



The University of the State of New York

The State Education Department

State Review Officer

www.sro.nysed.gov

No. 20-107

Application of a STUDENT WITH A DISABILITY, by his parents, for review of a determination of a hearing officer relating to the provision of educational services by the NEW YORK CITY DEPARTMENT OF EDUCATION

Appearances:

The Law Offices of Steven L. Goldstein, attorneys for petitioners, by Steven L. Goldstein, Esq. and Vanessa Jachzel, Esq.

Howard Friedman, Special Assistant Corporation Counsel, attorneys for respondent, by Theresa Crotty, 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 for compensatory education services and reimbursement for tuition costs at the Lang School (Lang) to remedy respondent's (the district's) failure to provide their son with an appropriate educational program and services for the 2018-19 and 2019-20 school years. The appeal must be sustained in part.

II. Overview—Administrative Procedures

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

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

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

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

III. Facts and Procedural History

The student attended an "[i]ntegrated [c]o-[t]eaching (ICT) classroom" in first grade as a general education student (Parent Ex. A at p. 2). There, he struggled with maintaining attention and initiating and completing assignments, and experienced anxiety in the classroom (id.). The student was evaluated by a district occupational therapist and an "independent behavior therapist," both of whom opined that the student did not qualify for services at that time (Tr. pp. 200-212;

Parent Exs. A at pp. 2-3; R at p. 1; Dist. Ex. 12 at pp. 2-3).^{1, 2} The student continued to attend an ICT classroom as a general education student in second and third grades and also continued to demonstrate difficulties with attending and initiating and completing tasks (Parent Exs. A at pp. 2-33; R; Dist. Ex. 12 at pp. 3-4). In addition, the student struggled with writing, which led to tantrums; he had difficulty relating to peers (Parent Ex. A at p. 3; Dist. Ex. 12 at p. 3).

When the student was in third grade, his parents referred him to the district for an initial evaluation in an email dated February 9, 2018 (Tr. pp. 219-21; Parent Ex. R; Dist. Ex. 4). The district school psychologist responded in an email later that day informing the parents that the district would begin the process of opening an evaluation for the student and the parents would be hearing from someone soon (Parent Ex. S).

In a February 28, 2018 prior written notice, the district informed the parents that it proposed to conduct an initial evaluation of the student to determine his eligibility for special education services and identified the assessments which would be used in the initial evaluation (Dist. Ex. 2). The parents indicated that they did not receive the February 28, 2018 prior written notice from the district (see Tr. p. 279).

In a March 7, 2018 email the district social worker requested a meeting with the parents to begin the initial step of the evaluation process which consisted of "go[ing] over [their] concerns" (Parent Ex. T).

On or around May 4, 2018, the parents informed the district that they were in the process of obtaining a private neuropsychological evaluation as they were concerned with the amount of time that had passed since they had originally requested the evaluations and "wanted to secure the appropriate assistance for [the student] as soon as possible" (Parent Ex. A at pp. 3-4; see Parent Ex. U).

The parents reported that they were told by the school psychologist that the district could not "keep IEPs open over the summer," and that the referral had to be "closed out" and would be reopened in September (Parent Ex. A at p. 4; Tr. pp. 228-29). The parents advised the school psychologist that they would not withdraw the referral unless they could write something that said it would be reopened when the private neuropsychological evaluation was finished (Tr. p. 228). In a May 16, 2018 handwritten note, the parents withdrew the initial referral pending the completion of the private neuropsychological evaluation (Dist. Ex. 7 at p. 2). In a letter dated May 16, 2018 the district informed the parents that it would not proceed with an initial evaluation of the student because the parents had not provided consent (Dist. Exs. 6; 7).

The parents reported that they were informed by the evaluator's office manager on June 13, 2018 that the neuropsychological evaluation was completed (Tr. p. 226). In an email dated June

¹ The person the parents refer to as an independent behavior therapist is a licensed master social worker (LMSW) (see Parent Ex. II at pp. 1, 2).

