



The University of the State of New York

The State Education Department

State Review Officer

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No. 19-133

Application of a STUDENT WITH A DISABILITY, by his parents, for review of a determination of a hearing officer relating to the provision of educational services by the New York City Department of Education

Appearances:

Kule-Korgood & Associates, PC, attorneys for petitioners, by Joseph DaProcida, Esq.

Howard Friedman, Special Assistant Corporation Counsel, attorneys for respondent, by Cynthia Sheps, 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 did not address the appropriateness of the educational program recommended by the respondent (the district) for the student for the 2017-18 school year and which denied their request to be reimbursed for their son's tuition costs at the Summit School (Summit) for the 2018-19 school year. The appeal must be sustained in part.

II. Overview—Administrative Procedures

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

§§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[l]).

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

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

III. Facts and Procedural History

According to the evidence in the hearing record, as a young child the student exhibited a speech delay for which he received services through the early intervention program and the Committee on Preschool Special Education (Tr. pp. 117-19; Parent Ex. C at pp. 1, 5). The student attended a district public school for kindergarten in an integrated co-teaching (ICT) "class" and, subsequently, the parents placed him in a general education setting within a private, religious school, which he attended for two years and reportedly did not do well, had behavioral outbursts, refused to do work, and threatened self-injury (Tr. pp. 119, 122; Parent Ex. C at pp. 1, 5). While

attending the private school, the student received therapy outside of school for about a year due to his frustration and anxiety, was referred for a psychiatric evaluation, and received the diagnosis of attention deficit hyperactivity disorder (ADHD) (Parent Exs. C at pp. 1-2, 5). The student reportedly entered the fourth grade (2015-16 school year) in a general education class setting in a district public school but began attending a 12:1 special class setting in or around November 2015 (Tr. p. 122; Parent Exs. C at pp. 1, 5; H at p. 1). During the 2016-17 school year (fifth grade), the student reportedly continued in the 12:1 special class until, based on an IEP developed in December 2016, he was moved to an "ICT class" in January 2017 (Tr. p. 122; Parent Exs. C at pp. 1, 5; H at p. 1).¹ Beginning in May 2017, the student received therapeutic services for emotional and behavioral concerns outside of school (Parent Ex. G at p. 1).

For the 2017-18 school year (sixth grade), the student started attending a district middle school (see Parent Exs. E at p. 1; F; H at p. 2; Dist. Ex. 5 at p. 1). In November 2017, a CSE developed an IEP for the student and recommended ICT and counseling services (see Parent Ex. H at p. 2; Dist. Ex. 5 at p. 1; see also Dist. Exs. 1 at p. 2; 4 at p. 1; 6 at p. 1).² In January and February 2018, the district conducted a reevaluation of the student that consisted of a January 2018 classroom observation, a February 2018 psychoeducational evaluation, and a February 2018 "Considerations of a Student's Need for Positive Behavior Supports, FBA, or a BIP" (Dist. Exs. 4 at pp. 1-3; 5 pp. 1-8; 7 at pp. 1-2).

On February 14, 2018, the CSE convened to discuss the student's educational needs and develop his IEP (Dist. Exs. 1 at pp. 1, 16; 2 at p. 1). Finding the student eligible for special education and related services as a student with an other health-impairment, the February 2018 CSE recommended that the student attend a general education class placement with ICT services for math, English language arts (ELA), social studies, and sciences and one 30-minute session per week of both individual and group counseling services (Dist. Exs. 1 at pp. 1, 11, 16).³ As supports for the student's management needs, the CSE recommended small group instruction, on-task focusing prompts, sentence starters, and graphic organizers (id. at p. 6). According to the IEP, the CSE determined that the student did not require "strategies, including positive behavioral interventions, supports [or] other strategies to address behaviors that impede the student's learning or that of others" and did not require a behavioral intervention plan (BIP) (id. at pp. 6-7). The CSE also recommended five annual goals, several testing accommodations, and a coordinated set of transition activities (id. at pp. 7-10, 12-14).

According to the February 2018 IEP, the student's mother shared with the CSE that the student's behavior at home was problematic and that he was receiving behavioral therapy to address his "issues" (Dist. Ex. 1 at p. 6). She expressed that she also had concerns about the

¹ The December 2016 IEP was not included in the hearing record.

² The November 2017 IEP was not included in the hearing record.

³ The student's eligibility for special education as a student with an other health-impairment is not in dispute (see 34 CFR 300.8[c][9]; 8 NYCRR 200.1[zz][10]).

student's "lack of friendships in school" (*id.*). In addition, the student's mother shared that she was exploring moving the student to Summit to address his needs (*id.*).⁴

In a prior written notice dated February 28, 2018, the district summarized the program and placement recommended by the February 2018 CSE, as well as the reports relied upon by the CSE in reaching its recommendations (Dist. Ex. 3 at p. 1). The student attended the district middle school for the remainder of the 2017-18 school year (*see* Parent Ex. F).

In an August 22, 2018 letter to the district, the parents stated their dissatisfaction with the February 2018 IEP and the district's failure to implement the IEP for the remainder of the 2017-18 school year, as well as their intention to enroll the student at Summit and pursue public funding for the costs of the tuition (Parent Ex. H at pp. 1-3). According to the parents, during the February 2018 CSE meeting, the student's mother requested that the student be placed in a State-approved nonpublic school "that could address his emotional and social needs while also providing academically appropriate work" but that, instead, the CSE continued the inappropriate "ICT program" for the student (*id.* at p. 2).

The student was enrolled in and began attending Summit in the fall 2018 (Parent Exs. J at pp. 1-8; L at pp. 1-2; M at pp. 1-3).

A. Due Process Complaint Notice

By due process complaint notice dated September 28, 2018, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2017-18 and 2018-19 school years (*see* Parent Ex. A at pp. 1-7).⁵ For both school years, the parents broadly asserted that the district failed to include the parents in the development of the student's IEPs, failed to "conduct and consider adequate evaluations," failed to offer the student "a procedurally valid and substantively appropriate IEP and placement recommendations," and failed to provide proper prior written notices (*id.* at p. 1).

More specifically with regard to the December 2016 CSE process, the parents alleged that the December 2016 CSE was not validly constituted as it failed to include a qualified district representative who was aware of and had the authority to recommend the full continuum of services available to the student (Parent Ex. A at p. 2). The parents also alleged that the CSE failed to include the parents in the evaluation process, failed to review existing data and decide "jointly" what additional evaluations were required, failed to conduct an updated speech-language evaluation, and conducted a December 2016 educational evaluation that, on its own, was insufficient to reflect the full scope of the student's needs (*id.* at p. 2).

With respect to the resultant December 2016 IEP, the parents averred that it was substantively inappropriate in that the present levels of performance were insufficient to provide an adequate baseline from which to guide instruction and determine progress, and the annual goals

⁴ The Commissioner of Education has approved Summit as a school with which school districts may contract to instruct students with disabilities (*see* Tr. p. 95; *see also* 8 NYCRR 200.1[d], 200.7).

⁵ The parents also alleged violations of section 504 of the Rehabilitation Act of 1973 (section 504) and the Americans with Disabilities Act (ADA) (Parent Ex. A at p. 1).

listed within the December 2016 IEP were vague and unmeasurable, failed to address all the student's areas of need, and were predetermined (Parent Ex. A at p. 3). Also, the parents argued that the district failed to conduct a functional behavioral assessment (FBA) or develop a BIP for the student and that the December 2016 IEP did not otherwise address the student's behavioral needs, notwithstanding that his behaviors were "his most significant area of need" (id. at pp. 2, 3). The parents further alleged that the December 2016 IEP, including the identified management needs, failed to include sufficient supports and strategies to address the student's language, social/emotional, behavioral, or academic needs (id. at p. 3). The parents further argued that the CSE recommended a general education setting for the student despite the fact that the student had "struggle[d] academically, socially and behaviorally" in a general education setting in the past (id. at p. 2). Overall, the parents asserted that the December 2016 IEP failed to provide for "the type, intensity, and level of instruction and support that [the student] require[d]" (id. at p. 3).

Regarding implementation of the December 2016 IEP, the parents alleged that, beginning in January 2017 and continuing into the beginning of the 2017-18 school year, the student was overwhelmed and did not make academic progress in the general education class with ICT services and that his "social/emotional functioning deteriorated" (Parent Ex. A at p. 3).

Next, the parents offered similar allegations in challenging the November 2017 CSE process and its resultant IEP (see Parent Ex. A at pp. 3-4). The parents again contested the composition of the CSE (i.e., attendance of a qualified district representative) (id. at p. 4). The parents alleged that the district failed to involve the parents in the evaluation process, failed to review existing data and decide "jointly" what additional evaluations were required, failed to conduct an updated speech-language evaluation, and conducted another educational evaluation in November 2017 that, on its own, was insufficient to reflect the full scope of the student's needs (id. at p. 3). The parents further alleged that, although they provided the November 2017 CSE with the April 2017 private neuropsychological evaluation report, it was not reviewed or "seriously considered" by the CSE and was not even listed in the district's prior written notice as an evaluation or report used in developing the student's program recommendation (id. at p. 3).

Regarding the resultant November 2017 IEP, the parents again set forth allegations challenging the present levels of performance (lack of baseline), annual goals (vague, unmeasurable, not aligned with the student's needs, and predetermined), and appropriateness of supports and strategies (including management needs) (Parent Ex. A at p. 4). The parents also alleged that the district failed to conduct an FBA or develop a BIP for the student and that the November 2017 IEP did not otherwise address the student's behavioral needs, notwithstanding the student's "social/emotional regression and intent to self-harm" (id. at p. 4). In addition, the parents alleged that the November 2017 CSE inappropriately continued the recommendation for ICT services, with only counseling as a related service, and opined that the student did not fit within any of the district's "recommended programs" (id.). The parents further alleged that the IEP failed to provide the type, intensity, and level of instruction and support which the student required (id.).

The parents alleged that the district failed to implement the November 2017 IEP by not providing the small group instruction noted in the management needs section of the November 2017 IEP (Parent Ex. A at p. 4). Further, the parents asserted that the student's grades, ability to attend, and skills in several areas suffered in the inappropriate placement (id. at pp. 4-5).

Finally, the parents challenged the February 2018 CSE process and its resultant IEP raising similar allegations as with the prior December 2016 and November 2017 IEPs (see Parent Ex. A at pp. 5-6). The parents set forth claims regarding composition of the February 2018 CSE (attendance of a qualified district representative) and sufficiency and consideration of evaluative information (involvement of the parents, review of existing data, failure to consider the April 2017 private neuropsychological evaluation report, and lack of an updated speech-language evaluation) (id.). As to the latter claim, the parents added that the district failed to conduct a classroom observation of the student and that, while the district completed a February 2018 psychoeducational evaluation, the evaluation was insufficient to reflect all of the student's areas of deficit and need (id. at p. 5). In addition, the parents alleged that the February 2018 CSE predetermined the student's IEP pursuant to district policy rather than the student's needs (id. at p. 6).

