IEP developed. The parents' rights were not altered in anyway by this act as the district still convened and developed an IEP for the student.

C. 2016-17 School Year

Next the parties dispute whether the IHO erred in regard to the need for a classroom observation prior to the May 2016 meeting and whether the parents granted consent to evaluate the student in March 2016.[22] The IHO found, in regard to the classroom observation, that the parent did not provide authorization for the district to speak to IVDU until after the May 2016 CSE meeting (IHO Decision at p. 27).

An initial evaluation of a student must include a physical examination, a psychological evaluation, a social history, a classroom observation of the student and any other "appropriate assessments or evaluations," as necessary to determine factors contributing to the student's disability (8 NYCRR 200.4[b][1]). Pursuant to 8 NYCRR 200.4(b)(4), a reevaluation of a student with a disability must be conducted by a multidisciplinary team or group that includes at least one teacher or specialist with knowledge in the area of the student's disability and, in accordance with 8 NYCRR 200.4(b)(5), the reevaluation must be "sufficient to determine the student's ability to participate in instructional programs in regular education and the student's continuing eligibility for special education." A CSE may direct that additional evaluations or assessments be conducted in order to appropriately assess the student in all areas related to the suspected disabilities (8 NYCRR 200.4[b][3]). Any evaluation of a student with a disability must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parent, that may assist in determining, among other things the content of the student's IEP (20 U.S.C. § 1414[b][2][A], [B]; 34 CFR 300.304[b][1][ii]; see Letter to Clarke, 48 IDELR 77 [OSEP 2007]). In particular, a district must rely on technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors (20 U.S.C. § 1414[b][2][C]; 34 CFR 300.304[b][3]; 8 NYCRR 200.4[b][6][x]). Whether it is an initial evaluation or a reevaluation of a student, a district must ensure that a student is appropriately assessed in all areas related to the suspected disability, including, where appropriate, social and emotional status (20 U.S.C. § 1414[b][3][B]; 34 CFR 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]). An evaluation of a student must be sufficiently comprehensive to identify all of the student's special education and related services needs, whether or not commonly linked to the disability category in which the student has been classified (34 CFR 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]; see Application of the Dep't of Educ., Appeal No. 07-018).

Here, the parents are correct that the IHO failed to acknowledge that they granted the district consent to conduct "any evaluations or assessments required" in March 2016 (Dist. Ex. 9 at p. 1).[23] Based on that letter and consent, the district completed a physical therapy evaluation,

[22] The district argues that the parent did not raise the observation issue in the due process complaint notice and is precluded from raising the issue on appeal. However, in the due process complaint notice, the parents raised the issue that the student was not fully evaluated in all areas of suspected disability for the 2016-17 school year and as described below, an observation is among the components of an evaluation of a student suspected of having a disability; therefore, the lack of a classroom observation prior to the May 2016 meeting was raised and properly addressed in this review on appeal (Joint Ex. 6 at pp. 1-2).

[23] The IHO acknowledged the CSE's receipt of the parent's consent for evaluation in March 2016, but then

an OT evaluation, a psychological evaluation, a speech-language evaluation, and an educational evaluation (see generally Dist. Exs. 3; 4; 5; 6; 7). Further, the hearing record indicates that the district did not seek consent to contact IVDU to obtain records until September 2016, clearly after the May 2016 CSE meeting (Dist. Exs. 13; 14). In September 2016, the parent provided the district with consent and the district was able to conduct a classroom observation in November 2016 (see Dist. Exs. 13, 19). However, on November 3, 2016, the parent rescinded authorization for the school psychologist to speak with the IVDU staff (Dist. Ex. 14). The school psychologist, who received the email, testified that she understood that she could obtain information from IVDU, but was not able to speak with the staff about that information (Tr. p. 458).[24]

The IHO erred in determining that the parent had withdrawn authorization to speak with IVDU prior to the May 2016 CSE; however, the lack of a classroom observation until November 2016 did not deny the student a FAPE for the 2016-17 school year. First, while an observation is mandated by State regulation as part of an initial evaluation of a student with a disability (8 NYCRR 200.4[b][1]), an observation is not automatically required as part of a reevaluation.[25] Thus, it is not clear that there is a procedural violation in this instance. The CSE was able to obtain information from the student's learning environment in other ways. The May 2016 CSE had a May 2016 teacher progress report available to it, which was completed by the student's teacher at the nonpublic school and described the student's academic strengths and weaknesses, identified the student as an active participant in class and a motivated learner, and further identified some strategies employed by IVDU, including the use of multi-sensory instruction, displaying a daily schedule, teacher proximity, and the use of a smart board and alternative media, 1:1 instruction, graphic organizers, and positive reinforcement (Dist. Ex. 8; see Dist. Ex. 2 at p. 2). As the district had the private IVDU teacher's progress report, the lack of a classroom observation did not prevent the district from having the necessary information to develop an IEP for the student.[26]

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inconsistently determined that the consent was not provided until November 2016 (IHO Decision at pp. 10, 22).