² According to the parent, the independent behavior therapist suggested that the student belonged in a smaller school with gifted children that could deal with his yet undiagnosed problems (Tr. p. 209).

13, 2018 the parent notified the school psychologist that the neuropsychological evaluation was complete (Parent Ex. V).

In June 2018, the student was diagnosed as having an attention deficit hyperactivity disorder (ADHD) and mild anxiety (Dist. Ex. 12 at p. 1).

The student began seeing a private therapist in September 2018 (Parent Ex. 12 at pp. 2, 6). In an October 26, 2018 email to the district, the parents stated that they were "checking in to see if [the student's] first IEP meeting was being planned" (Parent Ex. W). The vice-principal responded on November 3, 2018 informing the parents that a district social worker would be contacting them to complete a social history and that she anticipated that a CSE meeting would be scheduled before Thanksgiving (id.).

In an October 31, 2018 prior written notice, the district notified the parents that it had received a written referral and would conduct an evaluation of the student to determine his initial eligibility for special education services (Dist. Ex. 9).³ In a November 1, 2018 email, the principal of the student's school notified the "SBST" to "open an IEP" for the student (Dist. Ex. 11).

In a November 5, 2018 email to the parents, a district social worker indicated that the district had a copy of the private neuropsychological evaluation report and requested to meet to "go over [the parents'] [then-] present concerns (if they differ[ed] from last year) and/or any new information" (Parent Ex. X).

A CSE convened on January 9, 2019 to determine the student's eligibility for special education services (Tr. pp. 232-33; Dist. Ex. 27). Based on the results of the parents' neuropsychological evaluation and a psychoeducational evaluation, OT evaluation, social history, and classroom observation (Tr. p. 189, Dist. Ex. 32 at p. 2; see Dist. Exs. 19; 21, 23, 27)⁴, the January 2019 CSE determined that the student was eligible to receive special services as a student with an other health impairment and recommended that he receive integrated co-teaching services for math, ELA and social studies (Dist. Ex. 27 at pp. 1, 6). In addition, the January 2019 CSE recommended that the student receive testing accommodations of extended time (double time), separate location (lesser number of students, quiet location), and breaks (two five-minute breaks per hour of testing) (Dist. Ex. 27 at p. 7). The January 2019 IEP also identified the resources needed to address the student's management needs including preferential seating, additional time for assignments, hands-on and interactive lessons, and check-ins to ensure he stayed on-task (Dist. Ex. 27 at p. 2). The student's IEP was subsequently revised on or around February 9, 2019 (see Parent Ex. A at p. 6).⁵ Notably, information regarding the student's learning style and academic

³ The prior written notice identified the referral as a "Principal Referral," but also indicated that the "Principal/CSE Chairperson has received a written referral from you requesting an evaluation" (see Dist. Ex. 9).

⁴ The hearing record does not contain a November 2018 psychoeducational evaluation. The social history evaluation was conducted on November 14, 2018, but the report is dated January 2, 2019 (Dist. Ex. 12 at pp. 1, 8).

⁵ Although district staff reported that the CSE met in February 2019 to revise the student's IEP, the parents deny that a second CSE meeting took place (Tr. pp. 105, 129-31, 134, 253-54; Parent Ex. A at p. 6; see Dist. Exs. 30; 31).

needs was added to the present levels of performance, scores from state testing were recorded on the student's IEP, and the CSE recommended an additional reading goal for the student (Tr. pp. 105-06; compare Dist. Exs. 27 at pp. 1-2, with 30 at pp. 1-2, 8).

By letter dated March 19, 2019, the parents advised the district that they had still not received a copy of the student's revised IEP and requested that the CSE provide them with a copy as soon as possible so that they could review it and determine whether to sign the consent form for the initial provision of services (Parent Ex. A at pp. 1, 6). On March 28, 2019 the parents signed an enrollment agreement with Lang for the 2019-20 school year (Parent Ex. CC at p. 7).

