



The University of the State of New York

The State Education Department

State Review Officer

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No. 20-085

**Application of a STUDENT SUSPECTED OF HAVING A
DISABILITY, by her parents, for review of a determination of
a hearing officer relating to the provision of educational services
by the Board of Education of the Goshen Central School District**

Appearances:

Price, Meese, Shulman & D'Arminio, PC, attorneys for petitioners, by Karen F. Edler, Esq., and Jacqueline E. Esposito, Esq.

Thomas, Drohan, Waxman, Petigrow & Mayle, LLP, attorneys for respondent, by Conor C. Horan, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioners (the parents) appeal from the decision of an impartial hearing officer (IHO) which denied their request to be reimbursed for their daughter's tuition costs at The Storm King School (Storm King) for the 2018-19 school year. The appeal must be dismissed.

II. Overview—Administrative Procedures

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

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

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

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

III. Facts and Procedural History

The parties' familiarity with the detailed facts and procedural history of the case and the IHO's decision is presumed and will not be fully recited herein. Briefly, on May 7, 2018, the parents signed an enrollment contract for the student's attendance at Storm King for the 2018-19 school year (Joint Ex. 153 at pp. 3-4).¹ The CSE convened on August 22, 2018 for an initial

¹ Storm King is an independent college preparatory boarding or day school for grades 8-12 (Joint Ex. 137). The

eligibility determination meeting pertaining to the student for the 2018-19 school year (see generally Joint Ex. 74). The CSE determined the student was not eligible for special education as a student with a disability (id. at pp. 1, 3). According to the parents, they disagreed with the CSE's determination, and, as a result, unilaterally placed the student at Storm King for the 2018-19 school year (see Joint Ex. 142).² In a due process complaint notice, dated February 26, 2019, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2018-19 school year and, therefore, requested the costs of the student's attendance at Storm King at district expense (see Joint Ex. 142).³

After prehearing conferences on April 5 and April 26, 2019, the parties proceeded with the impartial hearing on June 18, 2019, which concluded on November 14, 2019 after five days of proceedings (Tr. pp. 1-870). In a decision dated March 19, 2020, the IHO determined that the August 2018 CSE properly determined that the student was ineligible for special education as a student with a disability, that Storm King was not an appropriate unilateral placement for the student for the 2018-19 school year, and that equitable considerations did not weigh in favor of the parents' requested relief, and, therefore, denied the parents' request for an award of tuition reimbursement (IHO Decision at pp. 23-34).⁴

IV. Appeal for State-Level Review

The parties' familiarity with the particular issues for review on appeal in the parents' petition for review and the district's answer thereto is also presumed and will not be recited herein. The crux of the parties' dispute on appeal is whether the IHO erred in determining that the student was ineligible for special education as a student with a disability. In addition, the parents challenge determinations by the IHO related to the composition of the August 2018 CSE and the sufficiency of the evaluative information obtained by the district. The parents also appeal the IHO's determination that Storm King was not an appropriate unilateral placement for the student for the 2018-19 school year and that equitable considerations did not weigh in favor of their requested relief.⁵

Commissioner of Education has not approved Storm King as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

² Although the parents' due process complaint notice referenced that, on September 26, 2018, the parents provided the district with notice of their intention to unilaterally place the student at Storm King (and indicated that such notice was attached to the complaint), no such correspondence was included in the hearing record (see Joint Ex. 142 at p. 10).

³ The parents also alleged that the district violated section 504 of the Rehabilitation Act of 1973 (section 504), 29 U.S.C. § 794(a), and "the 'due process' clause" of the United State Constitution (Joint Ex. 142 at p. 11).

⁴ The IHO also determined that the district did not violate section 504 (IHO Decision at pp. 29-30).

⁵ In their due process complaint notice, the parents had requested that "the district be required to reimburse them "for the costs and expenses incurred to date for the placement at Storm King, including all costs and expenses for transportation to date" (Joint Ex. 142 at p. 11). When asked during the impartial hearing to clarify the relief sought by the parents, the parents' attorney stated they were seeking tuition reimbursement and transportation for

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

the 2017-18 and 2018-19 school years (Tr. p. 38). However, the student did not attend a unilateral placement for the 2017-18 school year (see, e.g., Joint Exs. 25; 51). The IHO addressed the parents' allegations and relief specific to the 2018-19 school year (IHO Decision at p. 5) and, on appeal, the parents do not allege that this was error. Accordingly, for purposes of this decision the only year under review is the 2018-19 school year.

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]).⁶

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

⁶ 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 Matter--Section 504 of the Rehabilitation Act of 1973

On appeal, the parents argue that the IHO erred in finding that the district did not violate section 504. More specifically, the parents argue that the IHO should have found that the CSE failed to identify or evaluate the student under section 504, and the IHO failed to consider the evidence in the hearing record that the student had a mental impairment substantially limiting her ability to listen, think, learn, and concentrate.

With respect to the parents' allegations in their request for review relating to section 504, State law does not make provision for review of such claims through the State-level appeals process authorized by the IDEA and the Education Law (see Educ. Law § 4404[2] [providing that SROs review IHO determinations "relating to the determination of the nature of a child's handicapping condition, selection of an appropriate special education program or service and the failure to provide such program"]). Therefore, an SRO has no jurisdiction to review any portion of the parents' claims regarding section 504 and such claims will not be further discussed herein (see A.M. v. New York City Dep't of Educ., 840 F. Supp. 2d 660, 672 n.17 [E.D.N.Y. 2012] ["Under New York State education law, the SRO's jurisdiction is limited to matters arising under the IDEA or its state counterpart"]; see also D.C. v. New York City Dep't of Educ., 950 F. Supp. 2d 494, 507 [S.D.N.Y. 2013]).

B. CSE Process

1. CSE Composition

I will first turn to the parents' contention that the IHO erred in finding that the August 2018 CSE was appropriately composed (IHO Decision at p. 25). The parents claim that the regular education teacher that attended the August 2018 CSE meeting was the student's science teacher from sixth grade and that there was no seventh-grade teacher at the CSE meeting. The parents argue that the student's sixth grade science teacher had no knowledge regarding the student's performance as of the date of the CSE meeting.

A review of the parents' due process complaint notice reveals that the issue regarding CSE composition was not raised (see Joint Ex. 142). "Generally, the party requesting an impartial hearing has the first opportunity to identify the range of issues to be addressed at the hearing (Application of a Student with a Disability, Appeal No. 09-141; Application of the Dep't of Educ., Appeal No. 08-056). Under the IDEA and its implementing regulations, a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.507[d][3][i], 300.511[d]; 8 NYCRR 200.5[i][7][i][a]; [j][1][ii]), or the original due process

complaint is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.507[d][3][ii]; 8 NYCRR 200.5[i][7][b]). Moreover, it is essential that the IHO disclose his or her intention to reach an issue which the parties have not raised as a matter of basic fairness and due process of law (Application of a Child with a Handicapping Condition, Appeal No. 91-40; see John M. v. Bd. of Educ. of Evanston Tp. High Sch. Dist. 202, 502 F.3d 708, 713 [7th Cir. 2007]). Although an IHO has the authority to ask questions of counsel or witnesses for the purposes of clarification or completeness of the hearing record (8 NYCRR 200.5[j][3][vii]), or even inquire as to whether the parties agree that an issue should be addressed, it is impermissible for the IHO to simply expand the scope of the issues raised without the express consent of the parties and then base his or her determination on new issues raised sua sponte (see Dep't of Educ., Hawaii v. C.B., 2012 WL 220517, at *7-*8 [D. Haw., Jan. 24, 2012] [finding that the administrative hearing officer improperly considered an issue beyond the scope of the parents' due process complaint notice]).

Here, the district did not agree to expand the scope of the impartial hearing to include the issue of CSE composition and the parents did not seek permission to amend their due process complaint notice to include this issue. Further, to the extent that the Second Circuit has held that issues not included in a due process complaint notice may be ruled on by an administrative hearing officer when the district "opens the door" to such issues with the purpose of defeating a claim that was raised in the due process complaint notice (M.H., 685 F.3d at 250-51; see N.K. v. New York City Dep't of Educ., 961 F. Supp. 2d 577, 585 [S.D.N.Y. 2013]; A.M. v. New York City Dep't of Educ., 964 F. Supp. 2d 270, 282-84 [S.D.N.Y. 2013]; J.C.S. v. Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, at *9 [Aug. 5, 2013]; B.M. v. New York City Dep't of Educ., 2013 WL 1972144, at *5-*6 [S.D.N.Y. May 14, 2013]), here, the issue was only addressed briefly during the impartial hearing during parents' counsel's cross-examination of the district director of pupil personnel services, who served as the CSE chairperson at the August 2018 CSE meeting (2018 CSE chairperson) (Tr. p. 131). The district, in contrast, did not initially elicit testimony regarding the composition of the August 2018 CSE meeting, other than asking routine questions about the attendees at the meeting for background purposes (see Tr. pp. 75-76), and, therefore, could not be deemed to have "opened the door" under the holding of M.H. (see A.M., 964 F. Supp. 2d at 283; J.C.S., 2013 WL 3975942, at *9; B.M., 2013 WL 1972144, at *6). Accordingly, the IHO erred in reaching the issue of CSE composition sua sponte and finding "that the CSE was appropriately staffed as per New York State regulations" (IHO Decision at p. 25).

Nevertheless, even assuming arguendo that the issue of CSE composition had been properly raised by the parents, the evidence in the hearing in the hearing record would not support the conclusion that it would have resulted in or contributed to a denial of FAPE to the student. The IDEA requires that a CSE include not less than one regular education teacher of the student, if the student is or may be participating in the general education environment (20 U.S.C. § 1414[d][1][B][ii]; see Educ. Law § 4402[1][b][1][a][ii]; 34 CFR 300.321[a][2]; 8 NYCRR 200.3[a][1][ii]; see also E.A.M. v. New York City Dep't of Educ., 2012 WL 4571794, at *6 [S.D.N.Y. Sept. 29, 2012]). The regular education teacher "shall, to the extent appropriate, participate in the development of the IEP of the child, including the determination of appropriate positive behavioral interventions and supports and other strategies and supplementary aids and services, program modifications, and support for school personnel" (20 U.S.C. § 1414[d][3][C]; 34 CFR 300.324[a][3]; 8 NYCRR 200.3[d]). As previously noted, however, under the IDEA an administrative hearing officer may find that a student did not receive a FAPE only if procedural

inadequacies impeded the student's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or 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]).