[24] The parent gave consent on September 23, 2016 for the district to assess the student through an observation, classroom work sample, teacher progress report and a report card; however the hearing record indicates that the parent withdrew consent for the school psychologist to interact with staff at IVDU via email on or about November 3, 2016 because she was not comfortable with the school psychologist conducting such conversations (Tr. pp. 368, 456, 1497-99, 1512, 1625-27; Dist. Exs. 13; 14). The school psychologist testified that she attempted several times in emails and phone calls to explain the importance of these conversations; however, the parent testified that she continued to withhold consent because she was uncomfortable with the school psychologist (Tr. pp. 369, 383, 1513, 1625-26). As noted above, while the school psychologist conducted the classroom observation on November 21, 2016, she complied with the parent's wishes and did not interact with IVDU staff, with the exception of the secretary (Tr. p. 373-77; Dist. Ex. 19).

[25] Observations can be valuable during reevaluations, and I have encouraged school districts to utilize them especially in cases when the student has not been attending the public school and the CSE lacks useful information regarding the student's performance or progress after being placed by the parent in nonpublic school. In this case, such information was available to the CSE.

[26] State regulations dictate that an initial evaluation of a student include a classroom observation (see 8 NYCRR 200.4[b][1]). However, as the May 2016 CSE was not an initial evaluation of the student, but an annual review, the federal regulations require that for a re-evaluation a CSE must review existing evaluative data, which the May 2016 did through the current evaluations and teacher progress report (34 CFR 300.305[a]; Dist. Ex. 2 at p. 2).

In regard to the January 2017 CSE meeting, the parent's argument that the student was not fully evaluated due to the lack of an observation is without merit as the classroom observation had been conducted prior to that meeting (see Dist. Ex. 19).

Turning next to the parents' argument that neither the May 2016 nor the January 2017 CSEs were properly composed because the CSE failed to invite any participants from IVDU, the IDEA requires a CSE to include the following members: the parents; one regular education teacher of the student (if the student was, or may be, participating in the regular education environment); one special education teacher of the student or, where appropriate, not less than one special education provider of the student; a district representative; an individual capable of interpreting instructional implications of evaluation results; at the discretion of the parent or district, other persons having knowledge or special expertise regarding the student; and if appropriate, the student (see 20 U.S.C. § 1414[d][1][B]; see 34 CFR 300.321[a]; 8 NYCRR 200.3[a][1]). Specifically, 8 NYCRR 200.3(1)(a)(ix) allows the parents to designate other persons having knowledge or special expertise of the student to participate in the CSE meeting.

The hearing record supports the IHO's findings regarding the composition of the CSE meetings for the 2016-17 school year. A review of the meeting information summary for the May 2016 CSE meeting shows that in addition the CSE chairperson and student's mother, a special education teacher, general education teacher and two school psychologists from the district attended the CSE meeting (Tr. pp. 197-99; Dist. Ex. 2 at p. 1). One of the school psychologists had chaired previous meetings and was the school psychologist assigned to the student's private school (Tr. p. 197). The district supervisor testified that she could not recall anyone from IVDU being present at the May 2016 CSE meeting (Tr. pp. 196, 198). She indicated that she "always ma[d]e it a point to call and send a letter to the school" that she was going to be working with, and that IVDU had been very difficult to get in touch with, including for this meeting (Tr. pp. 198, 651). The district supervisor reported that she did not receive return phone calls from IVDU, but she did speak with the secretary more than once (Tr. p. 198). According to the district supervisor, one of the reasons she invited the school psychologist assigned to the student's private school to the May 2016 CSE meeting was because she thought the psychologist would have more familiarity with the student and family and she wanted someone familiar with the student to be present at the CSE meeting (Tr. pp. 197). The school psychologist testified that the chairperson of the May 2016 CSE called IVDU during the CSE meeting but that she was unable to speak with anyone (Tr. pp. 446-47). The parent confirmed that no one from IVDU was present at the May 2016 CSE meeting and stated that the district did not ask her to have staff from IVDU participate in the meeting by telephone (Tr. p. 1435). However, as discussed above, the May 2016 CSE had a teacher progress report from May 2016 available for its review (Dist. Ex. 8; see Dist. Ex. 2 at p. 2).

Regarding the January 2017 CSE meeting, the meeting information summary and attendance sign-in sheet indicates that the members of the committee included the CSE chairperson and parent along with a district special education teacher, general education teacher, school psychologist, and the district supervisor of secondary education (Dist. Exs. 21 at p. 1; 22). As noted above, the parent rescinded authorization for the district to "exchange information" with IVDU in November 2016 (Dist. Ex. 14). The school psychologist testified that the topic of IVDU's absence from the January 2017 CSE meeting came up during the meeting (Tr. p. 386; see Tr p. 384). According to the school psychologist, she informed the CSE that she had let the parent know the date of the meeting and indicated that the district would like the school to attend or be present

by telephone (Tr. pp. 386, 465). The school psychologist further recalled that she explained to the CSE chairperson that she could not tell the school (IVDU) about the meeting because she did not want to go against the parent's request that she not talk to the school (Tr. p. 387). According to the school psychologist, the CSE chairperson asked the parent about her request and the parent indicated "something to the effect" that English was not her first language and she did not understand what she was writing (Tr. p. 387). The school psychologist confirmed that she had not reached out to invite IVDU to the meeting and was not aware if anyone else had (Tr. pp. 387-88, 465). She indicated that although IVDU was not present at the meeting she had a teacher progress report from the school (Tr. p. 388; see Dist. Ex 21 at p. 3). The parent testified that the district did not attempt to call IVDU during the meeting and denied that the district asked her to arrange for IVDU's attendance at the meeting (Tr. p. 1501).