In an April 29, 2019 letter, one of the psychologists who conducted the May 2018 neuropsychological evaluation recommended that due to the student's "neurodevelopmental weaknesses and the impact that they have had on his academic achievement, his social functioning, and his emotional well-being," the student should be placed "in a small, structured classroom setting in a nurturing academic environment" (Parent Ex. GG).

By letter dated May 9, 2019, the parent informed the district that she received the "most up to date IEP, dated April 10, 2019" and indicated her concerns regarding the recommendations contained in the IEP, but also provided consent for the initial provision of services (Parent Ex. B at pp. 1-2, 4). The parent also requested a copy of the district's December 2018 OT evaluation (id. at p. 2).

By letter dated August 19, 2019 the parent informed the district of her intention to unilaterally place the student at Lang and seek funding from the district if it did not recommend the student for an appropriate program and placement for the 2019-20 school year (Parent Ex. C).

A. Due Process Complaint Notice

In an October 30, 2019 due process complaint notice, the attorney for the parents requested a due process hearing regarding the parents' concerns related to the 2018-19 and 2019-20 school years (Parent Ex. D at p. 1). The parents alleged that the district failed to convene a CSE meeting prior to the start of the 2018-19 school year and did not do so until January 2019, nearly a year after the parent's initial request for an evaluation (id. at pp. 6-7). With respect to the evaluative information available to the CSE, the parents alleged that the district conducted a December 2018 OT evaluation, which the district did not provide the results of to the parent and which the OT present at the CSE meeting "struggled to understand" (id. at p. 7). Regarding the CSE meeting, the parents asserted that the IEP was written "in a rushed manner," that the parents were not asked about the student's needs, that the CSE did not discuss the recommendations contained in the 2018 independent neuropsychological evaluation report, and that the teachers' concerns that the student was struggling academically and social-emotionally were ignored (id. at p. 9). In addition, the parent alleged that the January 2019 CSE was not properly constituted because the participants were not sufficiently qualified or familiar with the resources available to meet the student's needs (id. at p. 9-10). Regarding the January 2019 IEP, the parents raised concerns regarding the present levels of performance, curriculum, methodology, staff credentials, peer groupings, annual goals, and transportation accommodations (id. at p. 10).⁶ The parents also noted that the student's age

⁶ According to the parent, the January 2019 IEP and April 2019 IEP were nearly identical and the April 2019 IEP

was incorrect on the IEP (id. at p. 9). In addition, the parents averred that the January 2019 IEP failed to include all of the accommodations recommended in the 2018 independent neuropsychologist report, as well as assistive technology and OT (id. at p. 9).

With respect to the 2019-20 school year, the parents asserted that due to their concerns with the January 2019 IEP and the district's failure to conduct another CSE meeting prior to the start of the 2019-20 school year, they had no choice but to set up their own program for the student (Parent Ex. D at pp. 12-13). As relief, the parents sought a determination that the district denied the student a FAPE for the 2019-20 school year, a finding that Lang was an appropriate placement for the student for the 2019-20 school year, and an award of reimbursement or prospective funding for the cost of the student's tuition at Lang for the 2019-20 school year as well as transportation to and from Lang, including any necessary special transportation services (id. at p. 13-14). In addition, the parents requested any necessary assistive technology, specifically requesting the provision of a laptop computer for use at school and at home, and compensatory OT services due to the district's failure to recommend OT services during the 2018-19 school year (id. at p. 14).

B. Impartial Hearing Officer Decision

An impartial hearing convened January 23, 2020 and concluded on March 30, 2020 after three days of proceedings (Tr. pp. 1-418).