The student's sixth grade science teacher attended the August 2018 CSE meeting and provided input regarding the student's performance and progress during the 2016-17 school year (Joint Exs. 74 at pp. 1-2; 75 at p. 1). The district school psychologist testified that she contacted the seventh-grade teachers prior to the CSE meeting but that, during the summers, staffing was limited for attendance at CSE meetings as it was outside of staff's contractual time (Tr. pp. 131-32). In short, even assuming that the issue was properly raised as an issue to be resolved during the impartial hearing and that the sixth-grade science teacher's attendance at the August 2018 CSE meeting was not sufficient to satisfy the regulatory requirements, there is no evidence to support that the inclusion of a sixth grade-regular education teacher who was familiar with the student instead of one of the student's seventh grade regular education teachers was so infirm as to have impeded the student's right to a FAPE or significantly impeded the parent's opportunity to participate in the decision-making process, or caused a deprivation of educational benefits, especially when the regulations also contemplate that even a regular education teacher who had not yet worked with the student could have permissibly served on the CSE (see 20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; see also IEP Team Attendance, 71 Fed. Reg. 46,675 [Aug. 14, 2006] [noting that "[t]he regular education teacher who serves as a member of a child's IEP Team should be a teacher who is, or may be, responsible for implementing a portion of the IEP so that the teacher can participate in discussions about how best to instruct the child"] [emphasis added]). Additionally, the hearing record does not contain any evidence upon which to base a determination that a CSE composition deficiency warrants such a conclusion. The district is reminded of its obligation to include the appropriate personnel on the CSE; however, in this instance there was no procedural error that would warrant or contribute to a finding that the participation of the student's sixth grade regular education teacher as opposed to one of her seventh grade regular education teachers denied the student a FAPE.

2. Evaluative Information

The IHO held that the August 2018 CSE had "proper information before it in order to make an appropriate determination" as to the student's eligibility (IHO Decision at p. 26). Specifically, the IHO stated that the CSE reviewed its own psychological and educational evaluation, together with a social history, and documents provided by the parent including a private neuropsychological evaluation report, ADHD testing, and a "speech/hearing" evaluation report (id.). The IHO further held that, although the parent was correct that the district did not obtain a physical exam or complete a classroom observation, "the physical examination is typically provided by the Parents," the CSE reviewed some "medical information. . . related to the Student's ADHD and Anxiety," and the student's sixth grade teacher attended the CSE meeting "and reported on her informal observations of the Student in the classroom" (id.). On appeal, the parents argue that the IHO erred in these determinations. Specifically, the parents argue that a physical examination, recent classroom observation, and speech-language evaluation were required evaluations for an eligibility determination.

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 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 a May 21, 2018 email, the student's mother notified the CSE chairperson of her decision to enroll the student at a private school that could address her needs in "executive functioning, organization, social counseling, and therapists for anxiety" and stated that she wanted the district to "arrange for transportation" for the student to and from the private school (Joint Ex. 83 at p. 2). The mother asked if she needed to have the student "re-classified" in order to accomplish this and requested information on how to begin the process (id.).⁷ The CSE chairperson responded advising the parent of the process to request both a special education evaluation and transportation to the private school (id. at pp. 1-2; see Tr. pp. 312-13).

In a May 31, 2018 letter, the parents notified the district that, "[u]pon the recommendation of the doctors and clinicians," they were referring the student to the CSE to request an "evaluation and an IEP" (Joint Ex. 64 at pp. 1-2). The parents informed the district of the student's prior diagnoses and that they were in the process of obtaining private evaluations, which they would share with the district once they received them (id. at p. 1). In a June 1, 2018 prior written notice, the district requested the parents' consent to evaluate the student (Joint Ex. 72). In a second letter dated June 12, 2018, the parents reiterated their referral of the student to the CSE and "attached several of her evaluations" for review (Joint Ex. 65 at pp. 1-3; see Tr. pp. 313-14, 437-38). According to testimony from the student's mother, evaluations attached to the June 2018 letter included a speech-language evaluation report, "an audiology report," "raw data" from ADHD testing and a related report, as well as a report indicating that the student met the criteria for an anxiety diagnosis (Tr. p. 314). In addition, in the June 2018 letter, the parents provided detailed information regarding the student's medical and educational history and academic difficulties (see

⁷ The student had received special education services as a preschool student with a disability but was declassified as of June 2009 (see Joint Exs. 66; 67).

Joint Ex. 65). On June 12, 2018, the parents signed consent for the district to conduct an initial evaluation of the student (Joint Ex. 52). The consent to evaluate was reportedly received by the district on July 3, 2018 (see Joint Exs. 52; 86 at p. 1).

The parents completed a social, developmental medical history form on June 12, 2018 (Joint Ex. 102 at pp. 1-8). On July 20, 2018, a district school psychologist conducted a psychosocial evaluation of the student, which consisted of a record review, review of the social history completed by the parent, administration of the Woodcock-Johnson IV (WJ-IV)-Test of Cognitive Abilities and the Vineland Adaptive Behavior Scales, Third Edition (Vineland-III), and an informal interview with the student (Joint Ex. 105 at p. 1). On August 20, 2018, a district special education teacher conducted an educational evaluation of the student, which consisted of administration of seven subtests from the WJ-IV Tests of Achievement (Joint Ex. 106 at p. 1).

The August 2018 CSE considered the above evaluations conducted by the district, as well as a July 16, 2018 private neuropsychological evaluation report (Tr. pp. 76-78, 155; Joint Ex. 74 at pp. 2-5; see Joint Ex.104 at pp. 1-45).⁸ The private neuropsychological evaluation report included scores obtained from administration of: the Wechsler Intelligence Scale for Children-Fifth Edition (WISC-V); the Wechsler Individual Achievement Test-Third Edition (WIAT-III); selected subtests of the NEPSY: A Developmental Neuropsychological Assessment Test-Second Edition (NEPSY-2); selected subtests of the Test of Written Language-Fourth Edition (TOWL-4); the Conners 3rd Edition, Self-Report (Conners 3-SR);⁹ the Behavior Assessment System for Children-Third Edition (BASC-3), self-report; the Sentence Completion Test; and the Three Wishes Assessment (Joint Ex. 104 at pp. 1, 8-39). In addition, the neuropsychologist conducted clinical interviews with the student, the student's mother, and the student's therapist (id. at p. 1).

The August 2018 CSE also considered otolaryngologist (ENT) reports submitted by the parent from December 2016 and January 2017, which were completed by an audiologist, a speech-language pathologist, and a medical doctor respectively, and included results from an audiogram, as well as administration of the Test of Auditory Processing Skills (TAPS) and the Clinical Evaluation of Language Fundamentals – Fifth Edition (CELF-5) (hereinafter collectively referred to as the private speech-language and hearing evaluations) (Tr. pp. 77-78, 106; Joint Exs. 74 at pp. 2, 5; 109-114).

Additionally, the August 2018 CSE considered a January 22, 2017 letter from the student's pediatrician (Tr. pp. 100, 127; Joint Exs. 61; 74 at p. 2). Although the student's pediatrician provided a diagnosis of a generalized anxiety disorder, she also concluded that the student did not meet the criteria for a diagnosis of an attention deficit hyperactivity disorder (ADHD) (Joint Ex. 61).

⁸ By email dated August 3, 2018, the parent provided the district with a copy of the private neuropsychological evaluation report (see Joint Ex. 91).

⁹ In the summary of assessment procedures used, the evaluation report refers to use of the Conners 3, Parent; however, in the summary of the results of the administration of the Conners 3, the neuropsychologist describes the use of the student self-report (compare Joint Ex. 104 at p. 1, with Joint Ex. 104 at p. 39).

Finally, the August 2018 CSE considered the student's academic record for sixth and seventh grades and the results of sixth grade NYSTP testing, as well as her discipline records (Tr. pp. 127-29, 148, 343; Joint Ex. 74 at p. 2; see Joint Exs. 8-23; 34-35; 126).

Generally, the parents are correct in their argument that the district failed to conduct all evaluations required by State regulation (8 NYCRR 200.4[b][1]) and for which it obtained the parents' consent (Joint Ex. 52). However, as demonstrated below, the CSE generally had before it the types of information that would have been obtained had the district conducted the classroom observation, physical examination, and speech-language evaluation identified by the parents as lacking and, therefore, the district's failure to conduct certain evaluations represents a procedural violation in this instance that does not rise to the level of a denial of a FAPE.

First, as to a classroom observation, State regulation requires that an observation take place "in the student's learning environment" for the purpose of "document[ing] the student's academic performance and behavior in the areas of difficulty" (8 NYCRR 200.4[b][1][iv]). The district argues that it was not possible to conduct a classroom observation prior to the CSE meeting, since classes were no longer in session by the time the parents provided consent for evaluations;¹⁰ however, State regulation makes no exception for evaluations conducted over summer months. Nevertheless, while the district did not conduct a classroom observation, the student's sixth grade teacher attended the August 2018 CSE meeting and provided a description of the student in the classroom environment (Joint Ex. 74 at p. 2).

Next, while a physical examination was not conducted by the district, the CSE did have a letter from the student's pediatrician, the private speech-language and hearing evaluations, and medical information provided by the parent in the social, developmental medical history form (see Joint Exs. 61; 102; 109-114). The form completed by the parents, in particular, included information about the student's family medical history and the student's developmental and medical history (Joint Ex. 102 at pp. 2-5).

Finally, while the district did not conduct a speech-language evaluation, a district speech-language pathologist attended the August 2018 CSE meeting (Joint Exs. 74 at p. 1; 75; see Tr. p. 249). At the meeting, she reviewed the private speech-language and hearing evaluations, including the results of the audiogram and the administration of the CELF-5 and TAPS (Tr. pp. 77-78; Joint Exs. 109-114). The private speech-language and hearing evaluation reports showed that the student demonstrated normal hearing (Tr. p. 95; Joint Exs. 109 at p. 2; 114 at p. 1; see Tr. p. 95). In addition, the private speech-language and hearing evaluation reports showed that administration of the TAPS yielded "normal scores other than sentence memory with a low score of three" (Tr. p. 95; e.g., Joint Exs. 110 at pp. 1-2; 114 at p. 1).¹¹ While administration of the CELF-5 yielded a below average score on a subtest assessing the student's ability to follow directions, the student's

¹⁰ As noted above, although the parents signed the consent for evaluations on June 12, 2018, the district apparently did not receive it until July 3, 2018 (see Joint Ex. 52).

¹¹ The speech-language pathologist testified that performing poorly in this area could have a negative impact on the student and could present in the classroom as having difficulty remembering information or stating things back (Tr. p. 257). However, she reported that such difficulty was not indicated by the report or at the meeting (id.).

scores fell in the average to above-average range on the remaining subtests; according to the reports, the private speech-language pathologist concluded that the student's overall receptive and expressive language skills were found to be within normal limits (Joint Exs. 111 at p. 1; 112 at pp. 1-2). Based upon the private speech-language and hearing evaluation reports reviewed at the CSE meeting, the district's speech-language pathologist did not find any basis to recommend further testing to assess the student's auditory processing, hearing, or expressive or receptive language abilities (Tr. pp. 251-52).

In sum, a review of the evidence in the hearing record does not establish that any alleged procedural violations in this matter, individually or cumulatively, resulted in a denial of a FAPE to the student. The evidence does not show that the lack of evaluations "deprived [the parents] of evaluative material so critical and insufficiently substituted at the CSE meeting that [they were] significantly hindered in [their] ability to advocate" for the student (A.A. v. New York City Dep't of Educ., 2015 WL 10793404, at *11 [S.D.N.Y. Aug. 24, 2015]). While the parents contend now that the district did not conduct all required evaluations, the evaluative information available to the CSE, even if not meeting every procedural requirement for an initial evaluation, provided sufficient information regarding the student (see C.M. v. New York City Dep't of Educ., 2017 WL 607579, at *16-*17 [S.D.N.Y. Feb. 14, 2017]; S.Y. v. New York City Dep't of Educ., 210 F. Supp. 3d 556, 567 [S.D.N.Y. 2016] [holding that procedural violations, including untimely evaluations and the failure to obtain required evaluations, did not rise to the level of a denial of a FAPE where the CSE had adequate information about the student's needs]; K.F. v. New York City Dep't of Educ., 2016 WL 3981370, at *7-*8 [S.D.N.Y. Mar. 31, 2016] [holding that where evaluative materials provided detailed information regarding the student's needs, the procedural violation of not conducting required evaluations did not rise to the level of a denial of a FAPE]; T.C. v. New York City Dep't of Educ., 2016 WL 1261137, at *7-*8 [S.D.N.Y. Mar. 30, 2016]; M.T. v. New York City Dep't of Educ., 165 F. Supp. 3d 106, 116 [S.D.N.Y. 2016]; N.M. v. New York City Dep't of Educ., 2016 WL 796857, at *5 [S.D.N.Y. Feb. 24, 2016]).