The January 2017 IEP indicates that the CSE had a November 23, 2016 teacher progress report from IVDU available for review (Dist. Ex. 21 at p. 3). The progress report, completed by the student's IVDU special education teacher for the 2016-17 school year, indicated that the student exhibited academic strengths in math, specifically math computation, solving two-step equations, and calculator skills; and reading, specifically fluency and decoding (Dist. Ex. 17). The teacher characterized the student as organized and motivated and indicated that she completed assignments and homework (id.). The teacher also detailed the student's academic weaknesses (id.). In math, the student had difficulty with word problems and "real life" application and in reading the student had difficulty with comprehension including inferencing and making connections and predictions (id.). The student also had difficulty with written expression and grammar, spelling and punctuation in particular (id.). With regard to the student's behavior and social/emotional development, the IVDU special education teacher observed that the student displayed an interest in socializing but had minimal social awareness and was not "tuned in" to other people (id.) The teacher characterized the student as "passive in social situations" (id.). She reported that the student was highly anxious and rigid but also that the student presented as calm and even tempered (id.).

> In view of the evidence above, the parents' claim that the CSE was improperly composed due to the lack of participation of the student's teachers from IVDU is insufficient to find a procedural violation. To be sure, had the parents asked IVDU personnel to participate (and not at one point discouraged personnel from communicating with IVDU staff), the district would have an obligation to consider any input of IVDU as members of the CSE having knowledge or special expertise of the student. And it has been held that the CSE may rely on teachers of a student in a nonpublic school and their familiarity with a student to develop the student's IEP (A.D. v. New York City Dep't of Educ., No. 12 CIV. 2673 RA, 2013 WL 1155570, at *7 [S.D.N.Y. Mar. 19, 2013]). However, the district was not in a position to compel the IVDU personnel to respond or participate in the CSE meetings, quite unlike a school district's obligation to include public or state approved school personnel who are or will be responsible for implementing the student's public school IEP. For example, the United States Department of Education noted in the Official Analysis of Comments to the revised IDEA regulations that
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> > Section 300.321(a)(3), consistent with section 614(d)(1)(B)(iii) of the Act, requires that the IEP Team include not less than one special education teacher, or where appropriate, not less than one special education provider

> of the child. This is not a new requirement. The same requirement is in current § 300.344(a)(3). As noted in Attachment I of the March 12, 1999 final regulations, the special education teacher or provider who is a member of the child's IEP Team should be the person who is, or will be, responsible for implementing the IEP. For example, if the child's disability is a speech impairment, the special education teacher or special education provider could be the speech language pathologist. We do not believe that further clarification is needed.

(IEP Team, 71 Fed. Reg. 46670 [August 14, 2006]; see also C.T. v. Croton-Harmon Union Free Sch. Dist., 812 F. Supp. 2d 420, 431 [S.D.N.Y. 2011] [rejecting the parents' claim that private school staff was not included in the CSE meeting and noting that the district made at least some attempt at including nonpublic school staff in the meeting]). Based on the evidence in the hearing record, the parents' objections to the composition of the May 2016 and January 2017 CSEs due to the lack of IVDU personnel is without merit.

D. April and December 2017 Educational Placement Recommendations

I will next address the parents' argument that the IHO failed to address the April and December 2017 IEPs and that the IHO should have rejected the district's argument that it offered a FAPE because district staff testified that the placement at BOCES was a "hybrid" program with Regents level academic classes as well as a life skill program, which "hybrid" program was not included in either IEP, and that the district was impermissibly rehabilitating a deficient IEP through testimony after the fact. The district disputes the parent's assertion that it offered a "hybrid" program for the 2017-18 school year and instead argues that the student's IEPs appropriately identified the programming recommended by the CSE.[27]

The IHO did not address the April and December 2017 IEPs separately, but found that the program recommendations made for the 2017-18 school year were appropriate (IHO Decision at pp. 30, 32), which is not surprising as the proposed programming between the two was quite similar and the CSE was attempting to make adjustments to the IEP in light of the parent's continuing concerns. Thus, the hearing record, as further described below, contained evidence not only of the actual programing offered in the student's April and December 2017 IEPs but also of

[27] The district did reference "hybrid" programming in its post hearing brief to the IHO, but it is not clear that it contemplated the same type of skills, suggesting vocational or transition planning components in addition to academic components (Dist. Post Hear'g Brief at p. 14 n.28). Further, the district argues that the parents did not raise the issue of the "hybrid" program in their due process complaint notice and therefore, it is precluded from being raised on appeal; however, the district elevates form over substance by insisting that the term "hybrid" have appeared in the parent's due process complaint notice. The parents were not required to use identical wording and sufficiently made this challenge to the recommended program at BOCES for the 2017-18 school year in the due process complaint notice (Joint Ex. 6 at pp. 5-9 [stating that "the BOCES program recommended for (the student) did not offer her a class that has both the academic and life skills instruction she needs]), which the parent now refers to as the alleged "hybrid" program likely due to testimony during the impartial hearing about the types of available programming at BOCES. As the parents sufficiently stated their challenge to the program recommendation for the 2017-18 school year in their due process complaint notice, the alleged error on the part of the IHO as raised in the request for review regarding the programming at BOCES will not be precluded from review.

other possibilities entertained in light of the parents desires for a greater emphasis on life skills programming similar to her programing at IVDU.