In a decision dated May 10, 2020, the IHO determined that the district offered the student a free appropriate public education (FAPE) for the 2018-19 and 2019-20 school years (IHO Decision at pp. 15-20). Initially, the IHO addressed child find, ruling that waiting until a parent referral before evaluation does not in itself create a child find violation and further determining that the delay in referring the student for an evaluation was appropriate considering the student's age and progress with some support (id. at p. 15-16).⁷ Addressing the timeline for completing the initial evaluation of the student, the IHO found that the February 9, 2018 initial parent referral was withdrawn by the parent to allow for the independent neuropsychological to be completed (id. at p. 19). In addition, the IHO determined that the June 2018 email presented by the parent to show that she delivered a copy of the neuropsychological report to the district did not include an attachment and, therefore, did not show that the evaluation was provided to the district (id.). Further, the IHO determined that the principal from the public school the student attended referred the student for an evaluation on November 1, 2018 and a CSE meeting convened on January 9, 2019 within the mandated timeline (id. at pp. 19-20).

In addressing the parent's request for OT services, the IHO determined that both district occupational therapists (the occupational therapist who conducted the December 2018 OT evaluation and the occupational therapist who attended the January 2019 CSE) found the student ineligible for services, therefore he was not entitled to compensatory OT services (IHO Decision

failed to meet the student's needs for the same reasons as the January 2019 IEP (Parent Ex. D at p. 11).

⁷ The IHO found that the child find issue was not raised in the due process complaint; however, the IHO addressed the issue because it was raised in the parents' closing brief (IHO Decision at p. 15-16). The IHO also found that any claim regarding the initial evaluation of the student in first grade (the 2015-16 school year) was barred by the statute of limitations (id.).

at p. 16). The IHO noted that the independent neuropsychological evaluation found weaknesses in the student's "motor sequence learning"; however, the IHO also noted that the student's teacher testified that motor difficulties did not cause the student's writing problems (id. at pp. 16, 18).

Regarding the January 2019 CSE, the IHO found that the CSE was properly constituted and all participants were given ample opportunity to participate (id. at p. 17-18). The IHO noted that although the district representative initially believed the student was not eligible for services, the student's teachers disagreed and services were recommended (id. at p. 18). The IHO found that the IEP adequately described the student's present levels of performance, that the writing goals included in the IEP were appropriate, that the supports, including graphic organizers, were appropriate, and that the program was reasonably calculated to address the student's needs (id. at pp. 18-19). With respect to the independent neuropsychological evaluation, the IHO found that the CSE considered the report in recommending ICT services, as the initial report recommended an inclusion classroom, and also found that the CSE could not have considered the amended neuropsychological report which deleted the recommendation for an inclusion classroom, as the district was not in possession of the amended report (IHO Decision at p. 19). In conclusion, the IHO found there was no denial of a FAPE and the parent was not entitled to tuition reimbursement (id. at p. 20).

IV. Appeal for State-Level Review

The parents appeal arguing that the IHO erred in finding that the district did not deny the student a FAPE and that the parent was not entitled to tuition reimbursement.

With respect to child find, the parents allege that the IHO erred in applying the statute of limitations to their claims, in finding that the due process complaint notice did not raise child find; and in finding that the district met its child find obligations as the district did not present any evidence regarding what happened prior to the parents' referral of the student for an initial evaluation in February 2018.

Further, the parents allege that the IHO erred in finding they deliberately presented "changed evidence" at the hearing as both sides were unaware of the differences between the initial neuropsychological evaluation report and the amended neuropsychological evaluation report.⁸ The parents further assert that the only substantive difference was the recommendation for an inclusion program and that because the parents did not disagree with the recommendation for ICT services, the differences in the reports were not meaningful and the IHO "unfairly ascribed intentional wrongdoing" to the parents.

⁸ As additional evidence the parents submit email correspondence between the parties and the IHO regarding the district's request for inclusion of the neuropsychological report into evidence, the parents' response, and the IHO's ruling on the matter (Req. for Rev. Ex. A). State regulation specifically requires that, in addition to exhibits and the transcript of the proceedings, "the due process complaint notice and any response to the [due process] complaint," "all briefs, arguments or written requests for an order filed by the parties for consideration by the [IHO]," as well as "all written orders, rulings or decisions issued in the case including an order granting or denying a party's request for an order," and "any other documentation as may be otherwise required by this section" are part of the hearing record (8 NYCRR 200.5[j][5][vi][a]-[c], [e]-[f]). Accordingly, the parents' additional evidence is accepted as a part of the hearing record.