C. Eligibility for Classification as a Student with a Disability

I will turn next to the issue of whether the August 2018 CSE properly determined that the student was ineligible for special education as a student with a disability. The IDEA defines a "child with a disability" as a child with specific physical, mental, or emotional conditions, including a learning disability, "who, by reason thereof, needs special education and related services" (20 U.S.C. § 1401[3][A]; Educ. Law § 4401[1]; see 34 CFR 300.308[a][1]; 8 NYCRR 200.1[zz]).

Minutes from the August 2018 CSE meeting indicate that based upon the documents described above and anecdotal information the CSE determined that the student was not eligible for classification at that time (Joint Ex. 74 at p. 3). The meeting minutes stated that the student did not "exhibit a significant delay in one or more functional areas related to cognitive, language and communicative, adaptive, socio-emotional or motor development which adversely affected her ability to learn" and noted that the student would be referred to the school-based RtI team (id.). According to the CSE meeting minutes, the parents requested a discussion regarding classification and eligibility, specifically that the student be classified as a student with an emotional disturbance (id.). However, the meeting minutes indicated that the student had not exhibited any of the factors needed to qualify for special education as a student with an emotional disturbance (id.). Next, a

family friend. who attended the meeting inquired about the hearing impairment disability category (id.). The meeting minutes indicated that in reviewing the student's most recent audiological report the student's audiogram showed hearing within normal limits (id.). In addition, language testing yielded receptive and expressive language scores within the average range (id.). According to the CSE meeting minutes, the CSE recommendations remained the same (id.).

In their due process complaint notice, the parents requested that the student be found eligible for special education as a student with an emotional disturbance or multiple disabilities (Joint Ex. 142 at p. 11). The IHO determined that the student did not meet the criteria for classification as a student with an emotional disturbance (IHO Decision at pp. 27, 29). The IHO failed to address the parents' argument that the student should be classified as having multiple disabilities. Further, the IHO held that the student did not meet the criteria for a student with a learning disability (id. at pp. 27-28). Finally, the IHO determined that the student did not meet the criteria for eligibility as a student with a hearing impairment (id. at p. 28).¹² In their request for review, the parents generally argue that the IHO erred in finding that the CSE appropriately found the student ineligible for special education under the criteria for any of the disability categories. However, the parents further specifically argue that the IHO should have found that student met the criteria for eligibility as a student with an emotional disturbance or a learning disability. Based upon the foregoing, for purposes of this appeal, the review shall be limited to whether the student should have been classified as a student with an emotional disturbance or learning disability.

1. Emotional Disturbance

The parents challenge the IHO's determination that the student's medical diagnosis of generalized anxiety disorder and the neuropsychologist's testing "did not establish a classification of emotionally disturbed" (IHO Decision at p. 27). Further, the parents argue that the neuropsychologist's report "also contained significant data that evidences the existence of at least one of the four [sic] characteristics of the [e]motional [d]isturbance." The August 2018 CSE consensus was that the student did not meet the criteria for eligibility as a student with an emotional disturbance (Tr. pp. 91-94; Joint Ex. 74 at p. 3; 76 at p. 1).¹³ The CSE explained that the student had "not exhibited the inability to learn that cannot be explained by intellectual, sensory, or health factors; she ha[d] not demonstrated the inability to build or maintain relationships with peers and teachers; she ha[d] not demonstrated inappropriate types of behavior or feelings under normal circumstances; she ha[d] not demonstrated a generally pervasive mood of unhappiness or depression; nor ha[d] she demonstrated a tendency to develop physical symptoms or fears associated with personal or school problems to a marked degree over a long period of time and to a marked degree within the school setting" (Joint Exs. 74 at p. 3; 76 at p. 1).

The elements discussed by the CSE are the first portion of the emotional disturbance category that must be analyzed. Under the IDEA, in order to be found eligible for special education

¹² The parents made clear in their memorandum of law in support of their request for review that they were not contending the student was eligible for special education as a student with a hearing impairment.

¹³ See 8 NYCRR 200.1[zz][4].

as a student with an emotional disturbance, the student must meet one or more of the following five characteristics:

- (A) An inability to learn that cannot be explained by intellectual, sensory, or health factors.
- (B) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers.
- (C) Inappropriate types of behavior or feelings under normal circumstances.
- (D) A general pervasive mood of unhappiness or depression.
- (E) A tendency to develop physical symptoms or fears associated with personal or school problems.

(34 C.F.R. § 300.8[c][4]; see 8 NYCRR 200.1[zz][4]). Additionally, the student must exhibit one or more of the five characteristics over a long period of time and to a marked degree that adversely affects the student's educational performance (id.). While emotional disturbance includes schizophrenia, the term does not apply to students who are socially maladjusted, unless it is determined that they otherwise meet the criteria above (id.; New Paltz Cent. Sch. Dist. v. St. Pierre, 307 F. Supp. 2d 394, 398 [N.D.N.Y. 2004]).

a. Inability to Learn

The August 2018 CSE considered the July 16, 2018 neuropsychological evaluation report which was reviewed and interpreted by the district's school psychologist in attendance at the meeting (Tr. pp. 76-77; 222-23, 226; see Joint Exs. 74 at p.2; 104). The neuropsychologist who evaluated the student offered the following diagnoses: generalized anxiety disorder, specific learning disability with impairments in mathematics (dyscalculia), and persistent depressive disorder (dysthymia), as well as sensorineural hearing loss and mixed receptive language disorder "by history" (Tr. p. 505; Joint Exs. 74 at pp. 2-3; 104 at p. 41).

With respect to the first of the five characteristics, the CSE chairperson testified that "[d]espite [the student's] generalized anxiety diagnosis, it was not substantially limiting her ability to learn or access the general education curriculum at that time" (Tr. p. 101; Joint Ex. 74 at p. 3). There was no disability or other factors affecting her ability to learn based upon grades and assessments (Tr. pp. 91-92). The director explained that the "student does not exhibit a significant delay or disorder in one or more functional areas related to cognitive, language and communicative, adaptive, socio-emotional or motor development which adversely affects the student's ability to learn" (id.). According to the CSE chairperson, in seventh grade the student reportedly did not have "attention concerns" but rather her attention was good, and she was missing assignments "in only the first marking period" (Tr. p. 153, 156).

The student's sixth grade regular education ELA and math teacher testified that the student loved reading, writing, and acting (Tr. pp. 835-36). The teacher stated that she contacted the parent at the beginning of the school year because the student was missing some homework assignments

(Tr. p. 840). The parent testified that the student's sixth grade regular education teacher for ELA and math teacher provided the student with accommodations in math class to help with anxiety (Tr. pp. 300, 409-10). Specifically, the teacher allowed the student to leave the classroom if she needed to, provided preferential seating, worked with her during lunch break, and made the student aware of and worked with her in "homework club" (Tr. pp. 300; 840-41). The student participated in homework club during sixth grade and her math grades improved over the course of the school year (Tr. p. 842). The teacher opined that the student "had a great year" (Tr. p. 845). The student received academic intervention services (AIS) services for math in sixth grade but not in seventh grade (Tr. pp. 90, 302; Joint Ex. 74 at p. 2). The student had been receiving private math tutoring since third grade but stopped receiving tutoring in December 2016 when she was in sixth grade and her regular education math teacher began working with her (Tr. pp. 310-11). However, the teacher acknowledged that even with private tutoring, homework club, AIS and extra help from the teacher, the student still received a final grade of 78 in math class (Tr. pp. 848-49, 852-53; Joint Ex. 15).

According to the July 2018 psychosocial evaluation report and as reflected in the August 2018 CSE meeting minutes, the student's general intellectual ability (GIA) fell within the average range (Joint Exs. 74 at p. 2; 105 at p. 3). Specifically, the student's comprehension–knowledge, fluid reasoning, short-term working memory, and cognitive efficiency abilities fell in the average to high average range (Joint Exs. 74 at p. 2; 105 at pp. 3-4). An assessment of the student's adaptive behavior based on parent responses fell in the moderately low range with the exception of daily living skills which fell within the adequate range (Joint Ex. 105 at p. 4). The school psychologist testified that the moderately low score meant that the student had some but not significant weaknesses in these areas (Tr. p. 240).

The July 2018 neuropsychological evaluation report indicated that during testing the student's overall level of attention and concentration were generally adequate, but that she gave up easily when she did not know the answer, and seemed to lack confidence which "likely lowered several of her scores" (Joint Ex. 104 at p. 7). According to the July 2018 neuropsychological evaluation report, the student's full-scale IQ, verbal comprehension, visual spatial skills, fluid reasoning, working memory, processing speed, nonverbal ability, general ability, and cognitive proficiency fell in the average to high average range (Tr. pp. 568, 583-85, 588, 628, 635-36, 677-78; 681-82; 104 at pp. 10-14). The student's attention and executive functioning and social perception skills fell at or above the expected level, while her language, and memory and learning indices fell at the borderline to expected level (Tr. pp. 522, 635, 678; 104 at p. 21). The neuropsychologist testified that the student's performance suggested some subtle dysfunction in language and memory and learning (Tr. p. 522). He reported that the student "struggled" to understand and follow directions, which he opined could be due to problems with receptive language, or anxiety (Tr. p. 523). He noted that the student was quick to say "I don't know" or give up which could be indicative of low self-esteem or anxiety (Tr. p. 523).

The August 2018 CSE also had before it an August 20, 2018 educational evaluation report which indicated that the student fell in the average range in the areas of broad reading, broad math, broad written language and broad achievement (Joint Ex. 106 at p. 1). The August 2018 CSE chairperson asserted that overall, the results of the August 2018 district educational evaluation were consistent with the results of the July 2018 private neuropsychological evaluation (Tr. p. 100; compare Joint Exs. 104, with 106).

The parent admitted during cross-examination that with respect to the student's ability to learn the student's testing and grades placed her largely in the average range; however, the parent also explained that she felt the student had several areas of relative weakness or deficit (Tr. pp. 380-91), however, a relative weakness does not indicate an inability to learn. The neuropsychologist stood by statements in his evaluation report regarding the student's inability to learn, but qualified his response, indicating that those concerns were not academic in nature (Tr. pp. 601-02). Overall, there is insufficient evidence to disturb the IHO's determination that the student's anxiety did not render her unable to learn.

b. Inability to Build or Maintain Satisfactory Interpersonal Relationships

Turning to the second of the characteristics, during the impartial hearing, the parent testified that the student experienced a "pretty rapid decline" and began having social issues, was no longer engaged, and became more withdrawn (Tr. pp. 292-93). As part of the July 2018 neuropsychological evaluation, the parent reported concerns about the student having few close friends, difficulty reading facial expressions, sensitivity to loud noise, stomachaches, motor difficulties, PTSD, and autism/Asperger's (Tr. pp. 135-36). The July 2018 psychosocial evaluation report indicated that according to the parent, the student had exhibited problems adjusting to sixth grade related to socialization and transitioning between classes, was easily distracted and forgetful, exhibited poor planning, and had been suspended for three days for a code of conduct violation in December 2017 (Joint Exs. 102 at pp. 5-6; 105 at p. 1).