Regarding the resultant February 2018 IEP, the parents again raised issues with the present levels of performance (lack of baseline), annual goals (vague, unmeasurable, not aligned with needs, and predetermined), appropriateness of supports and strategies (including management needs), and the lack of an FBA and a BIP or other behavioral supports (Parent Ex. A at pp. 5, 6). The parents alleged that the February 2018 CSE again inappropriately recommended ICT and counseling services, that the student did not fit within any of the district's "recommended programs," and that the IEP failed to include sufficient supports and strategies to address the student's needs (id. at pp. 5, 6).

The parents further alleged that the district failed to implement the February 2018 IEP by not providing the small group instruction noted in the management needs section of the IEP and that the student's grades continued to suffer and he failed to make progress in "his social/emotional and behavioral/attentional functioning (Parent Ex. A at p. 6).

As relief, the parents requested that the CSE refer the student to the central based support team (CBST) to locate a State-approved nonpublic school for the student or that the district be required to fund the costs of the student's attendance at a State-approved nonpublic school (such as Summit) (Parent Ex. A at p. 6). Additionally, the parents requested an unidentified amount of compensatory education for the district's failure to recommend an appropriate program for the 2017-18 school year and a declaratory finding that the district failed to provide the student a FAPE (id. at pp. 6-7).

B. Impartial Hearing Officer Decision

On March 18, 2019 the parties proceeded to an impartial hearing, which concluded on May 28, 2019, after two days of proceedings (see Tr. pp. 1-154). In a decision dated November 14, 2019, the IHO found that the district offered the student a FAPE for the 2018-19 school year (IHO Decision at pp. 23-24). Initially, the IHO noted that, during the impartial hearing, the parents withdrew their claim for compensatory education services (id. at p. 4; see Tr. pp. 6, 15).⁶

⁶ The IHO's decision was not paginated (see generally IHO Decision). For ease of reference, citations to the IHO decision will reflect pages numbered "1" through "25," with the cover page identified as page "1."

As for the February 2018 CSE process, the IHO found that the CSE was duly constituted (IHO Decision at p. 18). The IHO also found that the February 2018 IEP accurately reflected the February 2018 psychological evaluation report (*id.*). The IHO noted that the parties agreed that the April 2017 private neuropsychological evaluation report was available to and considered by February 2018 CSE, but acknowledged the parents' position that it was "not given particular attention" (*id.* at pp. 18-19). However, the IHO found that the February 2018 IEP incorporated findings and recommendations from the April 2017 neuropsychological evaluation report, including the call for "a small, highly structured, emotionally supportive educational setting" (*id.* at pp. 19-20).

Next, the IHO summarized evidence about the student's behavioral and academic progress leading up to the February 2018 CSE meeting, including testimony from the school psychologist, which the IHO found credible (IHO Decision at pp. 20-21). The IHO further noted testimony from the school psychologist that: the February 2018 IEP's present levels of performance were based upon the school psychologist's testing, the classroom observation, and the guidance counselor's input; that the teacher who attended the CSE meeting agreed with the recommendations for ICT services and counseling; and that the CSE determined an FBA was not necessary in light of the student's progress (*id.* at p. 21).⁷

With regard to the district's ability to implement the IEP during the 2018-19 school year, the IHO found that the school psychologist, in uncontroverted testimony, stated that she was familiar with the assigned public school, that it had "multiple ICT class settings," and there was a seat available for the student for the 2018-19 school year (IHO Decision at p. 23).

Based on the foregoing, the IHO concluded that the February 2018 IEP was reasonably calculated to enable the student to make progress appropriate in light of his circumstances and, therefore, denied the parents' request for relief (*see* IHO Decision at p. 23).

IV. Appeal for State-Level Review

The parents appeal, arguing that the IHO erred in failing to determine that the district denied the student a FAPE for the 2017-18 and 2018-19 school years and that the parents were entitled to the costs of the parent's unilateral placement of the student at Summit for the 2018-19 school year.

First, the parents argue generally that the IHO applied incorrect legal standards and issued improper rulings and directives during the impartial hearing. Specifically, the parents contend that the IHO's exclusion of the district's October 2015 psychoeducational evaluation from evidence, the IHO's direction to the parent to narrow her testimony to the 2017-18 and 2018-19 school years, and the IHO's efforts to curtail parent testimony due to calendar volume and time constraints denied the parents a fair opportunity to present their case, thus depriving them of their due process rights.

⁷ The IHO further noted that the clinical director at Summit testified that Summit did not develop an individual BIP for the student although the school had a "schoolwide behaving management system" (IHO Decision at pp. 21-22).

Regarding the 2017-18 school year, the parents argue that the IHO erred in failing to make any rulings as to whether the district met its burden regarding its provision of a FAPE to the student. The parents further allege that the IHO erred in finding that the district met its burden to show that it offered the student a FAPE for the 2018-19 school year.

Turning to the specific claims before the IHO, the parents argue that the IHO should have found that the district neglected to conduct sufficient evaluations leading up to the CSEs' recommendations for ICT services for the student for the 2017-18 and 2018-19 school years. Further, that parents assert that the IHO should have found that the February 2018 CSE failed to properly consider the April 2017 private neuropsychological evaluation. Next, the parents argue that the IHO erred in failing to find that the annual goals in the February 2018 IEP were insufficient. With regard to the student's behavioral needs, the parents assert that the IHO incorrectly determined that, as of February 2018, the district had sufficient evidence to support its decision that an FBA was not needed. Further, the parents contend that the IHO incorrectly found that the district met its burden to show that the ICT services recommended for the student for the 2018-19 school year were appropriate. The parents also argue that the IHO applied an incorrect legal standard in assessing whether the assigned public school site was appropriate for the student for the 2018-19 school year and, therefore, erroneously found the assigned school to be appropriate.

As a final matter, the parents argue that the IHO erred in failing to make any rulings as to whether Summit was an appropriate unilateral placement for the student for the 2018-19 school year and whether equitable considerations supported the parents' request for relief.

For relief, the parents request that the IHO's decision be reversed in its entirety, that the district be found to have denied the student a FAPE for the 2017-18 and 2018-19 school years, that the district be required to amend the student's IEP to recommend a State-approved nonpublic school, and that the district be required to reimburse the parents for the costs of the student's attendance at Summit for the 2018-19 school year.

In an answer, the district generally responds to the parent's allegations and argues that the IHO's decision should be upheld in its entirety. In particular, with respect to the 2017-18 school year, the district argues that the IHO correctly declined to make findings regarding the 2017-18 school year because the parent did not pursue relief relating thereto. In addition, the district argues that the parents' request for review should be rejected as it violates State regulation by exceeding the ten-page limit and objects to the parents' submission of additional evidence with their request for review.⁸

⁸ State regulation provides that a "request for review, answer, answer with cross-appeal, answer to cross-appeal, or reply shall not exceed 10 pages in length" (8 NYCRR 279.8[b]), and that all pleadings "be signed by an attorney, or by a party if the party is not represented by an attorney" (8 NYCRR 279.8[a][4]). Generally, the failure to comply with the practice requirements of Part 279 of the State regulations may result in the rejection of the submitted documents or the dismissal of a request for review by an SRO (8 NYCRR 279.8[a]; 279.13; see M.C. v. Mamaroneck Union Free Sch. Dist., 2018 WL 4997516, at *23 [S.D.N.Y. Sept. 28, 2018] [upholding dismissal of allegations set forth in an appeal to an SRO for "failure to identify the precise rulings presented for review and [failure] to cite to the pertinent portions of the record on appeal, as required in order to raise an issue" for review on appeal]; T.W. v. Spencerport Cent. Sch. Dist., 891 F. Supp. 2d 438, 440-41 [W.D.N.Y. 2012]

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

[upholding dismissal of a petition for review that was untimely and exceeded page limitations]). However, "judgments rendered solely on the basis of easily corrected procedural errors or 'mere technicalities,' are generally disfavored" (J.E. v. Chappaqua Cent. Sch. Dist., 2015 WL 4934535, at *4-*6 [S.D.N.Y. Aug. 17, 2015], quoting Foman v. Davis, 371 U.S. 178 [1962]). Here, although the attorney's signature and attorney information appear on page 11 of the request for review, I decline, as a matter within my discretion, to dismiss the request for review on this ground.

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

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).⁹

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

⁹ The Supreme Court has stated that even if it is unreasonable to expect a student to attend a regular education setting and achieve on grade level, the educational program set forth in the student's IEP "must be appropriately ambitious in light of his [or her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives" (Andrew F., 137 S. Ct. at 1000).

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--Conduct of the Impartial Hearing

The parents argue that the IHO's exclusion of the October 2015 psychoeducational evaluation from evidence and the narrowing and curtailing of the testimony of the student's mother denied the parents a fair opportunity to present their case and deprived them of their due process rights.

State regulations set forth the procedures for conducting an impartial hearing and address, in part, minimal process requirements that shall be afforded to both parties (8 NYCRR 200.5[j]). Among other process rights, each party shall have an opportunity to present evidence, compel the attendance of witnesses, and to confront and question all witnesses (8 NYCRR 200.5[j][3][xii]). Furthermore, each party "shall have up to one day to present its case" (8 NYCRR 200.5[j][3][xiii]). State regulation further provides that the IHO "shall exclude any evidence" that he or she determines to be irrelevant, immaterial, unreliable, or unduly repetitious" and "may limit examination of a witness by either party whose testimony the impartial hearing officer determines to be irrelevant, immaterial or unduly repetitious" (8 NYCRR 200.5[j][3][xii][c], [d]).

First, with respect to the October 2015 psychoeducational evaluation, the IHO noted that the district had no objection to admission of the document but requested that the parents present a proffer regarding its relevance to the issues raised for determination at the impartial hearing (see Tr. p. 22). Counsel for the parents indicated that the purpose was to present "a history of [the student's] behavior that should have put the District on notice as to [the student's] need for appropriate behavior interventions" (id.). The IHO found that, based on the "snapshot" analysis to be applied when examining the development of the February 2018 IEP, and in light of the "more updated and more comprehensive" April 2017 private neuropsychological evaluation, the October 2015 psychoeducational evaluation, conducted "almost three years" prior to the CSE meeting would not "have a lot of value in terms of [showing] where the Student was at three years later" (Tr. pp. 22-23). The IHO further opined that there would likely be testimony that would "give some background information regarding the Student" (Tr. p. 23).