The evidence indicates that the parent was concerned about the student's life skills and social emotional skills (Tr. pp. 560, 681, 847-48, 1519-21, 1615). Specifically, the district supervisor testified that the parent was "extremely concerned about [the student's] practical social judgement" and her ability to "take her place in the adult world," and that the parent was looking for a life skills program to address those issues (Tr. p. 560; see Tr. p. 848). The chairperson of the April 2017 CSE meeting testified that the parent wanted a life skills program for the student and, based on her (the chairperson's) meeting notes, reported that the parent felt the student needed more reinforcements in place, and more social and life skills (Tr. pp. 788-89; see Dist. Ex. 42 at p. 2). The parent recalled telling the April 2017 CSE that the student required more supervision and more help, not only with scholastics, but also for life skills and socializing (Tr. p. 1519).

Although life skills is not a term specifically defined by the IDEA or State regulation, the term is sometimes associated with instruction for students with severe developmental delays or at a very low cognitive level who require basic skills training such as hygiene, hand washing, hair combing and teeth brushing (see, e.g., EC v. Cty. of Suffolk, 882 F. Supp. 2d 323, 329–30 [E.D.N.Y. 2012], aff'd sub nom. E.C. v. Cty. of Suffolk, 514 F. App'x 28 [2d Cir. 2013]), but at other times the term is used to refer to items at a slightly more advanced level such as "functional academics," light housekeeping, and food preparation (see, e.g., Warton v. New Fairfield Bd. of Educ., 217 F. Supp. 2d 261, 264 [D. Conn. 2002]). In this case, the parent explained that by life skills she meant crossing the street, managing money, and turning the power on to cook; in essence critical thinking (Tr. p. 1519-20). She testified that during the April 2017 CSE meeting, she expressed her concern with the recommended program and even though the CSE recommended a smaller class size, it did not have the life skills and job coaching the student needed (Tr. p. 1615). IVDU staff testified that the school provided life skills training that included things such as how to make a grocery list, follow a recipe and plan a menu; how to cross the street or navigate public transportation; how to fold laundry; and how to manage money (Tr. pp. 950, 983, 988-89, 1044, 1214-15, 1317).

The evidence shows that when examining the parent's concerns regarding the student's "life skills," the April 2017 CSE discussed developing a "hybrid" program by creating a "unique individualized program" that combined Regents level academic instruction in a 12:1+1 classroom with a BOCES program focusing on adaptive daily living skills and social practical daily living skills (Tr. pp. 561-62, 728, 788-92; see Dist. Ex. 42 at p. 2). Further review of the hearing record indicated that the parent sent a letter to the district dated August 21, 2017 in which she expressed concerns regarding the April 2017 CSE recommendations of a 12:1+1 classroom in a BOCES program, specifically indicating that the student required a smaller class size with small group instruction and "significant levels of individual support," as well as a "functional academic program" that focused on both academic and life skills instruction (Dist. Ex. 29). The district supervisor), who attended both the April and December 2017 CSE meetings, responded to the parent's concerns by letter dated August 29, 2017, where she indicated that the student had "academic abilities to earn an academic diploma aligned with the New York State learning standards" and that she was properly placed in the BOCES program on track to earn a Regents diploma, and would also receive "appropriate transition training and skill building to meet her postsecondary goals included on her IEP" (Dist. Ex. 30 at p. 1; see Dist. Exs. 28; 40). The

supervisor testified that the intent of her letter was to define the hybrid program created for the student and included in the IEP (Tr. pp. 743-44). She indicated that she "did not know how to code it correctly on the IEP, but the life skills portion of it would not have been on a Regents track" (Tr. pp. 568, 676-77). The supervisor testified that the "life skills program" would include functional math such as time and money, and prevocational skills including skills for getting a job, such as how to interact with coworkers and how to manage oneself in an interview (Tr. p. 568). The hearing record indicates that the programming was discussed during the April and December 2017 CSE meetings, and that BOCES was going to work with the school district to create an individual program specifically to meet this student's unique needs (Tr. pp. 678-79; Dist. Ex. 42 at pp. 2-4). According to the chairperson from the April 2017 CSE meeting, the CSE listened to "the needs that the parent had" and listened to the needs that the CSE put forth (Tr. p. 790). The chairperson reported that "there were two recommendations put out on the table for discussion" a BOCES program that was a regular education program that accepted special education students and a BOCES program called Pave that could address the student's social, academic, vocational and adaptive living skills (Tr. p. 790). The chairperson testified that the district felt that the Pave program "was good for both what the Parent asked for and what [the district] wanted for [the student]" (Tr. p. 790). The chairperson testified that the BOCES 12:1+1 special class at Tappan Zee High School was very similar to the Pave program and offered the same thing as IVDU in terms of life skills and vocational training (Tr. p. 792). In addition the BOCES program at Tappan Zee High School provided the student with the opportunity to remain on a Regents track (Tr. p. 789-92; see Dist. Ex. 42 at pp. 2-3). Thus, the testimony of the district personnel during the impartial hearing indicates that at times district personnel discussed and contemplated adding a life skills component to the student's IEP due to the parent's concerns, but that that component could not be "coded" correctly on the student's IEP, at least in the April and December 2017 IEPs (see, e.g., Tr. pp. 567-68). However, in other communications with the parent, the district was also communicating that the student should be placed in the Regents track of the BOCES program (Dist. Ex. 30 at p. 1).