However, the evaluative information before the CSE also indicated that in the area of social skills, the student was reportedly "excellent with adults," had "many friends but none that are close" and was "bullied frequently" (Joint Exs. 102 at p. 7; 105 at p. 2).¹⁴ The student's sixth grade regular education ELA and math teacher testified that she had a very good relationship with the student (Tr. p. 845). The student's sixth grade science teacher testified that the student communicated on issues and had an appropriate relationship with her, and had relationships with other students in the class (Tr. 201-02). During cross-examination the parent made additional admissions that the student was outgoing, made friends easily (albeit few close friends) and had appropriate relationships with adults and peers (Tr. pp. 370-373; see Tr. p. 421).¹⁵ The evidence in the hearing record is sufficient to support the IHO's finding that the student did not meet this characteristic.

c. Inappropriate types of behavior or feelings

With regard to the third characteristic, during the evaluation of the student by the district, the parent reported that the student exhibited social anxiety, difficulty "understanding the material," distractibility, disorganization, anxiety, and depression (Joint Exs. 102 at p. 6; 105 at p.

¹⁴ At the time of the July 2018 psychosocial evaluation report, in addition to tutoring, the student was reportedly receiving cognitive behavioral therapy (CBT) outside of school (Joint Exs. 74 at p. 2; 102 at p. 5; 105 at p. 2).

¹⁵ Although I find the statements unpersuasive, the neuropsychologist indicated that the student did not form appropriate relationships with peers or teachers (Tr. p. 603, 617-18).

1). The student's sixth grade regular education science teacher, who attended the August 2018 CSE meeting, testified that the student exhibited good attendance and behavior typical of a sixth grade student when she was in her class of 25 students during the 2016-17 school year (Tr. pp. 131, 199-201).¹⁶ The teacher described the student's transition into middle school as "a little shaky," but that she "gained a lot of good skills," and "made a lot of progress through sixth grade" (Tr. p. 203). The student's fourth quarter grade in her sixth-grade regular education science class was 90 (Tr. p. 204; Joint Ex. 15). The teacher reported that the student used strategies she was taught to become more focused and organized during the year, and that she liked to participate in class (Tr. pp. 205-06). The teacher confirmed that similar to "most sixth graders," the student's organization abilities were an area of concern and she was sometimes focused on "things other than the lesson" like socializing or engaging in something else (Tr. pp. 208-09). The student's ability to attend to a task reportedly improved as the year progressed (Tr. pp. 152, 156, 210; see Joint Exs. 8; 9; 10; 11; 16; 17; 18; 19; 74 at p. 2). With regard to the student's affect and social skills, the student's sixth grade regular education ELA and math teacher testified that the student "was very enthusiastic and very social with the kids and me" (Tr. p. 837). The teacher described the student as overall "very happy" (Tr. pp. 837, 845)

Despite reports of the student's apparent successes, the parent was nevertheless of the view that the student "began having difficulty navigating the system" when she started middle school (Tr. p. 292). The parent explained that she was "not sure that it was the transferring from class to class, the noise, the chaos involved with going in the hallways between classrooms or whether or not it was remembering the materials from class to class" but that the student seemed to have issues with all of these things (Tr. p. 292).

The student was assessed by the district for maladaptive behavior and the results indicated that the student fell in the "clinically significant" range for "internalizing problems" (Joint Exs. 74 at p. 2; 105 at p. 5). Specifically, the student's responses indicated that she fixated on objects and topics, exhibited repetitive movements, and could be "tricked" into doing something that could cause harm (Joint Ex. 105 at p. 5). In an informal interview, the student reported nervousness about going to school, big tests, and social difficulties as well as "feelings of anxiety" which interfered with "everything" (Joint Ex. 105 at p. 5). The private July 2018 neuropsychological report indicated that the student fell in the at-risk range for school problems and personal adjustment (Joint Ex. 104 at p. 31). The student reported in the informal interview that she had made some poor social choices but was now "with a new peer group" which was "better" (Tr. pp. 147-48; Joint Ex. 105 at p. 5).

Additional self-reporting suggested that the student exhibited clinically significant levels of inattention, hyperactivity/impulsivity, learning problems, defiance/aggression, and family relations (Joint Ex. 104 at p. 39). The neuropsychologist explained that the student met the diagnostic criteria for persistent depressive disorder and described the reasoning for the diagnosis (Tr. pp. 533-36). Specifically, he stated that based on the BASC-3 self-report, many of the

¹⁶ During the sixth grade, the student was absent from school seven days and tardy four days (Joint Exs. 15, 25).

student's scores were significant, and her score in the area of self-esteem was clinically significant (Tr. pp. 526, 529, 533; Joint Ex. 104 at pp. 35-36).

However, the neuropsychologist confirmed during the impartial hearing that the BASC-3 was administered only one time prior to the August 2018 CSE meeting, to only the student, despite the fact that the BASC-3 consisted of several additional rating scales for parents and teachers (Tr. pp. 229-230, 580-81, 599-600). The neuropsychologist was unaware that purportedly there was a "low correlation" between the student's scores and the teacher and parent scores, and that three successive administrations over time were recommended by the publishers of the BASC-3 to determine an emotional disturbance classification, which in accordance with NYS law requires that the student exhibit "characteristics [of emotional disturbance] over a long period of time" (Tr. pp. 581-82, 599-600).¹⁷ The school psychologist testified that one rating (student self-report) was not enough information to base a decision on whether a student qualified as having emotional disturbance under IDEA (Tr. pp. 230-231). The school psychologist testified that the BASC-3 administration (only to the student and not to a parent and a teacher) diminished the reliability and validity of the assessment (Tr. p. 230).

During cross examination, the neuropsychologist conceded that he was aware of a single specific incident in which the student exhibited an inappropriate responses to normal stimuli involving a racist symbol (Tr. pp. 623-24), and while I agree the student's conduct was inappropriate, the student's mother explained the circumstances in which it occurred—that the student was seated next to and invited to engage in the inappropriate conduct by other students which were described as "cool kids" (Tr. pp. 315-17). The cause of stimuli leading to the incident was clear, and while an example of poor judgement by the student under peer pressure, the single incident is not sufficient to find that the student met one of the criteria for an emotional disability.

The United States Department of Education's Office of Special Education Programs has indicated that the third characteristic,

"inappropriate behaviors under normal circumstances" as operationally defined by a number of States may include those behaviors which are psychotic or bizarre in nature or are atypical behaviors for which no observable reason exists. For example:

Running away from a stressful situation, whether at home or at school, is not characteristic of the type of behavior this definition contemplates. Nor is the taking of alcohol or drugs, however harmful, such an inappropriate act under normal conditions as to come within this definition. This definition might include behavior such as assaulting teachers or students for no apparent reason. (emphasis in original). In re: Sacramento County Office of Education, 1981-82 EHLR DEC. 503:314, 316. See also Sequoia Union High School District, 1985-86 EHLR DEC. 507.495.

The essential element appears to be the student's inability to control his/her behavior (Doe v. Maher, 793 F.2d 1470, 1480 footnote 8, (9th Cir. 1986))

¹⁷ See NYCRR 200.1(zz)(4).

and conform his/her conduct to socially acceptable norms (Honig v. Doe, 108 S.Ct. 592, 595 (1988)).

Letter to Anonymous, 213 IDELR 247 (OSEP 1989). In this case, while the student experienced anxiety in response to stressful situations, the student's behavior under the circumstances in which she found herself were not so unusual to satisfy the third characteristic and there is no reason to disturb the IHO's decision on this basis.

d. General Pervasive Mood of Unhappiness or Depression

Turning next to the fourth characteristic, the student's mother indicated during the impartial hearing that the student experienced depression (Tr. p. 354, 372). On the other hand, the sixth grade science teacher did not observe the student ever presenting with a "mood of sadness" and indicated that the student was able to "handle" the sixth-grade curriculum (Tr. pp. 202-03). The teacher described the student as "bubbly" and "fairly outgoing," with a good sense of humor (Tr. p. 206). The student's sixth grade regular education ELA and math teacher testified that she saw the student was upset at the beginning of the school year because she was concerned about family relationship issues (Tr. p. 837).

The neuropsychologist testified that in addition to the self-report, interviews with the student's parent and her doctor confirmed that she did meet the diagnostic criteria for depression (Tr. p. 534).¹⁸ The August 2018 CSE chairperson confirmed that the background information section of the July 2018 neuropsychological report included a matrix where the parent starred items that were an area of concern for the parents or might be problematic for the student (Tr. p. 79). She noted that the parent did not star items that indicated the student was sad most of the day, was excessively nervous, had panic attacks, was withdrawn, refused to attend school, or had phobias (Tr. pp. 78-79). In addition, the parent did not indicate that the student had problems with nausea or vomiting, a math learning disability, had a hearing impairment or an emotional disturbance (Tr. pp. 79-81; Joint Ex. 104 at pp. 2-6). The neuropsychologist also acknowledged that neither the parent nor the student's doctor had expressed concerns regarding depression, sadness or poor self-esteem in the written information that he reviewed for the evaluation (Tr. pp. 620-21; see Joint Exs. 61; 103 at pp. 2-3, 7; 104). The neuropsychologist opined that the student met the criteria for a diagnosis of depression and an emotional disturbance classification based upon a "pervasive mood of unhappiness or depression" (Tr. pp. 576-77, 620). However, according to the neuropsychologist's own testing, the student did not meet the criteria for classification as a student with an emotional disturbance as she did not have the inability to form appropriate relationships, was not diagnosed with depression, and was not at risk for suicidal behavior (Tr. pp. 619-22). Although the neuropsychologist opined that the student had an emotional disturbance, his opinion was premised upon a false presumption that if a student is diagnosed with a disorder or disability under the Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (DSM-V) it therefore means that the student has a disability under IDEA (Tr. p. 593). However, the mere

¹⁸ The CSE chairperson acknowledged that the BASC-3 showed scores in the clinically significant range (Tr. pp. 139, 240-41; see Tr. pp. 532-33), but as described above, there is evidence that shows the administration of the BASC-3 rendered it less reliable in this case.

evidence that a student has a medical or DSM-V diagnosis does not mean she meets the criteria for special education under the IDEA or State law.

Although the neuropsychologist expressed the opinion that the student experienced a general pervasive mood of unhappiness or depression respect to the student's education, on cross examination he also conceded that he relied upon the mother's intake data which did not actually identify sadness or depression as an issue and that the student's treating physician did not actually offer a diagnosis of depression (Tr. pp. 620-21). The evidence regarding the student's mood was scattered and the evaluative information that was before the CSE was not sufficient in this case to support the conclusion that the student met the characteristic for a general and pervasive mood of unhappiness or depression that would require reversal of the IHO's determination.

e. Physical Symptoms or Fears Associated with Personal or School Problems

With regard to the last of the five characteristics, the CSE chairperson testified with regard to a tendency to develop physical symptoms or fears associated with personal or school problems that the CSE discussed that factor and found that the student did not demonstrate those tendencies (Tr. pp. 93-94).