On appeal, the parents argue that the October 2015 psychoeducational evaluation had particular relevance since it set forth an assessment conducted by a district school psychologist, highlighted the student's attentional and behavioral needs, established a "benchmark" to show whether or not the student made progress in the areas of attention and behavior over time, and presented a contrast to the "barebones" February 2018 psychoeducational evaluation conducted by district (Req. for Rev. at p. 9). For reasons unknown, the parents did not present these specific rationales during the impartial hearing when the IHO specifically asked for a proffer regarding the relevance of the October 2015 psychoeducational evaluation (see Tr. p. 22). In any event, as set

forth below, it is sufficiently established in the hearing record, without considering the October 2015 psychoeducational evaluation, that the student had a history of behavioral needs about which the district was aware (see, e.g., Parent Ex. C at pp. 1-2, 5-6; Dist. Ex. 5 at p. 1). Accordingly, I see no reason to disturb the IHO's exercise of his discretion to exclude the document on the basis that it was irrelevant and/or repetitious (8 NYCRR 200.5[j][3][xii][c]).¹⁰

With respect to the parents' allegations about the limits the IHO placed on the testimony of the student's mother, the hearing record reflects that the IHO acknowledged that the student's mother "ha[d] a lot to say about the child" but indicated that the proceedings were intended to examine "a snapshot in time" and that he did not "know how helpful" it would be for the parent to present testimony about the student's educational history back through elementary school (Tr. pp. 119-20, 124-25). In response to the parents' attorney's explanation that the testimony would show that the district should have been aware of the student's history, the IHO indicated that such background could be discussed in the context of the disputed CSE meeting, such as through "what documents were reviewed, who was present, what was said" (Tr. p. 120). On appeal, the parents allege that they "were precluded from offering relevant evidence regarding the nature and severity of [the student's] problem behaviors, deficits, and the success or failure of different educational programs and strategies" (Req. for Rev. at p. 9). Contrary to the parents' argument and as discussed below, the hearing record is sufficiently developed with respect to information available to the February 2018 CSE, which included information about the student's needs and his educational history, including his struggles in different classroom environments (see Parent Ex. C at pp. 1-2, 5-6; Dist. Ex. 1 at pp. 2-5). Moreover, the student's mother did, in fact, present testimony specific to the student's struggles in a general education class setting in a private school and in an ICT setting in district schools during kindergarten and again in fifth and sixth grades, as well as testimony about the opinions of district staff that the special class the student attended for a portion of elementary school was not a fit given the student's academic abilities (see Tr. pp. 122-26).

On appeal, the parents also allege that the IHO placed limits on the testimony of the student's mother due to time constraints and calendar volume, pointing to a late start to the proceedings on May 28, 2019 and the fact that parties to other impartial hearings were waiting to use the hearing room. However, the IHO explained the rationale for his limits, discussed directly above, and, although the IHO did reference the "late start" and that "other attorneys" were looking into the hearing room "because they want[ed] their cases called" (Tr. p. 125), this is insufficient to show that the IHO's primary motivation in limiting the testimony was other than to limit the scope of the impartial hearing to nonduplicative and relevant testimony (see 8 NYCRR 200.5[j][3][xii][d]). Further, there is no indication that the IHO precluded the parents from presenting testimony from additional witnesses either that day or on an additional hearing date (see Tr. pp. 142-43).

¹⁰ Given this determination, the parent's request that the October 2015 psychoeducational evaluation be considered on appeal as additional evidence is denied. The parents' request for consideration of the other document submitted with their request for review is similarly denied as the document is unnecessary in order to render a decision in this matter (see, e.g., Application of a Student with a Disability, Appeal No. 08-030; Application of a Student with a Disability, Appeal No. 08-003; see also 8 NYCRR 279.10[b]; L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 488-89 [S.D.N.Y. 2013] [holding that additional evidence is necessary only if, without such evidence, the SRO is unable to render a decision]).

Based on the foregoing, a review of the hearing record does not support the parents' allegation that the IHO unduly limited the evidence presented during the impartial hearing or otherwise impeded the parents' right to due process.

B. 2017-18 School Year

The parents argue that the IHO erred in failing to rule on their allegations related to the district's provision of a FAPE to the student for 2017-18 school year. The district argues that the parents withdrew the specific relief, compensatory education, for these claims at the impartial hearing and did not refer to these claims in their closing statement and, therefore, the IHO did not err by not addressing the parents' allegations related to the 2017-18 school year.

A dispute between parties must at all stages be "real and live," and not "academic," or it risks becoming moot (Lillbask v. State of Conn. Dep't of Educ., 397 F.3d 77, 84 [2d Cir. 2005]; see Toth v. City of New York Dep't of Educ., 720 Fed. App'x 48, 51 [2d Cir. Jan. 2, 2018]; F.O. v. New York City Dep't of Educ., 899 F. Supp. 2d 251, 254 [S.D.N.Y. 2012]; Patskin v. Bd. of Educ. of Webster Cent. Sch. Dist., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]; Student X v. New York City Dep't of Educ., 2008 WL 4890440, at *12 [E.D.N.Y. Oct. 30, 2008]; J.N. v. Depew Union Free Sch. Dist., 2008 WL 4501940, at *3-*4 [W.D.N.Y. Sept. 30, 2008]; see also Coleman v. Daines, 19 N.Y.3d 1087, 1090 [2012]; Hearst Corp. v. Clyne, 50 N.Y.2d 707, 714 [1980]). In general, cases dealing with issues such as desired changes in IEPs, specific placements, and implementation disputes may become moot at the end of the school year because no meaningful relief can be granted (see, e.g., V.M. v. N. Colonie Cent. Sch. Dist., 954 F. Supp. 2d 102, 119-21 [N.D.N.Y. 2013]; M.S. v. New York City Dep't of Educ., 734 F. Supp. 2d 271, 280-81 [E.D.N.Y. 2010]; Patskin, 583 F. Supp. 2d at 428-29; J.N., 2008 WL 4501940, at *3-*4; but see A.A. v. Walled Lake Consol. Schs., 2017 WL 2591906, at *6-*9 [E.D. Mich. June 15, 2017] [considering the question of the "potential mootness of a claim for declaratory relief"]). In most instances, a claim for compensatory education will not be rendered moot (see Mason v. Schenectady City Sch. Dist., 879 F. Supp. 215, 219 [N.D.N.Y. 1993] [demand for compensation to correct past wrongs remains as a live controversy even if parents are satisfied with student's current placement]; see also Toth, 720 Fed. App'x at 51).

In addition, a claim may not be moot despite the end of a school year for which the student's IEP was written, if the conduct complained of is "capable of repetition, yet evading review" (see Honig v. Doe, 484 U.S. 305, 318-23 [1987]; Toth, 720 Fed. App'x at 51; Lillbask, 397 F.3d at 84-85; Daniel R.R. v. State Bd. of Educ., 874 F.2d 1036, 1040 [5th Cir. 1989]). The "capable of repetition, yet evading review" exception applies only in limited situations (City of Los Angeles v. Lyons, 461 U.S. 95, 109 [1983]), and is severely circumscribed (Knaust v. City of Kingston, 157 F.3d 86, 88 [2d Cir. 1998]). It must be apparent that "the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration" (Murphy v. Hunt, 455 U.S. 478, 482 [1982]; see Knaust, 157 F.3d at 88).

Given the parents' withdrawal of their request for a remedy of compensatory education during the impartial hearing (see Tr. pp. 6, 15), the only relief sought by the parents with respect to the 2017-18 school year is declaratory in nature (see Parent Ex. A at pp. 6-7; Req. for Rev. at p. 10). In light of the analysis of the claims pertaining to the 2018-19 school year set forth herein, most of which resemble the parents' claims raised relating to the 2017-18 school year (see Parent

Ex. A at pp. 2-6), there is little to no benefit that might arise from issuing a judgment regarding the 2017-18 school year (see Alan H. v Hawaii, 2007 WL 2790738, at *6 [D Haw Sept. 24, 2007] ["The mootness doctrine may be invoked to deny a declaratory judgment where the benefits of issuing such a judgment are too slight to justify the decision"]; see also A.A., 2017 WL 2591906, at *6-*9 [noting that "when considering the potential mootness of a claim for declaratory relief, [t]he question is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issue of declaratory judgment"], quoting Super Tire Eng'g Co. v. McCorkle, 416 U.S. 115, 122 [1974]). Similarly, although the parents' claims pertaining to the 2017-18 school year may have been "capable of repetition, but evading review" if alleged in isolation, here the parents have attained review of the repeated claims in the context of the 2018-19 school year and, therefore, the controversy is resolved herein, subject to judicial review, and the exception is not applicable.

Based on the above, the allegations addressed in this decision are limited to those related to the student's 2018-19 school year. Accordingly, the remainder of this decision will focus on the February 2018 IEP, which is the IEP that was in effect when the parent made the decision to place the student at Summit for the 2018-19 school year (see Parent Ex. H; Dist. Ex. 1). However, prior to reaching the appropriateness of the February 2018 CSE process and the resultant February 2018 IEP as they relate to the 2018-19 school year, the parents' due process complaint notice also included allegations related to the implementation of the February 2018 IEP during the 2017-18 school year as the February 2018 IEP was to be implemented beginning March 8, 2018 (see Parent Ex. A at p. 6; Dist. Ex. 1 at p. 11). The IHO appears to have treated this claim as an allegation that the school to which the student was assigned for the 2018-19 school year could not implement the February 2018 IEP and found that the district presented testimony that it could (IHO Decision at pp. 22-23). On appeal the parents argue that the IHO applied the wrong legal standard in evaluating the capacity of the public school to implement the February 2018 IEP; however, as discussed, the parents' implementation allegations related to the 2017-18 school year and the parents did not make allegations regarding the assigned school's capacity to implement the student's IEP for the 2018-19 school year. As the parents' claims related to the 2017-18 school year are moot and the parents did not challenge implementation for the 2018-19 school year in their due process complaint notice, I will not further address the parents' arguments related to implementation on appeal.

C. February 2018 CSE Process—Sufficiency and Consideration of Evaluative Information

The parents argue that the IHO erred in failing to find that the district did not conduct sufficient evaluations leading up to the February 2018 CSE meeting and that the CSE failed to properly consider the April 2017 private neuropsychological evaluation report.

An initial evaluation of a student must include a physical examination, a psychological evaluation, a social history, a classroom observation of the student and any other "appropriate assessments or evaluations," as necessary to determine factors contributing to the student's disability (8 NYCRR 200.4[b][1]). A district must conduct an evaluation of a student where the educational or related services needs of a student warrant a reevaluation or if the student's parent or teacher requests a reevaluation (34 CFR 300.303[a]; 8 NYCRR 200.4[b][4]); however, a district

need not conduct a reevaluation more frequently than once per year unless the parent and the district agree otherwise (34 CFR 300.303[b][1]; 8 NYCRR 200.4[b][4]). 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).