The parents are correct in their legal statements that under Second Circuit precedent, the district cannot rely on any evidence that the BOCES program set forth in the IEP actually incorporated both a Regents track and a distinct life skills track because it would be impermissibly retrospective (see R.E., 694 F.3d at 186-88). However, the problem with the parents' argument is that the district, during much of the impartial hearing—and very clearly at this juncture—is urging that the written IEP should be judged on its own terms, namely that it offered the BOCES placement with the Regents track programming due to the student's progress in her Regents level academic programming. To the extent that the parents implicitly argue that the IHO impermissibly relied on retrospective evidence in finding that the district offered the student a FAPE, such an argument would be misplaced, as the IHO clearly rejected the parents argument that the student's IEP should have included a life skills track, finding instead that the parent had underestimated the student's abilities. Contrary to the parent's contention, there is no basis to conclude that the IHO's decision must be reversed simply because the hearing record contains evidence that can be considered retrospective, especially when the IHO did not rely upon the evidence and the district does not contest that the IEP should be defended as written. Instead, the inquiry must go further and examine if district was required to develop an IEP with a life skills track in addition to a Regents track in order to offer the student a FAPE. Stated differently, in order to prevail, the district must show that the IEP was appropriate without the inclusion of the BOCES life skills track, and I will turn next to that particular issue.

With respect to the student's needs related to life skills, the October 2016 neuropsychological evaluation report indicated that the student's ABA therapist worked with the student on ADLs such as showering, tooth brushing, and grooming skills (Dist. Ex. 16 at p.2). According to the report, the student's mother indicated that the student had difficulty following multistep instructions related to baking or completing a household chore independently (id.). The parent rated the student's general ability to function independently as being in the "extremely low range"(id. at p. 7). The parent's responses on the Adaptive Behavior Assessment System – Second Edition (ABAS-II) indicated that the student's home living and self-care skills were in the "extremely low range," however, the evidence also shows that the student's teacher reached a different conclusion and rated her skills in these areas as "average" and "low average," respectively (id. at pp. 16-17).

Although the parents had previously challenged the adequacy of the student's academic and social/emotional present levels of performance in the due process complaint notice, the claim lacked specific objections to any inaccuracies or omissions in the present levels of performance and the parents abandoned the claim on appeal. Accordingly, the discussion of the alleged need for life skills track in the April 2017 IEP and the December 2017 IEP requires an understanding of the student's present levels of performance as identified therein.

Initially, both IEP's included a brief description of the responses to the ABAS-II from the October 2016 neuropsychological evaluation (Dist. Exs. 27 at p. 6; 39 at p. 7). The IEPs highlighted the discrepancy between the parent's reporting and the reporting of the student's teacher, noting that the teacher reported functioning in the social domain in the "average" range and that the discrepancy could be due to the student functioning better at school (id.).[28]

As reflected in the April 24, 2017 IEP, the student's classroom teacher described the student as very responsible and having many friends (Dist. Ex. 27 at p. 7). The teacher also indicated that the student had difficulty reading social cues and could be emotional and anxious at times (id.). The parent reported that the student was insecure and dependent (id.). As reflected in the December 2017 IEP, the student's classroom teacher described the student as "a fine young lady who s[ought] companionship and friendship" (Dist. Ex. 39 at p. 8). The teacher indicated that the student had some difficulty with "perspective taking"; however, she also noted that the student had friends and was making good progress in her social skills (id.) The IEP indicated that the parent was concerned about the student's social judgment and worried about how she would function as an adult (id. at p. 9). A review of the hearing record shows that IVDU worked on the following life skills and social skills with the student: planning a balanced meal, dividing a six-ingredient recipe in half, budgeting and money skills, asserting herself in an appropriate manner, and

[28] The parents argued in the due process complaint notice that the October 2016 neuropsychological evaluation report was not properly considered. However, a review of the hearing record demonstrates that the CSE considered the report in January 2017 (Tr. pp., 492-93, 786-87, 816-17; Dist. Ex. 21 at pp. 3-4). Consistent with the IHO's finding that the neuropsychological evaluation was reviewed by the CSE, the January 2017 IEP and April 2017 IEP list the October 2016 neuropsychological evaluation report as being available to the CSE and also report the scores from the evaluation report (Dist. Exs. 21 at pp. 3, 4-5; 27 at pp. 2, 3-4). The parents offer no reason on appeal as to why I should depart from the IHO's findings as to the consideration of the evaluation.

identifying and analyzing options for dealing with anxiety (Parent Exs. G at pp. 5, 7; H at pp. 3-6).