However, the psychosocial evaluation report before the CSE noted in the student interview that

[the student] said her feelings of anxiety get in the way 'of everything.' She explained that she gets nervous about going to school, big tests and social difficulties, and will sometimes get so anxious that she vomits. [The student] noted 'if it's a bad Friday, I worry all weekend.' She described herself as a 'hot mess' in 6th grade. In 7th grade, she reported that she got her grades 'back on track' but was a 'hot mess' socially (was hanging out with kids that were not making good choices). [The student] added that she now has a new peer group and 'it is getting better.' She said she is looking forward to her new school but made several comments about the expense of the school causing her to worry as well as some tension at home.

(Joint Exhibit 105 at p. 5). The evaluator noted that "[the student] becomes physically ill at the thought of going to school" (*id.* at p. 2).¹⁹ According to the parent, starting in seventh grade she began to have difficulty getting the student to school (Tr. p. 293). She reported that the student started "dragging her heels" and "giving her a hard time" and there was "a lot of yelling, bribes, coercion whatever it took to get her in the car to school" (Tr. pp. 293-94). The parent reported that "a lot of times" the student was late getting to school (Tr. p. 294). In a letter dated January 26, 2018 the district advised the parent that the student had been late to school "an excessive number of times," 16 out of 83 possible school days (Joint Ex. 62).²⁰ The parent reported that in response

¹⁹ The student's mother reported to the neuropsychologist that the student experienced stomachaches (see Joint Ex. 103 at p. 6).

²⁰ There was also indication in the evidence that student was absent six days during the school year, and tardy 18 days (Joint Exs. 16-23).

to the letter she began setting the student's clothes out the night before and the student used a checklist at home for getting her bag prepared when she left for school (Tr. pp. 294-95). In addition, the student was working with a therapist at the time who "began assisting her with some of the issues and reasons she did not want to get up and go to school as well as giving her some tools to manage those issues and planning skills as well" (Tr. p. 295). As a result, the student reportedly benefitted "to a degree" from strategies implemented by the parent and her private therapist such as presets, checklists, and planning tools (Tr. pp. 294-95).

The evidence shows that according to the district's evaluation of the student, the student exhibited physical symptoms and fears related to her anxiety and her school experiences. Those symptoms were corroborated by the student's mother and were thus based on multiple sources of information. While the parent attempted to mitigate the symptoms with activities and strategies the night before, the district did not provide evidence that this was a short-term issue. Accordingly, I disagree with the IHO with regard to the last characteristic. However, meeting one or more of the five characteristics is only the first element of the emotional disturbance eligibility determination.

f. Adverse Affect

The next portion of the emotional disturbance definition is a determination of whether the characteristic was exhibited over a long period of time and to a marked degree and in a way that adversely affected the student's educational performance 34 CFR 300.8[c][4]; see 8 NYCRR 200.1[zz][4]). The meaning of adversely affecting educational performance is an issue that has been left for each state to resolve (J.D. v. Pawlet Sch. Dist., 224 F.3d 60, 66 [2d Cir. 2000]). Although some states elect to establish further, more explicit definitions for these terms, often through regulation or special education policy (see, e.g., Mr. I. v. Maine Sch. Admin. Dist. No. 55, 480 F.3d 1, 11 [1st Cir. 2007]; J.D., 224 F.3d at 66-67; Johnson v. Metro Davidson County Sch. Sys., 108 F. Supp. 2d 906, 918 [M.D. Tenn. 2000]), others do not and instead resolve the issue on a "case-by-case" basis (R.B. v. Napa Valley Unified Sch. Dist., 496 F.3d 932, 944 [9th Cir. 2007]; see, e.g., Yankton Sch. Dist. v. Schramm, 93 F.3d 1369, 1375-76 [8th Cir. 1996]; Greenland Sch. Dist. v. Amy N., 2003 WL 1343023, at *8 [D.N.H. Mar. 19, 2003]). Cases addressing this issue in New York appear to have followed the latter approach (Corchado v. Bd. of Educ. Rochester City Sch. Dist., 86 F. Supp. 2d 168, 176 [W.D.N.Y. 2000] [holding that each child is different and the effect of each child's particular impairment on his or her educational performance is different]; see Maus v. Wappingers Cent. Sch. Dist., 688 F. Supp. 2d 282, 294, 297-98 [S.D.N.Y. 2010] [emphasizing that educational performance is focused on academic performance rather than social development or integration]; Application of the Dep't of Educ., Appeal No. 11-152; Application of a Student Suspected of Having a Disability, Appeal No. 11-021; Application of the Bd. of Educ., Appeal No. 09-087; Application of the Dep't of Educ., Appeal No. 08-042; Application of a Student Suspected of Having a Disability, Appeal No. 08-023; Application of a Child Suspected of Having a Disability, Appeal No. 07-086; Application of a Child Suspected of Having a Disability, Appeal No. 07-042; see also C.B. v. Dep't of Educ. of City of New York, 322 Fed. App'x 20, 21-22 [2d Cir. April 7, 2009]; Muller v. E. Islip Union Free Sch. Dist., 145 F.3d 95, 103-04 [2d Cir. 1998]; A.J. v. Bd. of Educ., East Islip Union Free Sch. Dist., 679 F. Supp. 2d 299, 308-11 [E.D.N.Y. 2010] [noting the difficulty of interpretation of the phrase "educational performance" and that it must be "assessed by reference to academic performance which appears to be the principal, if not only, guiding factor"]; N.C. v. Bedford Cent. Sch. Dist., 473 F. Supp. 2d

532, 543 [S.D.N.Y. 2007], aff'd 300 Fed. App'x 11 [2d Cir. Nov. 12, 2008]; New Paltz Cent. Sch. Dist. v. St. Pierre, 307 F. Supp. 2d 394, 399 [N.D.N.Y 2004]).

In assessing whether a student's disability affects the student's educational performance, courts have taken a slightly broader approach, taking into account academic considerations beyond grades (such as considerations related to the student's attendance, homework, and organization)—but not so broad as to encompass social/emotional needs that have not necessarily translated to academics (see, e.g., M.N. v. Katonah-Lewisboro Sch. Dist., 2016 WL 4939559, at *11-*13 [S.D.N.Y. Sept. 14, 2016]; M.M. v. New York City Dep't of Educ., 26 F. Supp. 3d 249, 255-57 [S.D.N.Y. 2014]; cf. W.A. v. Hendrick Hudson Cent. Sch. Dist., 927 F.3d 126, 145 [2d Cir 2019], cert. denied, 140 S Ct. 934 [2020] [in the child find context, acknowledging that "academic success" may appropriately construed more broadly to include feedback from teachers and standardized test scores in addition to grades]). This interpretation of "educational performance" is in line with federal guidance from the Office of Special Education Programs (OSEP), discussing the eligibility of students with high cognition and providing an example explaining that a student "with high cognition and ADHD could be considered to have an 'other health impairment,' and could need special education and related services to address the lack of organizational skills, homework completion and classroom behavior, if appropriate" (Letter to Anonymous, 55 IDELR 172 [OSEP 2010]).

Thus in the absence of defined terms, the state of the law at this juncture remains somewhat imprecise in that that educational performance appears to lean toward academic performance while being mindful of social and behavior deficits that are affecting the student's academic performance, but the term also stops short of encompassing social and behavioral matters that relate more to matters outside the school environment (Maus, 688 F. Supp. 2d at 294 [noting that courts in this Circuit applying New York's IDEA-related regulations have uniformly interpreted this clause to require proof of an adverse impact on academic performance, as opposed to social development or integration]; A.J., 679 F. Supp. 2d at 308-11; see, e.g., Q.W. v. Bd. of Educ. of Fayette Cty., Ky., 630 Fed. App'x 580, 583 [6th Cir. Nov. 17, 2015]).

In this case, although student appeared to have physical symptoms associated with school as described above and the August 2018 neuropsychologist evaluation report included diagnoses of persistent depressive disorder, mixed receptive language disorder, sensorineural hearing loss, dyscalculia, and generalized anxiety disorder (Joint Ex. 104 at p. 41), the evidence is not clear that it affected the student's educational performance as that term has been interpreted. According to the August 2018 CSE chairperson, there was no indication that the student exhibited behaviors indicative of these diagnoses in the school setting, or that her ability to participate in school was affected in any meaningful way (Tr. pp. 96-98; Joint Ex. 74 at pp. 2-3). While student exhibited one of the five characteristics, the evidence tends to show that it did not have adverse effects on her academic performance.

The greater weight of the testimonial and documentary evidence contained in the hearing record leads to the conclusion that the physical symptoms of stomach aches and feeling ill about school, although certainly cause for concern, did not cause her to suffer academically and therefore did not adversely affect her educational performance to the extent that the student required special education and related services in order to learn, or that the student was unable to attend school and access the general curriculum without modification of the content, methodology, or delivery of

instruction (C.B., 322 Fed. App'x at 22; N.C. v. Bedford Cent. Sch. Dist., 2008 WL 4874535, at *13 [2d Cir. Nov. 12, 2008]; Maus, 688 F. Supp. 2d at 297-98; A.J., 679 F. Supp. 2d at 308-11). Accordingly, the hearing record supports the IHO's determination that the student does not meet the criteria for special education eligibility as a student with an emotional disturbance.

2. Learning Disability

The IHO determined that, based upon the student's "grades, performance on state testing, standardized test scores, all in the average range," she did not meet the criteria for eligibility as a student with a learning disability (IHO Decision at p. 28). The IHO further held:

Regarding the [neuropsychologist's] diagnosis of a Learning Disability, there was a discrepancy between the [neuropsychologist's] testimony and the District's regarding whether or not a learning disability in math actually existed. The [neuropsychologist] based his diagnosis on the Student's math scores on the academic testing which ranged from an 86 to a 91. The [neuropsychologist] originally characterized the Student's math scores as slightly below the average range, when in fact they were in the average range. He testified that her performance was an unexpected underachievement compared to her IQ score, which was average (FSIQ=100). However, the [neuropsychologist] admitted that scores alone were not sufficient and that one should take into account other factors. Although the [neuropsychologist] did review the Student's report cards, he never spoke directly to any District staff who had knowledge of the Student.

(IHO Decision at pp. 27-28 [internal citations omitted]). The parents argue that the IHO erred in these findings and that the student requires special education "to accommodate and remediate her math disability and her auditory processing disorder" (Parent Mem. of Law at p. 17). In particular, the parents argue that the IHO failed to acknowledge that the student's academic performance in math was lower relative to other subjects and her cognitive ability. In addition, the parents point to the negative affect of the student's auditory processing disorder as evidenced by the student's "pattern of strengths and weaknesses . . . in the area of math and reading comprehension" (id.).

As noted above, according to the ineligibility document and prior written notice, the CSE did not consider whether the student met the criteria for eligibility as a student with a specific learning disability (see Joint Exs. 74, 76).