In developing the recommendations for a student's IEP, the CSE must consider the results of the initial or most recent evaluation; the student's strengths; the concerns of the parents for enhancing the education of their child; the academic, developmental, and functional needs of the student, including, as appropriate, the student's performance on any general State or district-wide assessments as well as any special factors as set forth in federal and State regulations (34 CFR 300.324[a]; 8 NYCRR 200.4[d][2]). It is well settled that a CSE must consider privately-obtained evaluations, provided that such evaluations meet the district's criteria, in any decision made with respect to the provision of a FAPE to a student (34 CFR 300.502[c]; 8 NYCRR 200.5[g][1][vi]). However, "consideration" does not require substantive discussion, that every member of the CSE read the document, or that the CSE accord the private evaluation any particular weight (T.S. v. Bd. of Educ. of the Town of Ridgefield, 10 F.3d 87, 89-90 [2d Cir. 1993]; G.D. v. Westmoreland Sch. Dist., 930 F.2d 942, 947 [1st Cir. 1991]; but see A.M. v. New York City Dep't of Educ., 845 F.3d 523, 544-45 [2d Cir. 2017] [finding that recommendations included in private evaluation created a consensus as to what the student required where the district did not conduct any evaluations of its own to call into question the opinions and recommendations contained in the private evaluations]).

According to the February 2018 prior written notice that described the actions of the February 2018 CSE in developing the student's IEP, the CSE relied upon a January 2018 classroom observation, a February 2018 psychoeducational evaluation, and results from the administration of State assessments to the student in the spring in ELA and math (Dist. Ex. 3 at p. 1). In addition

to the documents outlined in the prior written notice, the district school psychologist testified that the February 2018 CSE also reviewed the April 2017 private neuropsychological evaluation, teacher information provided prior to the meeting, and parent and teacher input (Tr. pp. 29-30, 40, 48). According to the school psychologist the CSE discussed the evaluations and reports with the parent at the February 2018 meeting (Tr. pp. 31-32).

Turning first to the content of the April 2017 private neuropsychological evaluation, the neuropsychologist indicated that the student's school history included difficulties in focusing and staying on task, behavioral outbursts, work refusal, and threats of self-injury (Parent Ex. C at p. 1). The neuropsychologist found the student's verbal comprehension and visual spatial abilities to be in the above average ranges and his working memory, fluid reasoning, and processing speed in the average range, as measured by the Wechsler Intelligence Scale for Children – Fifth Edition (WISC-V) (*id.* at pp. 3, 7). The neuropsychologist reported that the student's full-scale IQ was in the "bright normal range" (*id.* at p. 3). According to the April 2017 evaluation report, in order to get an objective picture of the student's attention, the neuropsychologist administered a continuous performance task, the Test of Variables of Attention-8 (TOVA-8) (*id.*). The neuropsychologist reported that the student's performance on the TOVA-8 fell in the abnormal range and found the student to be quite impulsive under low levels of stimulation, his response times to be very slow and excessively variable, and his attention variable throughout the protocol (*id.*). The neuropsychologist indicated that he gave the student additional cognitive measures of executive function beyond attention, which measured flexibility, planning, and organizational skills and found that the student demonstrated "less than adequate scores" when he initially had to shift cognitive strategies, was unable to complete the more complex items, and demonstrated difficulty with time management and maintaining his cognitive set (*id.* at pp. 3-4). The student lost track of the basic premises of the tasks he was attempting to complete (*id.* at p. 4). According to the neuropsychologist, the administration of assessments of memory showed the student had an excellent fund of information for a child his age, but that the student encountered variability on short-term working memory tasks (*id.*). Referring to administration of the Wechsler Individual Achievement Test, Third Edition (WIAT-III), the neuropsychologist indicated that the student had "no difficulty" with basic spelling and writing skills, his math skills were "acceptable," his word recognition skills and phonetic decoding skills were "somewhat above age and grade expectancy," and his reading comprehension was variable depending on whether the student could access the material after it was read (*id.* at pp. 4-5, 9). In order to procure a subjective picture of the student's behavior and adjustment from a parental perspective, the parent completed the Behavior Assessment Scale for Children-3 (BASC-3) – Parent Rating Scale, which reflected some degree of mood and behavioral dysregulation, difficulty with executive functions, and problematic attention, behavioral and emotional control, and problem solving (*id.* at p. 5).

Within the April 2017 private neuropsychological evaluation, the neuropsychologist noted that, while medication for the student's attention may not be the "first order of business," he felt that the student may benefit from some medical intervention to help with his anxiety and mood (Parent Ex. C at p. 6). The neuropsychologist recommended that the student's family seek psychiatric consultation and stated that both the student and his family would need psychological and behavioral interventions: the student, in order to develop some coping strategies; and his family, in order to develop appropriate strategies in managing his issues at home (*id.*). The neuropsychologist added that an appropriate educational setting would go a long way towards alleviating the student's current distress (*id.*). The neuropsychologist opined that, since the student

had not found success in either a "self-contained special education program" or an "ICT [p]rogram," the student would benefit from a "small, highly-structured, emotionally supportive educational setting" (*id.*).

The parents argue that the district failed to sufficiently consider the April 2017 private neuropsychological evaluation, which was not meaningfully incorporated in the February 2018 IEP. As noted above, the April 2017 private neuropsychological evaluation report was not among the reports listed in the prior written notice as documents relied on by the February 2018 CSE (Dist. Ex. 3 at p. 1). However, the district school psychologist testified that the private evaluation was, in fact, relied on by the February 2018 CSE and was reflected in the student's IEP and that it was an error that the private evaluation was not listed on the prior written notice (Tr. pp. 30, 48-49). The February 2018 IEP explicitly references the April 2017 private neuropsychological evaluation, indicating that it included a diagnosis of ADHD with comorbidity of anxiety disorder, which reflected some underlying obsessive traits (Dist. Ex. 1 at p. 6). The school psychologist testified that the April 2017 evaluation report provided by the parent included testing results which "very much aligned" with the testing she recently conducted (Tr. p. 30). In addition, although the February 2018 CSE did not adopt the recommendation in the April 2017 private neuropsychological evaluation for a "small, highly-structured, emotionally supportive educational setting" (Parent Ex. C at p. 6), the school psychologist testified that this was because the private evaluation had been conducted almost a year prior to the February CSE meeting when the student was in the fifth grade and at a different school (Tr. pp. 49-52). Further, in order to satisfy its obligation to consider the private evaluation, the CSE was not required to adopt the recommendations of the neuropsychologist (*J.C.S. v. Blind Brook-Rye Union Free Sch. Dist.*, 2013 WL 3975942, at *11 [S.D.N.Y. Aug. 5, 2013] [holding that "the law does not require an IEP to adopt the particular recommendation of an expert; it only requires that that recommendation be considered in developing the IEP"]; *Watson v. Kingston City Sch. Dist.*, 325 F. Supp. 2d 141, 145 [N.D.N.Y. 2004] [holding that a CSE's recommendation is not necessarily rendered inappropriate by "[t]he mere fact that a separately hired expert has recommended different programming"], *aff'd*, 142 Fed. App'x 9 [2d Cir. July 25, 2005]). Accordingly, the parents' claim that the CSE failed to consider the April 2017 private neuropsychological evaluation is without merit.

Turning to the content of the evaluations conducted by the district and relied upon by the February 2018 CSE, the February 2018 psychoeducational evaluation included a description of the reason for referral and relevant background, administration of the WISC-V to assess the student's cognitive abilities, administration of the WIAT-III to assess the student's academic achievement, a student interview, and assessment session behavior observations (Dist. Ex. 5 at p. 1). As part of her behavior observations, the psychologist noted that the student was pleasant and bright and enjoyed the one-to-one attention that was provided during the assessment (*id.*). The psychologist reported that the student was "a little careless in his work" and rushed through his responses in some areas (*id.*). According to the psychologist, the student's inflexibility became apparent on a writing task, where the student struggled with an open-ended query and needed the directions to be provided very clearly for him (*id.*). She noted that the student did not appear to struggle with the rest of the assessment, which was more structured (*id.*). The psychologist noted that the student continued to try hard, even as the work became more difficult, and reported that the student benefitted from verbal praise (*id.*).

Administration of the WISC-V revealed that the student's full scale intelligence quotient (IQ) (107) fell in the average range; his verbal comprehension index (111) and visual spatial index (117) scores in the high average range; and his working memory index (103), fluid reasoning index (106), and processing speed index (92) scores in the average range (Dist. Ex. 5 at pp. 1-5, 7). The psychologist identified the student's working memory skills as an area of relative weakness, which could make it difficult for the student to concentrate and retain large amounts of information and, with respect to school performance, could lead to reading comprehension problems as the text became more complex (*id.* pp. 4-5). Based on the student's performance pattern, the psychologist offered recommendations to address the student's weaknesses in working memory such as digital interventions to build the student's capacity to exert mental control, ignore distraction, and manipulate information in his mind; chunking information; and connecting new information to known concepts (*id.* pp. 4-5). In addition, the psychologist indicated that, although the student's processing speed was in the average range, it was a relative (personal) weakness for the student that could potentially lead to difficulty keeping up with classroom activities (*id.* at p. 6). The psychologist offered interventions that focused on simple timed tasks and "[s]peeded" flash card drills which she indicated might help the student develop automaticity that could free up cognitive resources in the service of more complex academic tasks (*id.*). The psychologist noted that digital interventions might also be helpful in building the student's speed on simple tasks (*id.* at pp. 5-6). Administration of the WIAT-III yielded the following results: reading comprehension (118), oral reading fluency (107), mathematics (95), and spelling (107) (*id.* at pp. 6-7). The psychologist reported that these scores (with the exception of one math subtest) were all in average or above average range (*id.*).

While the February 2018 psychoeducational evaluation did not include specific standardized assessments of the student's behavior, contrary to the parent's claim, the psychologist administered subtests of the WISC-V that measured the student's abilities related to attention and made recommendations based on the student's relative weaknesses in the areas of working memory and processing speed (see Dist. Ex. 5 at pp. 3-6). For example, the psychologist explained that the visual spatial index measured skills which required "attentiveness to visual detail" (*id.* at p. 3). In addition, the psychologist reported that the working memory index measured the student's ability to "register, maintain, and manipulate visual and auditory information in conscious awareness, which requires attention and concentration, as well as visual and auditory discrimination" (*id.* at p. 4). Related to executive functions (attention, information processing, planning, and organization), the psychologist administered the fluid reasoning index and the processing speed index (*id.* at pp. 5-6). In particular, the psychologist described that the processing speed index related to "visual scanning, visual discrimination, short-term visual memory, visuomotor coordination, and concentration" (*id.* at p. 5). The psychologist did not administer formal assessments to measure the student's behaviors;¹¹ however, as summarized above, the April 2017 private neuropsychological evaluation reported results from the administration of the BASC-3 (Parent Ex. C at p. 5).