On April 24, 2017, the CSE reconvened, at the parent's request, to conduct an annual review for the 2017-18 school year (Tr. p. 559; Dist. Ex. 27 at p. 1). In order to address concerns expressed by the parent about the student's life skills and social judgement, the CSE recommended the student attend a 12:1+1 special class in a BOCES program located in a public high school daily for six hours and 15 minutes and receive the related service of counseling in a small group for 30 minutes weekly (Dist. Tr. pp. 560-63, Ex. 27 at pp. 1, 10-11, 13). For "supplementary aids and services/program modifications/accommodations" the CSE recommended check for understanding, noting that the student "require[d] assistance in attending to classroom activities" (Dist. Ex. 27 at p. 11). Additionally, the April 2017 IEP contained testing accommodations of extended time for all tests (1.5) and special location that allows "for the use of other accommodations" (id.). Finally, the April 2017 IEP contained measurable postsecondary goals, a career/vocational/transition annual goal, and a coordinated set of transition activities (id. at pp. 9-10, 12). The IEP noted that independent living goals were not required at that time considering the student's interests, goals, and age appropriate levels of performance (id. at pp. 9, 12). According to the postsecondary goals, the student was working towards completing the necessary coursework required for graduation and on building confidence to perform effectively in a work environment (id. at p. 9).

At the parent's request, the CSE reconvened for a program review on December 18, 2017 (Dist. Exs. 39 at p. 1; 42 at p. 3-4). The December 2017 CSE continued the recommendation for the student to attend a 12:1+1 special class in a BOCES program located in a public school for six hours and 15 minutes per day and receive the related service of counseling in a small group (5:1) once weekly for 30 minutes (Dist. Ex. 39 at pp. 1, 12). Moreover, the CSE added individual counseling once weekly for 30 minutes and speech-language therapy twice weekly for 30 minutes in a small group (id. at p. 12). According to the IEP, after much discussion regarding the parent's concerns, speech-language therapy was added to improve the student's social and pragmatic language skills (id. at p. 2, 8). Additionally, information provided by the student's then-current teacher from IVDU, who participated by phone, was included in the December 2017 present levels of performance, along with the addition of two annual goals designed to improve the student's speaking and listening skills (Tr. pp. 627-29; 710-11; Dist. Exs. 39 at pp. 7-8, 11; 40). The December 2017 IEP noted the parent's concerns regarding the student's social judgement and how the student would function as an adult and indicated that the CSE recommended an additional counseling session to address the parent's specific concern (Dist. Ex. 39 at p. 9). The December 2017 IEP detailed the nature and degree to which environmental and human or material resources were needed to address the student's management needs (id.). Specifically, the IEP noted that the student had significant academic delays and required a low student-to-teacher ratio with minimal distractions in order to progress; required mainstream opportunities with nondisabled peers, as appropriate; required small group instruction to focus on tasks; needed to increase frustration tolerance and increase perspective taking skills; needed to seek help when needed; required additional time to complete tests and to complete classroom assignments (id.).[29] Finally, the

[29] In contrast with the April 2017 IEP, which indicated the student had "significant delays in reading comprehension, math concepts and written expression" that interfered with her ability to participate in age

December 2017 IEP contained measurable postsecondary goals, a career/vocational/transition annual goal and a coordinated set of transition activities (id. at pp. 12-14).

As discussed above, while the present levels of performance and evaluative information upon which it relied showed that the student exhibited some needs in the areas of socialization, and regulating her emotions, the April 2017 IEP and December 2017 IEP included sufficient supports to address these needs as they were presented to the CSEs. It should be noted that one of the goals of specially designed instruction is "to ensure access of the student to the general curriculum, so that he or she can meet the educational standards that apply to all students" (8 NYCRR 200.1[vv]). In this instance, the student was working on attaining a Regents diploma and both the April 2017 IEP and the December 2017 IEP included special education supports that would have allowed her access to the general education curriculum. The CSE was in a delicate position of trying to accommodate the parents' concerns that the student should spend more time on basis life skills, when the available information strongly suggested that the student was capable of advancing toward a Regents diploma and that the student's time was well spent in that area. Based on the above, the April 2017 CSE and December 2017 CSE were justified in not altering the programming to increase the focus on life skills at the expense of the student's academic work and in determining that independent living goals were not required. Therefore, the arguments presented by the parents do not provide a basis reversing the IHO's determinations that the IEPs were ambitious, or in other words, that the IEPs were reasonably calculated to enable the student to make progress appropriate in light of the child's circumstances, even if they did not provide everything that might be thought desirable her loving parents.

E. Other Alleged Violations

The parents assert additional arguments that are not tied to a specific IEP or time period on appeal. The parents argue that the IHO erred by failing to find the alleged procedural violations were a cumulative denial of FAPE (Req. for Rev. at pp. 2, 10). The parents argue that the IHO erred by failing to find the district's characterization of the student as parentally placed rather than unilaterally placed was a denial of FAPE (Req. for Rev. at pp. 2, 8-9). The parent contends that the district inexplicitly created both an IEP and IESP after the January and December 2017 CSE meetings and that the creation of these IESPs were inappropriate (Req. for Rev. at p. 9).