A learning disability, according to State and federal regulations, means "a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, which manifests itself in an imperfect ability to listen, think, speak, read, write, spell, or to do mathematical calculations" (8 NYCRR 200.1[zz][6]; see 34 CFR 300.8[c][10]). A learning disability "includes such conditions as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia and developmental aphasia" (8 NYCRR 200.1[zz][6]; see 34 CFR 300.8[c][10][i]). A learning disability "does not include learning problems that are primarily the result of visual, hearing or motor disabilities, of an intellectual disability, of emotional disturbance,

or of environmental, cultural or economic disadvantage" (8 NYCRR 200.1[zz][6]; see 34 CFR 300.8[c][10][ii]).

While many of the eligibility classifications require a determination that a student's condition "adversely affects [the student's] educational performance" (34 CFR 300.8[c][1][i], [3], [4][i], [5]-[6], [8], [9][ii], [11]-[13]; 8 NYCRR 200.1[zz][1]-[2], [4]-[5], [7], [9]-[13]), the learning disability classification does not contain a requirement expressed in such terms (34 CFR 300.8[10]; 8 NYCRR 200.1[zz][6]). Instead, consideration of whether a student has a specific learning disability must take into account whether the student achieves adequately for the student's age or meets State-approved grade-level standards when provided with learning experiences and instruction appropriate for the student's age (34 CFR 300.309[a][1]; 8 NYCRR 200.4[j][3]), and either the student does not make sufficient progress or meet age or State-approved grade-level standards when provided with a response to intervention (RtI) process, or assessments identify a pattern of strengths and weaknesses determined by the CSE to be indicative of a learning disability (34 CFR 300.309[a][2]; 8 NYCRR 200.4[j][3][i]).²¹ Additionally, a CSE may consider whether the student exhibits "a severe discrepancy between achievement and intellectual ability" in certain areas, including reading fluency skills; however, the "severe discrepancy" criteria cannot be used by districts to determine if a student in kindergarten through the fourth grade has a learning disability in the subject of reading (8 NYCRR 200.4[j][4]).²²

In the present case, the evidence in the hearing record shows that the student's core academic grades for seventh grade were as follows: ELA 75, mathematics 77, social studies 90, and science 82 (Tr. p. 231; Joint Exs. 16-23, 25). Although the student's first quarter progress report for seventh grade indicated that she began the school year with an average between 90-94 in math, the student's fourth quarter progress report indicated that the student's average had dropped to between 65-69 and noted that the student needed to improve her quiz/test grades (Joint

²¹ When determining whether a student should be classified as a student with a learning disability, a CSE must also create a written report documenting the student's achievement according to the above, along with other information, including: the basis for the CSE's determination, any relevant student behaviors, any relevant medical findings, the effects of other factors on the student's achievement, and whether the student has participated in a RtI program (34 CFR 300.311[a]; 8 NYCRR 200.4[j][5][i]). State Education Department guidance provides a form for CSEs to use in ensuring that a proper written record is maintained (see "Response to Intervention: Guidance for New York State School Districts," Office of P-12 Educ., Appendix B [Oct. 2010], available at <http://www.p12.nysed.gov/specialed/RTI/guidance-oct10.pdf>). Since the CSE did not specifically consider whether the student met the criteria as a student with a learning disability, this form was not generated by the CSE.

²² In addition to drawing on a variety of sources including "aptitude and achievement tests, parent input, and teacher recommendations, as well as information about the student's physical condition, social or cultural background, and adaptive behavior" (8 NYCRR 200.4[c][1]), federal and State regulations prescribe additional procedures that a CSE must follow when conducting an initial evaluation of a student suspected of having a learning disability (see 34 CFR 300.307-300.311; 8 NYCRR 200.4[j]; see also 8 NYCRR 200.4[c][6]). As the student's achievement when provided with appropriate instruction is central to determining whether a student has a learning disability, State and federal regulations require that the evaluation of a student suspected of having a learning disability "include information from an observation of the student in routine classroom instruction and monitoring of the student's performance," and further require that the CSE include the student's regular education teacher (8 NYCRR 200.4[j][1][i]; [2]; see 34 CFR 300.308[a]; 300.310).

Exs. 16-19). The student's quarterly marking period grades for math ranged between 81 and 74 (Joint Ex. 23).

On the sixth grade New York State Testing Program (NYSTP) ELA assessment the student received a score of 316, or level 2, indicating that she was partially proficient in ELA standards for her grade level (Joint Ex. 34 at p. 1). In comparison, the student performed the same or better than 64 percent of other students in the district who were in the same grade (*id.*). For the sixth-grade NYSTP mathematics assessment, the student received a score of 286 which was also at level 2 and indicated that she was partially proficient in the sixth-grade standards for mathematics (Joint Ex. 35 at p. 1). With regard to mathematics, the student's performance fell at the 21st percentile within the district and 33rd percentile within the state (*id.*). According to the CSE chairperson, the sixth grade NYSTP results would have been used to determine whether the student required AIS in seventh grade but also indicated that she did not know why AIS services were not continued from sixth to seventh grade (Tr. pp. 116-18,121).

The July 2018 private neuropsychological evaluation report indicated that the student's IQ, processing speed, attention and executive functioning, and social perception skills fell in the average to above average range (Joint Ex. 104). In addition, the student's overall academic abilities fell in the average range (Tr. pp. 85-86, 95-96; Joint Ex. 74 at p. 2; *see* Joint Exs. 104 at pp. 26-30).²³ The school psychologist, who reviewed the results of the private neuropsychological evaluation at the August 2018 CSE meeting, testified that the results of cognitive and achievement testing conducted by the private neuropsychologist were consistent with the results obtained by the district (Tr. p. 225; *compare* Joint Ex. 104, *with* Joint Exs. 105, 106).

The neuropsychologist testified that, although the student's overall cognitive functioning fell in the average to above average range, her scores were scattered (Tr. p. 681). Specifically, he stated the student's average working memory, verbal comprehension, visual spatial skills, and fluid reasoning scores fell below her superior processing speed, and were therefore relative weaknesses which established her need for special education (Tr. pp. 681-83). The neuropsychologist testified that as the result of his evaluation he diagnosed the student with a specific learning disability in mathematics called dyscalculia, among other diagnoses (Tr. p. 505; Joint Ex. 104 at p. 51). He explained that the "crux of a learning disability [wa]s unexpected underachievement" (Tr. p. 510). He further explained that "technically" the student's math scores were at the bottom of the average range but that "best practice in psychology" called for using confidence intervals when a score was "close in between two different range scores" (*id.*). Using confidence intervals, the neuropsychologist reported that the student's math scores were somewhere between the average to below average range (Tr. pp. 510, 516-18). The neuropsychologist noted that the student's scores for math were significantly lower than her other academic scores which represented an unexpected underachievement based on her aptitude (Tr. pp. 510, 537-38). He indicated that he made the diagnosis of specific learning disability in math using a discrepancy model (Tr. pp. 510-11).

In addition to the student's scores, the neuropsychologist noted that the student took a lot of time during testing and her history of standardized testing in school indicated that the student

²³ The neuropsychologist reported that the student demonstrated "slightly below average math achievement" (Joint Ex. 104 at p. 30).

was "partially proficient" (Tr. p. 511). He suggested that based on the student's IQ, receipt of math tutoring, and extra help, her standardized scores on state assessments (NYSTP) should be better (Tr. pp. 511-13). He further indicated that the student's lowest scores in the district's academic achievement assessment were in math and that was unexpected given the extra help she had received from tutors (Tr. p. 570; Joint Ex. 106). The neuropsychologist testified that the student met the DSM-V diagnostic criteria for a specific learning disorder because the student had difficulty with number sense, number facts, or calculation and difficulty with mathematical reasoning that had lasted more than six months (Tr. pp. 513-14; Joint Ex. 146 at p. 1). In addition, he reported that the student's skills were substantially and quantifiably below those expected for the student's chronological age (Tr. p. 514; Joint Ex. 146 at p. 2). The neuropsychologist noted that he evaluated the student using grade-based norms and, because the student repeated kindergarten, had he used her chronological age there would have been more of a discrepancy (Tr. pp. 514-15, 632-33).²⁴ Returning to the DSM-V criteria, the neuropsychologist stated that it was true that the student's disability began during the "school year" and did not fully manifest until the demands for the affected academic skills exceeded the student's limitations (Tr. p. 515; Joint Ex. 146 at p. 2). Lastly he indicated that the student's learning difficulties were not better accounted for by intellectual disabilities, uncorrected visual or auditory acuity, other mental or neurological disorders, psychosocial adversity, lack of proficiency in the language or academic instruction, or inadequate educational instruction; he noted that, although the student had "some issues with psychosocial adversity and things of that nature," the math disability stood on its own (Tr. p. 515; Joint Ex. 146 at p. 2). The neuropsychologist opined that the student's psychosocial issues exacerbated her learning difficulty but were not the sole reason for it (Tr. p. 516). The student's pediatrician indicated that in addition to the generalized anxiety disorder she "strongly" suspected the student had an "associated subtle learning disability as suggested by executive functioning weaknesses detected by private speech therapist she is currently seeing" and noted that she was awaiting the therapist's full report (Tr. p. 299; Joint Exs. 61; 101 at p. 2). The neuropsychologist testified that the student's sixth grade math scores in the 70s reflected unexpected underachievement (Tr. pp. 537-40). He noted that the student's math score was the lowest score on her report card (Tr. p. 539).²⁵

The neuropsychologist reported that the student's processing skills were in the average range but that when processing speed was used with math alone the student's scores were average to low average (Tr. pp. 517-18, 636; Joint Ex. 104 at p. 16). He cited the student's difficulty with repeating a bunch of numbers from lowest to highest as possibly indicative of a math issue (Tr. pp. 519-20; Joint Ex. 104 at p. 15). The neuropsychologist opined that the student was not meeting her potential in math (Tr. p. 630).

On cross examination the neuropsychologist confirmed that the student's math scores as measured by the WIAT-III were "technically" in the average range and not slightly below average as he had stated in his report (Tr. pp. 583-85). Further he confirmed that the student's achievement scores for math were not 1.5 standard deviations or even 1.0 standard deviation below her full-

²⁴ Although the neuropsychologist testified that he evaluated the student using grade-based norms, his evaluation report reflected age-based scores (Joint Ex. 104 at p. 26).

²⁵ The student's report cards indicate that in sixth grade her final grade for social studies was lower than her math grade and in seventh grade her final grade for ELA was lower than her math grade (Joint Exs. 15; 23).

scale IQ (Tr. pp. 585-86). He agreed that the student's performance on NYSTP assessments had improved between fifth and sixth and seventh grades (Tr. p. 590). The neuropsychologist also agreed that in the federal and State definitions of learning disability one of the rule-out factors was whether the student responded to normal interventions, short of special education; however, he did not agree that the student had responded to the pre-referral intervention of AIS (Tr. pp. 590-91). The neuropsychologist reported that it was an oversight that he did not indicate that the student qualified for special education as a student with a specific learning disability in math in his report (Tr. pp. 595-96).