¹¹ The February 2018 psychoeducational evaluation did include information regarding the student's behaviors taken from the student's November 2017 IEP (that the student could be disruptive at times, did not speak or interact appropriately with peers, was the last one to pack up when bells ring, and had discussed harming himself) and observations made by the evaluator in the one-on-one testing environment (Dist. Ex. 5 at p. 1).

In addition, other information available to the February 2018 CSE described the student's behaviors (see Dist. Exs. 4 at pp. 1-3; 6 at p. 1). The January 2018 classroom observation conducted by a district social worker and memorialized in a written report noted the social worker's behavioral observations of the student, including that he often needed more attention than his peers, was easily distracted, seemed very nervous and anxious, and that no maladaptive behaviors were present during the observation (Dist. Ex. 4 at pp. 1-3; see Tr. pp. 29, 82). Further, a February 2018 related service provider progress report, completed by the student's guidance counselor, stated that the student needed to be more consistent in handing in homework and written assignments and that he seemed to have a lot of trouble doing written assignments in science (Dist. Ex. 6 at p. 1; see Dist. Ex. 1 at p. 19). The February 2018 progress report also included reports from the student's teachers that behaviorally the student had improved and had controlled his anger, had no concerning outbursts, and was working on dealing with his frustrations better and learning stress management techniques while being aware of his temper (Dist. Ex. 6 at p. 1). As set forth in the student's present levels of performance in the IEP, the student's teachers provided still further descriptions of the student's behaviors in the school environment (see Dist. Ex. 1 at pp. 2-5). On the other hand, as discussed in detail below, the student's needs were such that the district should have conducted an FBA in order to understand why the student engaged in the behaviors and how the behaviors related to the environment (see 8 NYCRR 200.1[r]). Nevertheless, the parents' claims that the February 2018 psychoeducational evaluation was inadequate due to the lack of formal measures of the student's attention or behavior are without merit given the administration of the WISC-V and the totality of the information available to the CSE about the student's attention and behavior.

With respect to the parents' claim that the district should have conducted a psychiatric evaluation of the student, the parents point to evidence that the student had expressed suicidal ideation on one occasion in the beginning of the 2017-18 school year and that the student exhibited fluctuating emotions (see Dist. Ex. 1 at pp. 2, 5). The district school psychologist testified that, to her knowledge, there had not been another occasion on which the student made reference to suicidal ideation (Tr. pp. 77-78). The school psychologist acknowledged that, within the February 2018 psychoeducational evaluation, no assessment was conducted regarding the student's emotional distress or mental state (Tr. pp. 77, 79). As noted above, in the April 2017 private evaluation, the neuropsychologist recommended that the student's family seek psychiatric consultation (Parent Ex. C at p. 6). While a psychiatric evaluation of the student may have yielded useful information about the student, an FBA, as discussed below, would likely have been more fruitful with respect to providing the CSE with a better understanding of the student's social/emotional and behavioral needs in the school environment.

The parents also argue that the district failed to conduct an OT evaluation to address the student's barely legible handwriting. In the April 2017 private evaluation report, the neuropsychologist noted that the student held a pencil with a tripod grip using an additional finger for support and stated that the student's visuomotor copying skills were noted to be average for when he had to accurately copy geometric and abstract forms (Parent Ex. C at p. 3). The February 2018 IEP's present levels of performance indicated that the student's motor skills appeared to be age-appropriate but that his handwriting, at times, was not legible and that he utilized very large print (Dist. Ex. 1 at p. 6). The district school psychologist testified that an OT evaluation was not conducted for the student and opined that, "as per numerous occupational therapists" that worked in the district middle school, OT "[wa]s not helpful" for addressing students' issues with legible

handwriting (Tr. pp. 70-71). Putting aside the psychologist's view about the usefulness of OT to address student handwriting issues, the information known to the CSE was not such that it triggered the CSE's obligation to obtain an OT evaluation of the student at that time.

Based on the foregoing—and with the exception of the FBA, discussed below—the hearing record support a finding that the student was appropriately assessed in all areas related to the student's suspected disability and that the evaluative information was sufficiently comprehensive to identify his special education and related services needs.

D. February 2018 IEP

1. Annual Goals

The parents contend that the annual goals included in the February 2018 IEP were insufficient and rendered the IEP defective. Specifically the parents argue that there were no annual goals to address the student's attention and executive functioning deficits. In their memorandum of law, the parents additionally assert that the annual goals were vague and unmeasurable.

An IEP must include a written statement of measurable annual goals, including academic and functional goals designed to meet the student's needs that result from the student's disability to enable the student to be involved in and make progress in the general education curriculum; and meet each of the student's other educational needs that result from the student's disability (see 20 U.S.C. § 1414[d][1][A][i][II]; 34 CFR 300.320[a][2][i]; 8 NYCRR 200.4[d][2][iii]). Each annual goal shall include the evaluative criteria, evaluation procedures and schedules to be used to measure progress toward meeting the annual goal during the period beginning with placement and ending with the next scheduled review by the committee (8 NYCRR 200.4[d][2][iii][b]; see 20 U.S.C. § 1414[d][1][A][i][III]; 34 CFR 300.320[a][3]).

The February 2018 IEP included five annual goals (Dist. Ex. 1 at pp. 8-10). According to the district school psychologist, the first two annual goals were developed by the social worker and were intended to be addressed in the student's counseling sessions (Tr. p. 38). The counseling goals addressed the student's needs to consider factors that create stress in the classroom and develop coping strategies and to establish positive relationships with others and promote group effectiveness (see District Ex. 1 at p. 8). Academic annual goals included in the February 2018 IEP involved: citing textual evidence and inferences drawn from the text to support analysis of the text; writing through the selection, organization, and analysis of relevant content; and solving multi-step word problems by breaking them down step-by-step and identifying key information and the appropriate operation (see Dist. Ex. 1 at pp. 8-10).

Specific to the parents' allegation that the goals were vague and unmeasurable, the parents cite no example of either condition. In any event, each goal addressed student-specific needs identified in the present levels of performance, i.e., the student's need to "manage his anger" and frustrations, "to form proper social emotional relationships with peers and adults," to improve his ability to "organiz[e] and elaborate[e] on his writing," as well as his ability to engage in "higher order thinking skills and inferencing" and, in math, to improve his ability "completing multi-step word problems and completing the necessary steps to solve the equation," as well as identifying the operation that must be used (compare Dist. Ex. 1 at pp. 2-5, with Dist. Ex. 1 at pp. 8-10).

Additionally, each annual goal included an evaluative criterion (i.e., 8 out of 10 trials, 90 percent accuracy; 4 out of 5 trials, 80 percent accuracy), an evaluation schedule (i.e., 1 time per week), and a procedure to evaluate the goals (i.e., provider observations, teacher made materials, and class activities) (Dist. Ex. 1 at pp. 8-10). Overall, the annual goals in the February 2018 IEP were sufficiently specific and measurable to guide instruction and to evaluate the student's progress over the course of the school year (see, e.g., R.B. v. New York City Dep't of Educ., 2016 WL 2939167 at *5-*6 [S.D.N.Y. May 19, 2016] [finding that the goals included in the IEP were sufficiently measurable as they provided enough detail to identify "the relevant benchmarks and educational objectives and also provided appropriate bases to measure and track [the student's] progress towards those goals"]).

The district school psychologist acknowledged in testimony that the IEP did not specifically include annual goals that targeted the student's attention and executive functioning skills (Tr. p. 73). However, the IEP otherwise provided supports to address these needs including management strategies to help the student stay on task (e.g.; on-task focusing prompts) and classroom supports of sentence starters and graphic organizers, which would address the student's executive functioning needs (see Dist. Ex. 1 at p. 6). Moreover, courts have determined that an IEP does not need to identify annual goals as the vehicle for addressing each and every need in order to conclude that the IEP offered the student a FAPE. (see J.B. v. New York City Dep't of Educ., 242 F. Supp. 3d 186, 199 [E.D.N.Y. 2017]; see also P.K. v. New York City Dep't of Educ. (Region 4), 819 F. Supp. 2d 90, 109 [E.D.N.Y. 2011] [noting the general reluctance to find a denial of a FAPE based on failures in IEPs to identify goals or methods of measuring progress], aff'd, 526 Fed. App'x 135 [2d Cir. May 21, 2013]).

In summary, the evidence in the hearing record supports a finding that the annual goals were specific, measurable, and aligned with the student's needs.

2. Special Factors – Interfering Behaviors

Next the parents contend that the IHO incorrectly determined that as of February 2018, the district had sufficient evidence to support its decision that an FBA was not needed.

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

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

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

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

According to the February 2018 prior written notice, "[t]eachers were provided with 'Request for Behavior Support' forms to investigate the possibility of a need for a[n] [FBA]" and that the CSE determined that no FBA was required (Dist. Ex. 3 at p. 2). The hearing record does not include "Request for Behavior Support" forms from the student's teachers; however, it does include a form entitled "Considerations of a Student's Need for Positive Behavior Supports, FBA, or a BIP" ("FBA consideration report"), which was completed by the district school psychologist and dated February 7, 2018 (Dist. Ex. 7 at pp. 1-2; see Tr. pp. 45, 60-61). The February 2018 FBA consideration report included a series of yes or no questions, with spaces for further description (Dist. Ex. 7 at pp. 1-2). The form reflected that the student displayed behaviors that impeded his learning or that of others and that he could be disruptive during class when he talked off topic and banged desks and chairs (id. at p. 1). Based on the response indicating that the student's behaviors impeded his learning or that of others, the form reflected that the CSE was required to "discuss and determine" whether an FBA should be conducted (id.). According to the psychologist's responses on the form, the CSE did not recommend that an FBA be conducted because the student's behaviors had been addressed through the use of a "behavior section sheet" and guidance from the guidance counselor and that recently a teacher mentor was assigned to meet with the student on a weekly basis to talk about home and school and to guide him through middle school (id. at p. 2).¹²

¹² In response to the question, had an FBA ever been conducted for the identified behavior, the box "[n]o" was checked; however, in an apparent error, the box "[y]es" was checked, indicating that the FBA needed to be updated (Dist. Ex. 7 at p. 1).