1. Alleged Procedural Violations

In their request for review the parents assert that the IHO erred in not finding a denial of FAPE "based on the cumulative impact/effect of numerous violations." The parents also identified six violations that the parents assert "were alleged," specifically: the IEP teams were not appropriately composed; the district evaluations were inadequate and no vocational assessment was conducted; the special factors section of each IEP indicated that the student required a particular device or service to address communication needs but did not recommend one; the student was below grade level in math, however, none of the IEPs contain math goals; the May 2017 and January 2017 CSEs recommended a 15:1 class for special education, yet there was no

appropriate activities in a mainstream class, the December 2017 IEP indicated the student had "significant delays in academic skills, social skills and Speech and Language skills" that interfered with her ability to participate in age appropriate activities in a mainstream class (compare Dist. Ex. 27 at p. 8, with Dist. Ex. 39 at p. 9).

indication of what supports the student would receive during the general education portion of the day; and the district failed to meaningfully consider the October 2016 neuropsychological evaluation (Req. for Rev. at pp. 2-3).

Under some circumstances, the cumulative impact of procedural violations may result in the denial of a FAPE even where the individual deficiencies themselves do not (L.O. v. New York City Dep't of Educ., 822 F.3d 95, 123-24 [2d Cir. 2016]; T.M., 752 F.3d at 170; R.E., 694 F.3d at 190-91 [noting that "even minor violations may cumulatively result in a denial of a FAPE"]; see also A.M. v. New York City Dep't of Educ., 845 F.3d 523, 541 [2d Cir. 2017] [noting that it will be a "rare case where the violations, when taken together," rise to the level of a denial of a FAPE when the procedural errors do not affect the substance of the student's program]).

In this matter, the IHO did not find any procedural violations, and accordingly did not err in failing to address the cumulative impact of such non-violations (IHO Decision at pp. 27-32). The IHO acknowledged that the proposed IEPs did not have math goals. However, the lack of appropriate goals in an IEP is a substantive violation that was addressed by the IHO and found to not result in a denial of FAPE. The parent did not challenge the IHO's substantive finding. Similarly, although the parents indicate that they had alleged the above-mentioned procedural violations, they do not directly attack the IHO's findings or lack of findings regarding these violations. For example, the IHO found that the CSE meetings conducted by the district were properly composed, that a vocational assessment was not necessary, and that the private neuropsychological evaluation was reviewed and was also afforded less weight by the IHO because of the qualifications of the evaluator (see IHO Decision at pp. 24, 27, 32). Additionally, the IHO did not address the parents' allegations related to the special factors section of the IEP and supports available in the general education setting (see id.). "The request for review shall clearly specify the reasons for challenging the impartial hearing officer's decision, identify the findings, conclusions, and orders to which exceptions are taken, or the failure or refusal to make a finding, and shall indicate what relief should be granted by the State Review Officer to the petitioner (8 NYCRR 279.4[a] [emphasis added]). As the parents did not specifically appeal from the IHO's determinations or the IHO's failure to address certain issues, the IHO's findings are final and the parent has not sufficiently challenged the IHO's failure to rule on specific issues (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; 279.4[a]). Accordingly, as the IHO did not find any of the alleged violations to constitute a procedural violation, other than perhaps the lack of math goals, there is no basis on which to find that they cumulatively rose to the level of a denial of a FAPE (see C.M. v. New York City Dep't of Educ., 2017 WL 607579, at *18 [S.D.N.Y. Feb. 14, 2017]).

2. Parental Placement

The parents assert that the IHO should have found that the district failed to meet its burden and deprived the student of a FAPE because the district continually addressed the student as parentally placed rather than unilaterally placed (Req. for Rev. at pp. 2, 8-9). Notably, the parents contend that the district created IESPs for the student following the January and December 2017 meetings (id. at p. 9). On this issue, the IHO indicated that the State Education Department had "changed the language to refer to such placements as unilaterally placed" (IHO Decision at p. 29).

Here, the parents' argument that the description of the manner in which the student was placed by the parents misses the mark. The parents clearly unilaterally placed the student at IVDU

notwithstanding the fact that district continually referred to the student as being parentally placed, much to the parents' chagrin (Dist. Exs. 2 at p. 1; 9; 21 at p. 1; 27 at p. 2; 29; 39 at p. 1; see Dist Exs. 11; 24; 30; Joint Exs. 1; 4). Moreover, the hearing record indicates that an IESP was created in addition to an IEP in January 2017 (Tr. pp. 823-24, 1509-10).[30] The CSE chairperson testified that the district created an IESP after the January 2017 meeting because the parent indicated that she would keep the student in a school outside of the district and therefore, both an IESP and an IEP were created (Tr. pp. 823-24; see Tr. p. 813). The decision to create an IESP in these circumstances is odd and quizzical (especially considering the private school the student attended was outside of the district, and thus the district of location would have the responsibility to create any IESP);[31] however, none of this is of critical importance rising to the level a denial of a FAPE as the district went ahead and developed IEPs for the student as requested for the school years at issue and the district did not attempt to circumvent its duty by creating an IESP in leu of an IEP. In this instance, the IESPs that were created were not useful and were not entered into the hearing record by either party. Moreover, hearing record does not otherwise demonstrate that the label of "parentally placed" was held against the parents nor did it impede the development of appropriate IEPs for the student.

3. Class Size at Prior School

The parents argue that, in finding the district's recommended program appropriate, the IHO inappropriately compared the class size at the student's prior nonpublic school to the district's recommended program without allowing evidence regarding the prior school and how the student performed in the larger class setting (Req. for Rev. at pp. 2, 9). Specifically, the IHO found that "[a]ny criticism of the size of the recommended special education program [was] not consistent with [the student's] previous education at Bais Shifra Miriam, where [the student] was enrolled in classes of up to 25 students" (IHO Decision at p. 30).