According to the CSE chairperson, the CSE discussed the diagnoses ascribed to the student by the neuropsychologist but there was no indication that a learning disability with impairment in mathematics (dyscalculia) existed (Tr. p. 97). She opined that the neuropsychologist's own testing did not indicate that the student had a significant impairment in mathematics (*id.*). The chairperson indicated that as assessed by the neuropsychologist, using the WIAT-III, the student's composite scores for mathematics and math fluency fell in the average range (Tr. p. 85). She noted that the testing results obtained by the neuropsychologist were consistent with those obtained by the district (Tr. p. 86).

The school psychologist testified that, based on the private neuropsychologist's testing, as well as other testing, in her opinion the student did not exhibit a learning disability in the area of mathematics (Tr. pp. 227-28). She noted that the student's scores for mathematics fell in the average range according to both district and the neuropsychologist's testing (Tr. p. 228).

The parent testified that the student had been receiving tutoring for math since third grade and continued to receive math tutoring in sixth grade, up until December when her math teacher started working with her (Tr. pp. 230, 310-11). The parent indicated that the student did not receive AIS in seventh grade (Tr. p. 302). The parent reported that at the August 2018 CSE meeting she asked why the student had not been provided supports in seventh grade, given her "sub par" Common Core testing in ELA and math in sixth grade (Tr. pp. 341-42; *see* Tr. pp. 394-99, 410-11). The parent reported that she brought copies of the NYSTP test results to the CSE meeting but was told by CSE members that they "could n[o]t speak to it and that was the extent of it" (Tr. 342-43). She indicated that she did not have the results of seventh grade testing at the time (Tr. p. 343). The parent testified that it did not seem to matter if the student had AIS because her scores did not improve while receiving them (Tr. p. 349). The parent indicated that following a review of evaluations at the CSE meeting she "brought up that [she] believed that under the I.D.E.A." the student had "multiple diagnoses and [a] math disability" (Tr. p. 345). According to the parent, "the school discussed that it was not profound enough to impact [the student] educationally" and she did not meet the criteria (*id.*). The CSE recommended homework club, but no "ad hoc" math accommodations (Tr. p. 346).

The parent confirmed that in seventh grade the student received Bs and Cs in core academic classes and the student's composite scores in basic reading, mathematics and math fluency, as reported by the neuropsychologist, were in the average range (Tr. p. 380). She explained that according to the neuropsychologist's report the student was inconsistent academically and "there [wa]s something underlying that [was] going on that [was] causing inability and difficulty learning" (Tr. p. 381). She highlighted areas of the neuropsychologist's report that indicated the student had relatively weak working memory skills and explained that her interpretation as a parent

and a layperson was that the student was an "above average intelligent student who struggle[d] with various aspects of testing performed" (Tr. pp. 384-85).

Turning to the parents' argument that the student required special education to remediate her auditory processing disorder, a student with an auditory processing disorder could potentially be found eligible for special education services as a student with a learning disability as the definition would include a disorders stemming from the inability to understanding spoken language which manifests in an imperfect ability to listen (see 8 NYCRR 200.1[zz][6]; see also 34 CFR 300.8[c][10]). In so arguing, the parent largely relies on a July 2019 audiological evaluation (Joint Ex. 145). As this information was not available to the CSE, it cannot be used to assess the August 2018 CSE's eligibility determination (C.L.K. v. Arlington Sch. Dist., 2013 WL 6818376, at *13 [S.D.N.Y. Dec. 23, 2013] [stating that in addition to districts not being permitted to rehabilitate a defective IEP through retrospective testimony, "[t]he converse is also true; a substantively appropriate IEP may not be rendered inadequate through testimony and exhibits that were not before the CSE about subsequent events and evaluations that seek to alter the information available to the CSE"]; see J.M. v New York City Dep't of Educ., 2013 WL 5951436, at *18-*19 [S.D.N.Y. Nov. 7, 2013][holding that a progress report created subsequent to the CSE meeting may not be used to challenge the appropriateness of the IEP]; F.O. v New York City Dep't of Educ., 976 F.Supp.2d 499, 513 [S.D.N.Y.][refusing to consider subsequent year's IEP as additional evidence because it was not in existence at time IEP in question was developed]). However, the hearing record includes six evaluation reports related to the student's speech-language and hearing abilities conducted between December 6, 2106 to January 4, 2017 (Joint Exs. 109-114). The first report, written by the private audiologist, indicated that the student was seen for an audiometric evaluation; the second and third reports, written by a speech-language pathologist, indicated that the student was seen for an auditory processing evaluation; the fourth and fifth reports, written by the same speech-language pathologist, indicated that the student was seen for a language assessment; and the sixth report, written by a medical doctor, indicated that the student was seen because she was having increasing difficulty following classroom lessons and her ability to do so appeared to be very teacher dependent (id.). Collectively, the evaluation reports indicated that the student's hearing was normal (Joint Ex. 109 at p. 2). With regard to the student's auditory processing ability, the reported indicated that the speech-language evaluation included administration of the TAPS and a finding that the student's scores fell within the average range of functioning with the exception of sentence memory which required the student to remember all of the words in a sentence directly (Joint Ex. 110 at p. 1). The speech-language evaluation also included administration the CELF-5 and noted that the student scored in the below average range on the following directions subtest (Joint Exs. 111-113). The speech-language pathologist concluded that the student's overall receptive and expressive language skills were within normal limits with the exception the subtests noted (Joint Ex. 113 at p. 1). She indicated that the student was very attentive and appropriately asked questions but also noted that the student asked for repetitions of several stimuli that were not allowed due to testing rules (id.). The speech-language pathologist further noted that, although the student's language skills appeared to be within normal limits, she might benefit from having test items repeated, preferential seating, and directions presented both visually and verbally if she demonstrated difficulty in school (id.). The last evaluation report, written by a medical doctor, indicated that the student had normal hearing but based on history was having difficulty processing or retaining input depending upon external circumstances in the classroom (Joint Ex. 114 at p. 1). The assessment plan portion of the report stated that the student had normal hearing, normal articulation, and no anatomic abnormalities but

that "the history, exam, audiologic and speech testing [we]re consistent with sensory processing disorder with particular difficulty with written/verbal sentence memory and most likely causing the distraction in class" (*id.* at p. 2). The doctor offered recommendations for classroom accommodations including preferential seating, alternative presentation of learning materials more geared toward how the student learned and retained subject matter, the consideration of one-to-one sessions at school if the student fell behind in classes, and speech/listening therapy to work on sentence focus (*id.*).

In summary, while evaluations of the student, along with student report cards, NYSTP assessment results, and input from the August 2018 CSE members indicated that in some circumstances the student struggled with math and auditory processing, the student's difficulties did not impact her educational performance to the degree that she required special education. The student's seventh grade report card shows that she achieved adequately for her age and although she continued to perform at level 2 on the NYSTP math assessment the evidence in the hearing record indicates that her performance on the assessment improved between sixth and seventh grade, even without the support of AIS (*compare* Joint Ex. 35, *with* Joint Ex. 37). The DSM-V discussion of a specific learning disability indicates that because academic skills are distributed along a continuum "any threshold used to specify what constitutes significantly low achievement . . . is to a large extent arbitrary" (Joint Ex. 146 at p. 4). The manual also, indicates that "Low achievement scores in one or more standardized tests or subtests within an academic domain (i.e., at least 1.5 standard deviations [SD] below the population for mean age, which translates to a score of 78 or less, which is below the 7th percentile) are needed for diagnostic certainty" (*id.*). Further, the manual states that a more lenient threshold of 1.0-2.5 standard deviations below the population mean can be used based on clinical judgement "when learning difficulties are supported by converging evidence from clinical assessment, academic history, school reports, or test scores" (*id.*) Here, the neuropsychologist who evaluated the student using a discrepancy model confirmed that the student's scores did not meet the 1.0 or 1.5 standard deviation criteria (Tr. pp. 585-86). Based on the above, the hearing record supports the IHO's conclusion that the student was not eligible for special education services as a student with a learning disability.

3. Need for Special Education

In addition to meeting criteria for a specific disability category, to be deemed eligible for special education, a student must "need special education and related services" by reason of such disability (34 CFR 300.8[a][1]; 8 NYCRR 200.1[zz]). State regulation defines "special education" as "specially designed individualized or group instruction or special services or programs" (8 NYCRR 200.1[ww]; *see* 20 U.S.C. § 1401[29]; Educ. Law § 4401[2]; 34 CFR 300.39[a][1]). "Specially-designed instruction," in turn, means "adapting, as appropriate, to the needs of an eligible student . . . , the content, methodology, or delivery of instruction to address the unique needs that result from the student's disability; and to ensure access of the student to the general curriculum, so that he or she can meet the educational standards that apply to all students" (8 NYCRR 200.1[vv]). In New York, the Education Law describes special education as including "special services or programs," which, in turn, includes, among other things, "[s]pecial classes, transitional support services, resource rooms, direct and indirect consultant teacher services, transition services . . . , assistive technology devices . . . as defined under federal law, travel training, home instruction, and special [education] itinerant teachers [services]" (Educ. Law § 4401[2][a]). In New York the definition of "special services or programs" (and therefore special

education) also encompasses related services, such as counseling services, OT, physical therapy, and speech-language therapy (Educ. Law § 4401[2][k]).

Here, the IHO noted that "the [neuropsychologist] never recommended any special education program to address the concerns indicated in his reports, only accommodations, which were similar to those provided when the [s]tudent received AIS services in the [d]istrict" (IHO Decision at p. 28). The neuropsychologist confirmed he did not discuss the student's need for special education in his reports and did not recommend the student for resource room services, consultant teacher services, or a special class (Tr. pp. 594-95). However, review of the private neuropsychological evaluation report reveals that, based upon his testing, the neuropsychologist offered numerous academic recommendations for the student including an IEP with a classification of emotional disturbance or specific learning disability, and placement in a private school "equipped to meet" her "specific needs" due to the "severity" of her "social-emotional" and "language based difficulties" (Joint Ex. 104 at pp. 41-45; see Tr. p. 542).²⁶ In addition, the neuropsychologist recommended counseling to address the student's social/emotional needs and busing to and from school to provide the student "with greater exposure to, and experience with, socialization with her peers" (Joint Ex. 104 at p. 41; see Tr. pp. 541-42). The neuropsychologist also recommended the use of positive reinforcement in the classroom and a consult with a speech-language therapist or audiologist and listed several techniques and accommodations to help the student "with her dyscalculia," her "inattention problems," as well as recommendations to address the student's relative weaknesses in verbal comprehension, visual spatial, and working memory skills and to reinforce the student's processing speed, which was a relative strength (Joint Ex. 104 at pp. 42-45).²⁷ The neuropsychologist testified that, although all her scores were in the average range, he made recommendations for remediation because the student was "not working up to her potential" and there was "unexpected underachievement" (Tr. p. 682).

The August 2018 CSE did not adopt all of the recommendations of the private neuropsychologist and instead determined that the student did not require special education services and that her "needs c[ould] be met with supplemental support services within the general education classroom" (Joint Ex. 76 at p. 3). The CSE indicated that the student would be referred to the school-based RtI team, recommended for pullout AIS for math, referred to the school social worker, and recommended for participation in the tenth period interventions of homework club and organizational club to assist with study skills and weaknesses in organization (id.). The CSE stated that the student's progress would be monitored for four to six weeks and that, if she did not show "adequate progress in these interventions, a referral to the 504 team should be considered" (Joint Exs. 76 at p. 1; 74 at p. 3).