Consistent with the characterization on the February 2018 FBA consideration report that the student exhibited behaviors that impeded his learning or that of others (Dist. Ex. 7 at p. 1), the February 2018 IEP present levels of performance included several descriptions of such behaviors. For example, the IEP indicated that the student was frequently absent or late to school or class (Dist. Ex. 1 at p. 2). Throughout the present levels of performance, the student's inability to focus is described (id. at pp. 2-5). The February IEP further reflected that the student could "go from very happy to very angry in a matter of minutes if something upset[] him or he bec[ame] frustrated" and could be disruptive at times (id. at pp. 2, 5). Further the IEP stated that the student "d[id] not speak or interact appropriately with his peers" and had been seen poking students with pencils, moving into others' personal space, and placing erasers on another student's head during group work (id. at pp. 3, 5). According to the IEP, the student's behaviors could, at times, "be very inappropriate and c[ould] make others feel uncomfortable" (id. at p. 5). The present levels of performance also reflected that the student had to leave school early on one occasion because he discussed death and harming himself (id.). The IEP also referenced several strategies, outlined below, which the student needed to address the identified behaviors (see id. at pp. 5-6); however, the February 2018 IEP reflected the CSE's determination that the student did not "need strategies, including positive behavioral interventions, supports and other strategies to address behaviors that impede the student's learning or that of others" and that he did not require a BIP (id. at pp. 6-7).¹³

The school psychologist testified that the student's behaviors in the classroom were attention seeking, "silly," and "impulsive" but did not "come across" as aggressive and that, according to teacher input, "focus" was the biggest concern in the classroom (Tr. pp. 31, 36-37, 67-69). However, when she was asked why an FBA was not done to assess the student's focus and attention issues, the school psychologist replied, "I don't really have an answer for that" (Tr. p. 56). The school psychologist also testified that an FBA was not necessary because the district did not generally conduct FBAs "for children who have a hard time focusing" (Tr. p. 60). However, during cross examination, when presented with the student's behaviors as outlined in the present levels of performance, the school psychologist acknowledged that the student's behavior was not simply a

¹³ Two additional documents in evidence also described the student's behaviors in a manner that indicated the behaviors impeded the student's learning or that of other students. The first is a November 2017 Summit admissions questionnaire completed by two of the student's special education teachers (Parent Ex. D at pp. 1, 3). The second is a hospital's department of psychiatry "Junior High School & High School Report," which was filled out by one of the student's special education teachers (Parent Ex. E at pp. 1, 3; see Tr. p. 53). The evidence in the hearing record is silent with respect to whether these documents were specifically known to or considered by the February 2018 CSE; however, the district special education teachers who provided the information in the documents attended the February 2018 CSE meeting (compare Parent Ex. D at pp. 1, 3, and Parent Ex. E at p. 3, with Dist. Ex. 1 at p. 19). The November 2017 admissions questionnaires completed by the student's special education teachers indicated that the student had trouble maintaining focus and engaged in tapping, touching, bouncing, picking at his body, and throwing objects (Parent Ex. D at pp. 2, 3, 4). The teachers reported that the student was off task and disruptive when assigned to a group and did not maintain appropriate relationships with his peers as he poked and distracted others and it was also noted that it was rare to see the student engage in an appropriate social relationship with peers (id. at pp. 2, 3, 4). Additionally, the teachers reported that the student had a very negative outlook and low self-esteem, made negative comments daily, and had spoken about death and stabbing himself (id. at pp. 2, 4). The January 2018 hospital form likewise referenced the student's lack of friendships and his off-task behaviors and indicated that there had been "multiple" incidents of behavior problems, citing as an example that the student could become "very angry" (Parent Ex. E at pp. 1-2).

matter of his inability to focus and that he was also affecting other students (Tr. p. 64; see Dist. Ex. 1 at pp. 2-5).

In noting the CSE's determination that an FBA was not necessary, the IHO indicated that the CSE felt the student "had been making progress" (IHO Decision at p. 21). Information about the student's progress during the beginning of the 2017-18 school year is discussed further below with regard to the ICT services recommended for the student. Briefly, however, the school psychologist testified that the CSE determined the student did not require an FBA because the student "had been making progress" and "was doing well within the classroom, with the classroom supports . . . and the guidance support that was being provided" (Tr. p. 45). Even assuming that the student's behaviors were being addressed through the use of a "behavior section sheet" and support from the guidance counselor and/or mentor as indicated on the February 2018 FBA consideration report (Dist. Ex. 7 at p. 2), State regulation indicates that an FBA be conducted for students who engage in behaviors that impede their learning or that of other students if "necessary to ascertain the physical, mental, behavioral and emotional factors which contribute to the suspected disabilities" (8 NYCRR 200.4[b][1][v]). In contrast, State regulation requires that a BIP be considered for a student who "exhibits persistent behaviors that impede his or her learning or that of others, despite consistently implemented general school-wide or classroom-wide interventions" (8 NYCRR 200.22[b][1][i]). Accordingly, while a BIP may not have been required for the student if school-wide or classroom-wide interventions addressed the student's behaviors, the district's view that certain interventions could address the student's learning should not have been determinative in evaluating whether or not to proceed with an FBA.¹⁴ The district's determination not to conduct an FBA is especially perplexing in the present matter where one of the purported ways that the district was responding to the student's behavior was through use of "behavior section sheet[s]" or "daily behavior chart[s]" (Dist. Exs. 1 at p. 4; 7 at p. 2). To the extent that these sheets or charts collected information about the student's behaviors, it is unclear why such data could not inform an FBA (see 8 NYCRR 200.22[a][2]).

In this instance, the district's failure to conduct an FBA is a procedural violation and the next question is whether the district through the February 2018 IEP adequately identified the student's problem behaviors and prescribed ways to manage them (see R.E., 694 F.3d at 190).

The February 2018 IEP's present levels of performance noted that the student was "frequently off task or not focused," could be disorganized, required support prompts and refocusing to complete assignments, and that he was given preferential seating in science to limit distractions (Dist. Ex. 1 at pp. 2, 3, 4). The February 2018 IEP's present levels of performance indicated that through counseling the student needed to learn about personal boundaries and

¹⁴ For this and other reasons, the IHO's reliance on the fact that Summit did not use a BIP was of limited relevance in that, even if the student did not ultimately need a BIP, that would not relieve the district of its obligation to conduct an FBA if necessary (see IHO Decision at pp. 21-22). Moreover, an FBA is intended to be environment-specific, meaning an assessment of the student's behaviors in a different environment (i.e., Summit) might yield a different understanding of what supports or plan might benefit the student (see 8 NYCRR 200.1[r] [defining an FBA as "the process of determining why the student engages in behaviors that impede learning and how the student's behavior relates to the environment] [emphasis added]). Finally, any after-the-fact evidence regarding a determination by Summit regarding the student's need for a BIP is retrospective and wholly irrelevant to an evaluation as to whether or not the district was obligated to conduct an FBA of the student leading up to the February 2018 CSE meeting (see R.E., 694 F.3d at 186-88).

seeking attention through positive actions (*id.* at p. 5). The IEP also noted that the student needed one-to-one support when discussing feelings, emotions, and how to handle situations such as working collaboratively in a group and having age-appropriate relationships (*id.*). In addition, the February 2018 IEP stated that the student benefitted from seeing his counselor to address his decision making and frustrations and that when he started exhibiting disruptive behaviors, he had benefitted from checking in with his counselor to get "centered" and return to class and engage in the lesson without being disruptive and attention seeking (*id.*). The IEP noted that in counseling the student had a place to relax and feel safe when he was overwhelmed by anger and frustration (*id.* at pp. 5-6). The February 2018 IEP further noted that the student had benefited from the use of stress balls and play therapy putty while vocalizing his feelings and frustrations (*id.* at p. 6).

The February 2018 IEP included classroom supports to address the student's management and behavioral needs including small group instruction, on-task focusing prompts, sentence starters, and graphic organizers as well as test accommodations such as extended time for assessments over 20 minutes, three-minute breaks every 30 minutes, and on-task focusing prompts (Dist. Ex. 1 at pp. 6, 13). The IEP also recommended individual and group counseling services to assist the student in developing coping strategies to establish positive relationships with others and included two annual goals: one involving analyzing factors that create stress and the build-up of anger while applying coping strategies learned in counseling to motivate successful performance in the classroom and another involving identifying ways to establish positive relationships with others while demonstrating cooperation and teamwork to promote group effectiveness (*id.* at pp. 8, 11). The school psychologist stated that the February 2018 CSE added group counseling to the student's IEP because of concerns about the student's ability to interact with other students and they felt that a group session would provide the student with the "social skills type of training" from which he would benefit (Tr. p. 34).

Overall, while the February 2018 IEP identified the student's off-task and disruptive behaviors and included supports—particularly individual and group counseling, annual goals and management strategies—to assist the student in addressing his behaviors and developing coping strategies and positive relationships, considering the student's performance and progress in an ICT class as described in the student's present levels of performance and discussed in further detail below, it is difficult to determine if the information that could have been gained by conducting an FBA may have assisted the February 2018 CSE in developing an appropriate program for the student. In this instance, the failure to conduct an FBA impairs the ability to conduct a substantive review of the student's program as it is not possible to determine what information an FBA would have yielded and whether that information would be consistent with the program recommended in the February 2018 IEP (see *L.O.*, 822 F.3d at 112; see *C.F. v. New York City Dep't of Educ.*, 746 F.3d 68, 81 [2d Cir. 2014][*"IEP's substantive inadequacy . . . is rooted in the testimony and reports indicating that [the student's] behavioral needs required a 1:1 placement"*]). Accordingly, although I do not find that the lack of an FBA in itself to be a denial of FAPE, I cannot find that the lack of an FBA did not contribute to a finding that the program recommended in the February 2018 was not appropriate.

3. ICT Services

The parents argue that the IHO incorrectly found that the district met its burden of establishing that ICT services were appropriate and that it offered the student a FAPE for the 2018-

19 school year. The parents claim that the student had been struggling in an ICT program leading up to and during the beginning of the 2017-18 school year, was failing ELA and social studies, and was barely passing science and robotics as of January 2018, and failed to make progress in attention, behavior or social/emotional functioning.

A student's progress under a prior IEP is to varying degrees a relevant area of inquiry for purposes of determining whether a subsequent IEP is appropriate, particularly if the parents express concern with respect to the student's rate of progress under the prior IEP (see H.C. v. Katonah-Lewisboro Union Free Sch. Dist., 528 Fed. App'x 64, 66 [2d Cir. Jun. 24, 2013]; Adrienne D. v. Lakeland Cent. Sch. Dist., 686 F. Supp. 2d 361, 368 [S.D.N.Y. 2010]; M.C. v. Rye Neck Union Free Sch. Dist., 2008 WL 4449338, at *14-*16 [S.D.N.Y. Sept. 29, 2008]; see also "Guide to Quality Individualized Education Program (IEP) Development and Implementation," Office of Special Educ., at p. 18 [Dec. 2010]). Furthermore, "if a student had failed to make any progress under an IEP in one year," at least one court has been "hard pressed" to understand how a subsequent IEP could be appropriate if it was simply a copy of the IEP which failed to produce any gains in a prior year (Carlisle Area Sch. v. Scott P., 62 F.3d 520, 534 [3d Cir. 1995] [noting, however, that the two IEPs at issue in the case were not identical as the parents contended]).