Under the circumstances, the IHO erred in using the student's prior class size at Bais Shirfa Miriam, to undercut the parents' arguments that the district's program recommendations were not appropriate for the student. Specifically, the hearing record demonstrates that the student's class size prior to the 2015-16 school year was somewhere between 20 and 28 students (Tr. pp. 149,

[30] The record is not particularly clear that the parents received an IESP after the December 2017 meeting; however, the parents alleged that they received an IESP following the January 2017 and December 2017 CSE meetings and the district did not specifically address the parents' allegations about receiving IESPs (Req. for Rev. at pp. 4, 6, 9; see generally Answer).

[31] 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.).

1575; see Dist. Ex. 9). However, there is no reliable indication from the hearing record how the student was performing in a class of that size or the nature of the student's instruction at the prior school and, in particular, whether and what special education and related services the student received in that program, as the hearing record does not go into any detail regarding the student's programming, needs, or progress while she attended Bais Shirfa Miriam. Due to the lack of information regarding the student's performance in the larger class setting, it was inappropriate to compare it with the district's recommendation as a way of assessing the appropriateness of that recommendation.

While, the IHO erred in comparing class sizes, the IHO's finding regarding the student's prior nonpublic school is not a basis for reversal of his conclusion that the district offered a FAPE. The hearing record does not support the parents' contention that the student would not have been able to progress in a 15:1 or 12:1+1 setting and that only a smaller class size was appropriate. The parent's main argument is that the nonpublic school selected by the parent had a smaller class size than the district's program, but a public school is not required to mimic the services provided by a nonpublic school, merely because the parents were able to obtain the services they preferred (see M.C. v. Mamaroneck Union Free Sch. Dist., 2018 WL 4997516, at *28 [S.D.N.Y. Sept. 28, 2018] [while "the district's proposed program would not have replicated the class size, structure and supports available at [the unilateral placement]. . . . that is not the standard the statute imposed on the CSE"]). Additionally, the only support in the hearing record for the parents' position is the October 2016 neuropsychological evaluation which stated that the student was "in a small class with a small teacher-student ratio" and that the supports that were in place "should be continued for [the student's] optimal performance in the classroom" (Joint Ex. 3 at p. 9). First, the recommendation in the neuropsychological evaluation does not the benefits of a specific class ratio, and both a 15:1 and 12:1+1 can be considered "small" class sizes (see A.A. v. New York City Dept. of Educ., 2015 WL 10793404, at *4 [S.D.N.Y. Aug. 24, 2015] [upholding IHO and SRO decisions finding a 15:1 class ratio in a special class was justified on the basis that the student needed the support of a small class ratio]). Additionally, the recommendation was made for the student's "optimal" performance and the district is not responsible for maximizing the student's potential (Rowley, 485 U.S at 189, 199; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 379 [2d Cir. 2003]; Walczak, 142 F.3d at 132). Accordingly, the parents' arguments do not offer a reason to depart from the IHO's ultimate determination that the district's program recommendations for both school years would have enabled the student to make progress in light of her circumstances.

VII. Conclusion

Having determined that the parent's challenges to the IHO's determination that the district offered the student a FAPE for the 2016-17 and 2017-18 school years are without merit, the necessary inquiry is at an end and it is not necessary to address the appropriateness of the parent's placement of the student at IVDU or whether equitable considerations preclude relief (see M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 66 [2d Cir. 2000]).[32]

[32] The IHO found that IVDU did not provide the student with educational benefit (IHO Decision at p. 31). The parents argue that the "IHO erred in addressing the appropriateness of the unilateral placement and also erred in his conclusion about the private school placement (Req. for Rev. at pp. 3, 10). The district contends that the parents did not appeal

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
December 18, 2019

JUSTYN P. BATES
STATE REVIEW OFFICER

the IHO's finding regarding the unilateral placement and therefore, the issue has been abandoned (Answer at pp. 6-7). In this instance, the parents failed to specifically challenge the IHO finding that IVDU was not an appropriate placement and therefore, the issue was abandoned due to inadequate pleading and failure to comply with form requirements (8 NYCRR 279.8[c][2], [4]; see also 8 NYCRR 279.4[a], [f]; see M.C. v. Mamaroneck Union Free Sch. Dist., 2018 WL 4997516, at *23 [S.D.N.Y. Sept. 28, 2018] [upholding dismissal of allegations set forth in an appeal to an SRO for "failure to identify the precise rulings presented for review and [failure] to cite to the pertinent portions of the record on appeal, as required in order to raise an issue" for review on appeal]; J.S. v. New York City Dep't of Educ., 2017 WL 744590, at *4 [S.D.N.Y. Feb. 24, 2017] [agreeing with an SRO that the parents' "failure to advance specific arguments in support of their conclusory challenge constituted waiver of those issues"]). Accordingly, even if I were to find that the district did not offer the student a FAPE, I would be unable to award the parents the relief they requested, i.e. tuition reimbursement for IVDU, as the parents have not appealed from the IHO's finding that IVDU was not an appropriate placement for the student.