As the evidence in the hearing record does not support a finding that the student met the criteria for one of the disability categories—i.e., her anxiety was not affecting her educational performance and she did not meet the criteria for a student with a learning disability—it is not necessary to determine whether the student was in need of special education (see Doe v. Cape

²⁶ The neuropsychologist indicated he "would be surprised" to find any public or State-approved private school that could address the student's needs (Tr. p. 706; see Tr. pp. 702-06).

²⁷ The neuropsychologist testified that he made recommendations "to advance the area of strengths and remediate the areas of weakness" (Tr. pp. 683-84).

Elizabeth Sch. Dist., 832 F.3d 69, 73 [1st Cir. 2016] [eligibility determinations proceed in two steps, with the first determining the existence of a qualifying disability and the second determining whether a student with a qualifying disorder "needs" special education and related services as a result of that disability]). Moreover, while the student may have received benefit from a private school environment along with supports and accommodations as recommended by the private neuropsychologist (Joint Ex. 104 at pp. 41-45), the purpose of specially designed instruction is not to "maximize" a student's potential; instead, it should "address the unique needs that result from the student's disability; and . . . ensure access of the student to the general curriculum, so that he or she can meet the educational standards that apply to all students" (8 NYCRR 200.1[vv]; see Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). In sum, the evidence in the hearing record supports the IHO's determination that the student did not meet the initial criteria for one of the disability categories and that, therefore, the August 2018 CSE appropriately concluded that she was not eligible for special education as a student with a disability.

D. Unilateral Placement

The IHO acknowledged that she was not required to make a finding regarding the unilateral placement but noted that, although Storm King "had services to address special education needs," the parents opted out of such services for the student and/or there was no evidence in the hearing record to indicate that the student received them (IHO Decision p. 32). As such, the IHO concluded that Storm King "appeared to provide the Student with same level of accommodations as a regular education program" (*id.*). On appeal, the parents point to the "size and setting" at Storm King as evidence of its appropriateness, as well as evidence of "individualized instruction and accommodations" (Parent Mem. of Law at p. 25).

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).

According to the evidence in the hearing record, Storm King offered both day and boarding school options for students in grades eight through twelve and, for the 2018-19 school year, had an enrollment of 184 students (Joint Ex. 137). The student's math teacher for the 2018-19 school year testified that Storm King was a "small school" that served students "who for whatever reason [we]re struggling . . . in public school[]" (Tr. pp. 790-91). Class size was, on average, 10 students (Joint Ex. 137; see Tr. pp. 791-92).

The private neuropsychologist conducted an observation of the student at Storm King in May 2019 as part of an amended supplemental report to the July 2018 neuropsychological evaluation (Joint Ex. 159 at pp. 1-3).²⁸ The neuropsychologist observed the student in an art class (in which there were 10 students), in the cafeteria during lunch, and in a math class (in which there were 14 students) (id. at p. 2). The neuropsychologist also summarized a conversation he had with an administrator at Storm King, who was also one of the school's academic support program teachers (administrator) (id. at p. 3; see Tr. p. 429). According to the report, the administrator shared his view that the student benefited from "the small class sizes and extra attention from faculty and staff" (Joint Ex. 159 at p. 3). According to the neuropsychologist, the student received "small group math instruction" and access to extra help from teachers and that the math teacher "differentiated the instruction based on the academic needs of the student" (id. at p. 10). Likewise,

²⁸ As part of the amended supplemental report, the neuropsychologist also reported results of his observation of a classroom in the district public school, as well as the results of updated standardized testing and a record review (see Joint Ex. 159 at pp. 1-2).

the student's math teacher testified that she provided the student with extra time to complete tests, as well as extra help, and used strategies such as repeated directions and prompts to make sure the student was attending during class (Tr. pp. 799-802, 813-14; see also Joint Ex. 175 at p. 1).

The administrator also shared with the neuropsychologist his opinion that the student "would make even more progress" if she participated in the school's academic support program, and the neuropsychologist concurred (Joint Ex. 159 at pp. 3, 11). According to the administrator, the academic support program offered "even smaller class sizes as compared to the general Storm King academic program, the availability of more accommodations, and an executive functioning class" (Joint Ex. 159 at p. 3).²⁹ The evidence in the hearing record reflects that the academic support program was recommended for the student when she enrolled at Storm King (see Joint Ex. 175 at p. 1); however, according to testimony from the student's mother, the parents did not take advantage of the program because it was cost prohibitive (Tr. p. 362).

With regard to the student's social/emotional needs, the neuropsychologist also reported information from the administrator that there was "a school counselor, as well as two doctoral level therapists that utilize a Cognitive-Behavioral Therapeutic (CBT) orientation . . . available a couple of days a week if needed"; however, due to confidentiality concerns, the administrator could not share with the neuropsychologist whether or not the student had utilized the services (Joint Ex. 159 at p. 3). Nevertheless, the neuropsychologist opined that Storm King met the student's social/emotional needs due to the "serene and calming" campus and the availability of services from mental health clinicians (id. at p. 11). There is no other evidence in the hearing record that the student received counseling or therapeutic services at Storm King.

As noted above, to qualify for reimbursement under the IDEA, parents must demonstrate that a unilateral placement provides educational instruction specially designed to meet their child's unique needs, supported by services necessary to permit the child to benefit from instruction (Gagliardo, 489 F.3d at 112; see Frank G., 459 F.3d at 364-65). However, small class size is the sort of support from which any student would receive benefit and, without more, is insufficient to establish that Storm King offered instruction specially designed to meet the student's needs (see Gagliardo, 489 F.3d at 115 [noting that reimbursement for a unilateral placement should be denied if "the chief benefits of the chosen school are the kind of educational and environmental advantages and amenities that might be preferred by parents of any child, disabled or not"]; see also Frank G., 459 F.3d at 365 [declining to determine whether small class size alone constituted special education]; J.B. & M.B. v. Bd. of Educ. of the City Sch. Dist. of the City of New York, 2001 WL 546963, at *7 [S.D.N.Y. May 22, 2001] [finding that "[w]hile placement in small classes would provide [the student], or any other child, with an education superior to that available in public school, it is well established that the IDEA does not guarantee the best possible education or

²⁹ According to the hearing record, the academic support program offered "an accommodations specific section or a general learning support section" to address students' specific needs and learning challenges (Joint Ex. 136 at p. 1). As part of the program, "an individualized learning profile" would be created for each student enrolled based on a review of documentation, as well as input from the student, parents, and teachers (id. at p. 2). The plan would focus on "specific areas of targeted growth" and would be shared with the student's academic team (id.). The program focused on helping students achieve core areas of competence and offered supports related to academics, social/emotional needs in the academic program (i.e., "academic anxiety"), executive function skills, and college preparation and life skills, with accommodations recommended an IEP or other source incorporated (id. at pp. 2-4).

require that parents be compensated for optimal private placements."]). Moreover, to the extent the student benefited from the new environment, a unilateral placement may not be deemed appropriate simply because it removes the student from an anxiety-provoking environment, as avoiding a need does not serve the same purpose or have the same effect as addressing it; rather, the placement must be tailored to address the student's specific needs to qualify for reimbursement under the IDEA (see W.A. v Hendrick Hudson Cent. School Dist., 927 F.3d 126, 147 [2d Cir. 2019]; John M. v Brentwood Union Free Sch. Dist., 2015 WL 5695648, at *9 [E.D.N.Y. Sept. 28, 2015]). In this case, there is little evidence describing how Storm King addressed the student's unique special education needs (L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 489-90 [S.D.N.Y. 2013]).

In summary, the evidence in the hearing record supports the IHO's determination in the alternative that Storm King was not an appropriate unilateral placement for the student for the 2018-19 school year, particularly given the evidence that the student did not participate in the academic support program and the lack of evidence as to whether the student received any counseling services. While there is some indication that the student received extra help or other classroom-based supports, this is insufficient to support a finding that Storm King provided the student with specially designed instruction to address her needs (see Hardison, 773 F.3d 372, 387 [finding a unilateral placement inappropriate where the hearing record lacked "more specific information as to the types of services provided to [the student] and how those services tied into [the student's] educational progress," and additionally stressing the importance of "objective evidence" in determining whether a parent's placement is appropriate]; see also L.K., 932 F. Supp. 2d at 490 [rejecting parents' argument that counseling services met student's social/emotional needs absent the counselor's testimony or evidence about the counselor's "qualifications, the focus of her therapy, or the type of services provided" or how the services related to the student's unique needs]; R.S. v. Lakeland Cent. Sch. Dist., 2011 WL 1198458, at *5 [S.D.N.Y. Mar. 30, 2011] [rejecting the parents' argument that speech-language therapy services met student's needs where parents "did not offer any evidence as to the qualifications of the provider of the therapy, the focus of the therapy, or when and how much therapy was provided"], aff'd sub nom., 471 Fed. App'x 77 [2d Cir. Jun. 18, 2012]).³⁰ Accordingly, the IHO's finding that the unilateral placement was not appropriate is affirmed.

E. Equitable Considerations

As a final matter, although the IHO was not required to make a finding regarding equitable considerations, she noted that "although the P]arents participated in all aspects of the special

³⁰ On appeal, the parents also point to evidence that the student made progress at Storm King during the 2018-19 school year (Parent Mem. of Law at pp. 25-26; see Tr. pp. 351, 354, 805; Joint Ex. 135; 139; 156 at p. 6); however, the Second Circuit has noted that progress made in a unilateral placement, although "relevant to the court's review" of whether a unilateral placement was appropriate, is not sufficient in itself to determine that the unilateral placement offered an appropriate education (Gagliardo, 489 F.3d at 115; see Frank G., 459 F.3d at 364 [holding that although a student's "[g]rades, test scores, and regular advancement [at a private placement] may constitute evidence that a child is receiving educational benefit, . . . 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"]; Lexington County Sch. Dist. One v. Frazier, 2011 WL 4435690, at *11 [D.S.C. Sept. 22, 2011] [holding that "evidence of actual progress is also a relevant factor to a determination of whether a parental placement was reasonably calculated to confer some educational benefit"]).

education process including procuring [their] own evaluations of the Student, the Parent[s] did not request that the District's CSE evaluate the Student until months after the Parent had applied to the Private School" (IHO Decision at p. 33).

While the IHO's finding on equitable considerations is not determinative of this matter, I note that the equitable grounds cited by the IHO would not have warranted a reduction or a denial of the parents' requested relief. Even if the parents had no intention of placing the student in the district's recommended program, it would not be a basis to deny their request for tuition reimbursement (see E.M., 758 F.3d at 461; C.L., 744 F.3d at 840 [holding that the parents' "pursuit of a private placement was not a basis for denying their [request for] tuition reimbursement, even assuming . . . that the parents never intended to keep [the student] in public school"]).

VII. Conclusion

The evidence in the hearing record supports the IHO's determination that the August 2018 CSE appropriately found the student ineligible for special education as a student with a disability. In addition, the evidence in the hearing record supports the IHO's determination in the alternative that Storm King was not an appropriate unilateral placement for the student for the 2018-19 school year.

I have considered the parent's remaining contentions and find them to be without merit.

THE APPEAL IS DISMISSED.

Dated: Albany, New York
July 1, 2020

JUSTYN P. BATES
STATE REVIEW OFFICER