First, at the impartial hearing, the district did not offer into evidence the student's IEP in effect for the beginning of the 2017-18 school year; therefore, a review of the student's progress under that IEP is flawed from the onset. For example, it is difficult to know whether or not the February 2018 IEP added, removed, or modified strategies, supports, services, or annual goals. What can be gleaned from the evidence in the hearing record is that, for a portion of the 2017-18 school year, there was a November 2017 IEP in effect for the student and that the student received ICT services, as well as two 40-minute sessions of individual counseling services per week (see Dist. Exs. 1 at p. 2; 4 at p. 1; 5 at p. 1; 6 at p. 1).

The school psychologist testified that the February 2018 CSE continued the recommendation for ICT services because the student had been making "a lot of progress" academically and cognitively and the staff had seen a lot of progress from when the student started school until the CSE meeting (Tr. p. 32). The school psychologist cited student progress from when she began the reevaluation process with the student in December 2017 to the February 2018 CSE meeting date and noted that the suicidal ideation expressed to the guidance counselor earlier in the year, to her knowledge, had not reoccurred (Tr. pp. 29, 31).

The single progress report included in the hearing record was completed by the student's guidance counselor and, beyond noting that the student had made "[p]artial [p]rogress" towards achieving annual goals (without identifying the specific goals referenced), included, in total, the following recitation:

[The student's] academics declined in the second marking period where his grade point average dropped from a 72 to a 69 average. According to his teachers, [the student] needs to be more consistent in handing in homework and written assignments. He seemed to have a lot of trouble doing written assignments in Science. Behaviorally, [the student] has improved according to his ICT teachers. He has controlled his anger and he has had no concerning

outbursts as he has had in the past. [The student] is working on dealing with frustrations better and learning stress management techniques while being aware of his temper. I am encouraged at the progress I have seen with [the student] and the potential for achieving more emotional and behavioral maturity.

(Dist. Ex. 6 at p. 1). The hearing record does not include any progress reports completed by the student's teachers or any annual goal progress reports.

A review of the student's first and second quarter grades, as reflected on his fourth quarter report card, reveal that the student had four absences each in the first and second quarters and was late to school on 5 occasions during the first quarter and 16 occasions during the second quarter (Parent Ex. F at p. 1).¹⁵ For first and second quarters, the student's grades were as follows: ELA 70 and 65; social studies 70 and 65, math 65 and 85, robotics 80 and 65, and science 75 and 65 (*id.*). There is some information in the hearing record indicating the student's grades were not an entirely accurate representation of his academic skills. For example, the February 2018 IEP reported the parent's concern that the student's grades did not reflect his abilities and his grades were being brought down by incomplete classwork and homework assignments (Dist. Ex. 1 at p. 5). Additionally, academic assessment results from the WIAT-III, conducted in February 2018, revealed that the student scored in the average or above-average range on all but one subtest in math fluency-multiplication (Dist. Exs. 5 at pp. 6, 7; *see* Dist. Ex. 1 at pp. 1-2). However, irrespective of whether the student's grades, which show he was passing (or just passing) his classes as of the February 2018 CSE meeting, were an accurate reflection or an understatement of the student's academic skills, the description of the student's present levels of performance in the IEP reflected that the student was struggling in several areas (Dist. Ex. 1 at pp. 2-5).

As for the student's "Expected Rate of Progress in Acquiring Skills and Information," the IEP indicated that the student was "making some progress in his core academic subjects," but noted that "he ha[d] the ability to do much better" (Dist. Ex. 1 at p. 2). The IEP stated that the student's "greatest areas of concern [we]re his inability to focus at times and his ability to form proper social emotional relationships with peers and adults" (*id.*). For the student's present levels of performance in activities of daily living, the IEP reflected that the student was late to school "on an almost daily basis" and had several absences and was frequently late to class (*id.*). The IEP also indicated that the student was frequently off task and unfocused, which resulted in incomplete work, and he had difficulty keeping his backpack organized, resulting in lost assignments (*id.*). The IEP indicated that the student "require[ed] support, prompts and refocusing to complete his assignments" (*id.*).

In ELA, the IEP reported that, according to the student's teachers, the student could "complete basic reading and writing tasks" but had "difficulty with organizing and elaborating on his writing," following routines, staying on task in class, working in a group, and completing assignments (Dist. Ex. 1 at pp. 3-4). In particular, the present levels of performance reflected the teachers' report that the student "[wa]s unable to pay attention for even a few minutes at a time"

¹⁵ The student's grades and attendance from the first and second marking periods for the 2017-18 school year were available to the February 2018 CSE (*see* Tr. p. 75; Parent Ex. F).

(id. at p. 3). For reading, the student could "read aloud grade level texts" but struggled "with higher order thinking skills and inferencing" (id.).

For social studies, the teachers reported that the student could complete tasks that were of interest to him and he was "somewhat able to take notes," but he "usually daydream[ed] the entire period," was "unable to complete classwork due to lack of focus," was not completing assignments despite the use of the behavior chart, was unable to work in a group, and had difficulty completing graphic organizers (Dist. Ex. 1 at p. 4). The IEP reflected that the student could not cite textual evidence or explain his answers and that it was "very difficult to assess [the student] on his understanding of the Social Studies content due to lack of information" (id.).

In math, the IEP included a report from the student's teacher indicating that, although the student exhibited "knowledge of basic math foundations," such as his multiplication and division facts, and demonstrated the ability to complete straightforward calculations when prompted, he had difficulties using math vocabulary to explain his answers, completing word problems, and completing the necessary steps to solve equations (Dist. Ex. 1 at p. 4). The teacher reported that the student was "offered multiple supports to overcome obstacles" (id.). The IEP reflected the student's difficulty completing classwork unless he received "focusing prompts every 30-60 seconds" and his difficulty staying on task and indicated his need to "work on his organization" (id.). The IEP stated that, in math, the student "ha[d] a difficult time starting assignments if he [wa]s not sitting 1:1 with a teacher" (id.). For math, the present levels of performance recounted comments from the student's second marking period report card that reported the student "need[ed] continued encouragement," was "far below standards in understanding the rational number system, [and was] far below standards in making sense of problems and persever[ing] in solving them" (id.).

For science, the student's IEP reflected the teachers' report that the student required guided questions since he often provided an answer that was not related to the question being asked (Dist. Ex. 1 at p. 4). The IEP noted that the student was easily distracted, had difficulty with organization and often misplaced important papers, and did not work with the group in lab due to his distractibility (id. at pp. 4-5). The present levels of performance recounted comments from a second marking period report card indicating that the student "struggle[d] to form healthy connections with peers," showed "inconsistent quality of work," and was "approaching standards in the use of scientific tools and technologies" (id. at p. 5).

The student's social/emotional and behavioral needs, as reported on the IEP, are detailed above in relation to the district's failure to conduct an FBA of the student (see Dist. Ex. 1 at pp. 5-6). Parent concerns reflected on the IEP included that the student was "not performing to his level of ability" and that he had the capability of achieving better grades but that the student's scores were affected by incomplete assignments (Dist. Ex. 1 at p. 5).

Based on the foregoing, even assuming that the student exhibited some progress in the social/emotional or behavioral realm as referenced by the testimony of the school psychologist and in the February 2018 progress report, the student's present levels of performance in the IEP reflected that, for the beginning of the 2017-18 school year, the student exhibited significant difficulties finding success in the ICT setting due, in large part, to his attendance issues and

inability to focus, complete assignments, and work in a group (compare Tr. pp. 31-32, 49-52 and Dist. Ex. 6 at p. 1, with Dist. Ex. 1 at pp. 2-5).

The February 2018 IEP recommended ICT services in math (eight times per week), ELA (eight times per week), social studies (four times per week), and sciences (four times per week), as well as one individual and one group counseling session per week (Dist. Ex. 1 at p. 11). The IEP additionally indicated that the student needed the support of small group instruction, on-task functioning prompts, sentence starters, and graphic organizers, as well as testing accommodations (id. at pp. 6, 13).¹⁶ State regulation defines ICT services as "the provision of specially designed instruction and academic instruction provided to a group of students with disabilities and nondisabled students" (8 NYCRR 200.6[g]).

Other than ICT services, the hearing record reflects that the CSE considered a general education class setting for the student (see Dist. Exs. 1 at p. 17; 3 at p. 2). The February 2018 CSE rejected that option because the placement could not provide the support for the student's social/emotional deficits which impacted his school performance (Dist. Exs. 1 at p. 17; 3 at p. 2; see Tr. p. 35). In addition, the school psychologist stated that the CSE briefly considered "the small class" but did not think that option would be appropriate for the student based on his academic and cognitive levels (Tr. pp. 35). According to the school psychologist, before the February 2018 CSE meeting, the parent mentioned she was considering a State-approved nonpublic school for the student (Tr. pp. 32, 35). The school psychologist stated that at the end of the meeting the February 2018 CSE discussed "the private school route" and that the district was initially "looking into" that option, but at the point of the February 2018 meeting the CSE did not feel it was an appropriate recommendation (Tr. pp. 33, 35, 74).

The February 2018 IEP stated that the student was expected to make "fair progress" in the general education curriculum with the help of ICT services and that, because he had difficulty with reading comprehension, writing, and mathematics, he could not make progress in the general education classroom without the support of the ICT services (Dist. Ex. 1 at pp. 2, 6). However, the present levels of performance, reflecting the student's struggles with executive functioning, attention, organization, and peer relationships during the beginning of the 2017-18 school year in a similar program, supports the conclusion that the student needed a more supportive setting or the addition of more targeted supports to enable the student to make progress appropriate in light of his circumstances, and there is insufficient evidence to demonstrate that the program aligned with the student's needs in light of the significant struggles identified by the student's teachers as reported in the IEP (id. at pp. 2-5).

Based on the foregoing, there is insufficient evidence in the hearing record to support a finding that the February 2018 was reasonably calculated to provide the student with meaningful educational benefit in light of his circumstances. Accordingly, the IHO's determination that the district offered the student a FAPE for the 2018-19 school year is reversed.

¹⁶ During the impartial hearing, the school psychologist testified that small group instruction was provided within the ICT setting when the staff would "pull the children back" to the side of the class (Tr. p. 37). The school psychologist added that the student was often working in small groups within the ICT classroom (Tr. p. 63).

E. Unilateral Placement

Having determined that the district failed to offer the student a FAPE, the next issue to be determined is whether the parents met their burden to establish that Summit was an appropriate unilateral placement for the student for the 2018-19 school year.

A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak, 142 F.3d at 129). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (Carter, 510 U.S. at 13-14). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ. of the City Sch. Dist. of Yonkers, 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement'" (Gagliardo, 489 F.3d at 112, quoting Frank G. v. Bd. of Educ. of Hyde Park, 459 F.3d 356, 364 [2d Cir. 2006]; see Rowley, 458 U.S. at 207). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). When determining whether a unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether the placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see Gagliardo, 489 F.3d at 115; Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] ["evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]). A private placement is appropriate if it provides instruction specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; Educ. Law § 4401[1]; 34 CFR 300.39[a][1]; 8 NYCRR 200.1[ww]; Hardison v. Bd. of Educ. of the Oneonta City Sch. Dist., 773 F.3d 372, 386 [2d Cir. 2014]; C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 836 [2d Cir. 2014]; Gagliardo, 489 F.3d at 114-15; Frank G., 459 F.3d at 365).

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

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

handicapped child, supported by such services as are necessary to permit the child to benefit from instruction.

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

In this matter, the Summit clinical director testified that Summit was a State-approved nonpublic school serving students with learning disabilities, emotional disturbances, and other health-impairments in a 12:1+1.5` student-to-teacher ratio (Tr. pp. 94-95, 115).¹⁷ The clinical director also reported that Summit was a ten-month, academic program that followed New York State core curriculum and the Regents program (Tr. p. 94).

The clinical director testified that she had the opportunity to review the student's educational records including the April 2017 neuropsychological evaluation, the student's IEP, and an intake report from the Summit director of admissions (Tr. pp. 95-96). Additionally, the clinical director testified that she had the opportunity to review reports written by Summit teaching staff and observe the student in the classroom (id.).

The clinical director described the student as coming to Summit with a history of anxiety and executive functioning issues, social concerns and failures, and difficulty self-regulating and noted that he had required a lot of support in order to be successful (Tr. p. 96). Reportedly the student began the year exhibiting off-task behavior, verbal and physical outbursts, maladaptive coping strategies, deficits in self-esteem and resiliency, and difficulty working in small groups and sustaining himself appropriately (Tr. pp. 98-99, 100). Also, the clinical director stated that the student displayed aggressive behaviors such as banging/punching walls and throwing objects (Tr. p. 101).

With respect to student's reading skills at the beginning of the 2018-19 school year, the clinical director stated that the student was reading on grade level, was stronger in decoding and with literal skills, and was weaker with inferential skills and inferential comprehension (Tr. pp. 97, 110). Regarding math skills, the clinical director stated that the student began the year at Summit "showing difficulty with retention and with understanding more conceptual information" (Tr. p. 99).

According to the clinical director: the student was in a class that "fit his cognitive, social, emotional, and behavioral profile"; he received counseling once a week individually and once a week in a group of three; he had access to one-to-one support for his academic, social, or behavior needs; and he participated in the "schoolwide behavior management system," which the clinical director described as a "positive behavior intervention system" (PBIS) (Tr. pp. 96-97, 101-02, 111). According to the clinical director, all staff were trained in the PBIS, the student's teacher was a New York State certified special education teacher, the teacher assistant was a New York State level three assistant, and his clinician was a licensed master social worker (Tr. pp. 97, 105, 111-12). The hearing record includes a schedule, which reflects that the student attended classes

¹⁷ Although not explained in the hearing record, it is presumed that the 12:1+1.5 class at Summit was as described in prior matters regarding Summit, which was "12 students to one special education teacher to one assistant teacher, and half the day two assistant teachers" (see Application of a Student with a Disability, Appeal No. 18-079).

for core academic subjects, as well as special classes such as an organization skills/study skills class once a week (Parent Ex. I).

The clinical director stated that Summit addressed the student's anxiety and behavioral needs through the integration of clinical and academic supports, the schoolwide behavior management system, a point card system, life space interviews, and counseling sessions (Tr. pp. 101-02, 114). The clinical director explained that Summit had a point card system which recorded "on-time, in-area homework work, behavior, and contact" (Tr. pp. 101, 113). The clinical director stated that the schoolwide behavior management system provided students immediate feedback on how they were doing and noted, in particular, that the student was "very actively involved in wanting to earn his points, in accepting the immediate feedback and correction, and [in] trying to sustain the appropriate behavior" (Tr. pp. 101-02, 113). The clinical director testified that to address his aggressive behaviors the student was removed from the classroom to a staffed support room where he could sit and calm down (Tr. pp. 112-13). Further she explained that the clinician and administrative staff were available to provide the student with crisis intervention support (Tr. p. 113). The clinical director also testified that Summit provided an adult to monitor and supervise the student's work and noted that he required one-to-one life space interviews from teaching staff and the ability to see his counselor, when needed, to review and support appropriate behavior (Tr. pp. 100-01). The clinical director described a life space interview as an immediate one-to-one interview with a teacher, a teacher assistant, or a clinician, removed from a group situation, where the student had the opportunity to review something that had occurred, to discuss more productive alternatives, and to address "whatever the road blocks [stood in the way of] his learning or . . . his successful participation in the classroom" (Tr. pp. 98, 114). The clinical director stated that providing the student with access to one-to-one support in the beginning of the year allowed the student to form relationships with staff and that those relationships were "incredibly helpful" to the student (Tr. p. 102). According to the clinical director, the student's teacher reported that, as a result of these interventions, the student became more motivated to do work and less of a disruption in the classroom and his mood was regulated more evenly and physical and verbal outbursts noted at the beginning of the year "hardly ever occur[red] anymore" (Tr. pp. 98-99).

Summit addressed the student's needs related to his diagnosis of ADHD by providing the student with executive functioning supports, utilizing the behavior management system, teaching him strategies in counseling for self-advocacy and self-regulation, and holding consultations between the clinician and teaching staff (Tr. p. 113). The clinical director explained that structured collaboration occurred through case conferences, parent-teacher conferences, and ad hoc meetings to discuss how the student was doing behaviorally, socially and emotionally, and academically (Tr. p. 105).

To address the student's weaknesses with inferential comprehension, the clinical director stated that the student's teacher used story maps, videos, checks for understanding, reviews of written work and assessments, small group instruction, and one-to-one support as needed and also worked with the student in areas such as executive functioning, motivational skills, internal and external distractions, and self-esteem which had historically impeded the student's functioning in school (Tr. pp. 97-98, 110-11). The clinical director stated that the student was placed in a seventh-grade math group to address his deficits, was following the "GoMath! curriculum," and was removed from the classroom to receive one-to-one math support (Tr. pp. 99-100).

With respect to behavioral progress during the 2018-19 school year, the clinical director stated that according to the student's homeroom teacher the student required fewer one-to-one life-space interviews, fewer removals from the classroom due to outbursts, and less prompting for being off-task (Tr. pp. 102-04). The student's clinician reported that the student required less one-to-one support and crisis intervention support (Tr. pp. 104-05). The parent testified that the she felt Summit was an appropriate placement for the student during the 2018-19 school year because he had made "huge improvement" and was more "emotionally balanced," was able to control his impulses, and was able to interact with others appropriately (Tr. pp. 134-35). Further, the clinical director reported that, according to his teacher, the student was doing his work, was more resilient, had improved his homework production, and demonstrated the ability to ask for help and be redirected and less disruptive (Tr. pp. 99-100).

The December 2018 Summit progress report stated that the student was gradually making a successful adjustment to the class, had developed a number of positive relationships in class, and tried hard to meet the academic requirements in class (Parent Ex. J at p. 7). The December 2018 progress report indicated that the student was making progress in in his academic courses and included teacher comments that, when focused or prompted, the student showed that he could actively or successfully participate in class discussions and writing assignments, would ask for help when needed, benefited from prompts, was a hard worker, and worked well with his peers on group or lab activities (id. at pp. 2-6).

In its answer, the district asserts that Summit was not an appropriate unilateral placement for the student because it served students with disabilities exclusively, thereby limiting the student's access to nondisabled peers. Although the restrictiveness of a parental placement may be considered as a factor in determining whether parents are entitled to an award of tuition reimbursement (M.S., 231 F.3d at 105; Walczak, 142 F.3d at 122; see Rafferty v. Cranston Pub. Sch. Comm., 315 F.3d 21, 26-27 [1st Cir. 2002]), parents are not as strictly held to the standard of placement in the LRE as are school districts (C.L., 744 F.3d at 830, 836-37 [noting "while the restrictiveness of a private placement is a factor, by no means is it dispositive" and furthermore, "[i]nflexibly requiring that the parents secure a private school that is nonrestrictive, or at least as nonrestrictive as the FAPE-denying public school, would undermine the right of unilateral withdrawal the Supreme Court recognized in Burlington"]; see Carter, 510 U.S. at 14-15; M.S., 231 F.3d at 105 [stating that parents "may not be subject to the same mainstreaming requirements as a school board"]) and "the totality of the circumstances" must be considered in determining the appropriateness of the unilateral placement (Frank G., 459 F.3d at 364).

Here, based on the totality of the circumstances and notwithstanding the restrictiveness of Summit, the evidence in the hearing record supports a finding that the student's program at Summit provided instruction specially designed to meet the unique needs of the student.

F. Equitable Considerations

The final criterion for a reimbursement award is that the parents' claim must be supported by equitable considerations. Equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; R.E., 694 F.3d at 185, 194; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 68 [2d Cir. 2000]; see Carter, 510 U.S. at 16 ["Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and

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

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

With regard to equitable considerations, the parents note that the district did not submit any evidence or make any argument during the impartial hearing to show that the parents failed to cooperate with the CSE process. Likewise, in its answer on appeal, the district makes no argument relative to equitable considerations. Moreover, the evidence in the hearing record reflects that the parents cooperated with the February 2018 CSE, did not impede or otherwise obstruct the CSE's ability to develop an appropriate special education program for the student, made the student available for evaluations, and did not fail to raise the appropriateness of an IEP in a timely manner or act unreasonably (C.L., 744 F.3d at 840). Therefore, equitable considerations do not bar an award of tuition reimbursement.

VII. Conclusion

In summary, the evidence in the hearing record establishes that, contrary to the IHO's decision, the district failed to offer the student a FAPE for the 2018-19 school year, that Summit was an appropriate placement for the student for the 2018-19 school year, and that equitable considerations did not present a bar to an award of tuition reimbursement.

I have considered the parties' remaining contentions and find that I need not address them in light of my determinations herein.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision, dated November 14, 2019, is modified by reversing that portion which found that the district offered the student a FAPE for the 2018-19 school year; and

IT IS FURTHER ORDERED that the district shall reimburse the parents for the cost of the student's tuition at Summit for the 2018-19 school year.

Dated: **Albany, New York**
 January 24, 2020

STEVEN KROLAK
STATE REVIEW OFFICER