The parents object to the IHO's findings regarding the timeline for completing the initial evaluation of the student. More specifically, the parents contend that their consent to withdraw the February 2018 request for an evaluation was given under duress based on inaccurate information and was only given after the district's time to complete the evaluation had already expired. Further, the parents assert that the IHO erred in finding the neuropsychological evaluation report was not attached to the parents' June 2018 email, alleging the IHO ignored testimony from district witnesses corroborating the June 2018 email. Accordingly, the parents allege the IHO erred in finding the district's time to initiate the evaluation began on November 1, 2018. Additionally, the parents allege that the IHO erred in not addressing the district's delay in delivering a finalized IEP to the parents until April 2019.

The parents object to the IHO's findings regarding OT services, specifically objecting to the IHO's consideration of the district OT evaluation as that was not provided to the parents until the hearing. Additionally, the parents contend that the IHO did not address the district witness' inability to explain that the OT report identified some problems in the student's social participation and "'definite dysfunction' in vision and touch."

The parents contend that the IHO erred in finding that the January 2019 CSE was conducted properly, objecting to the IHO's finding that the CSE reached a consensus, that the district representative was not the ultimate decision maker, and that all participants had the opportunity to participate. The parents assert the IHO overlooked evidence that the annual goals were not developed at the CSE meeting, that the district did not deliver the results of the OT evaluation to the parents, and that the CSE participants could not explain the sensory findings in the OT evaluation to the parents.

In addition, the parents assert that the IHO erred in finding the IEP was substantively appropriate. The parents contend that the IHO's finding did not consider their well-documented and consistently expressed objections to the IEP such as the absence of testing and classroom accommodations, assistive technology, and OT and other related services, including counseling and social skills instruction. The parents also allege that the IEP included inaccurate present levels of performance, omitting many of the student's significant and pervasive educational needs, as well as including an incorrect age for the student and failing to mention the independent neuropsychological evaluation. The parents further assert that the IEP did not include annual goals in the student's areas of identified needs, contending the IEP did not include annual goals to address the student's needs in the areas of sensory or sensory-motor, planning and organization, managing anxiety, or improving social skills. The parents further contend that the IHO failed to address their other concerns with the IEP, including the lack of assistive technology, counseling, cognitive behavioral therapy, and/or social skills instruction.

The parents conclude by asserting that Lang was an appropriate placement for the student for the 2019-20 school year, that equitable considerations support the requested relief, and that they should be awarded tuition reimbursement for the cost of the student's attendance at Lang for the 2019-20 school year.⁹

⁹ As an alternative, the parent requests tuition reimbursement for the cost of the student's tuition at Lang for the 2019-20 school year as a form of compensatory education; however, it is unclear how an analysis under this

In an answer, the district responds to the parents' allegations and asserts that the IHO properly found that the district offered the student a FAPE for the 2018-19 and 2019-20 school years. With respect to the parents' claims for the period leading up to the January 2019 CSE meeting, the district asserts that the IHO appropriately addressed those claims and further asserts that those claims were not properly before the IHO as the parents did not request relief regarding those claims. The district also asserts that the parents' due process complaint notice does not include allegations related to child find and that any such allegations regarding the 2015-16 school year are also barred by the statute of limitations. Finally, while the district does not respond to the parents' allegation that Lang was an appropriate placement for the student for the 2019-20 school year, the district contends that equitable considerations should bar the parents' request for relief because of their submission of the amended neuropsychological evaluation into evidence, which contained a different recommendation from the evaluation report that was in the possession of the district.

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

standard would be different from a more traditional tuition reimbursement analysis (see Application of the Dep't of Educ., Appeal No. 18-125).

Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245).

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

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).¹⁰

¹⁰ The Supreme Court has stated that even if it is unreasonable to expect a student to attend a regular education setting and achieve on grade level, the educational program set forth in the student's IEP "must be appropriately ambitious in light of his [or her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives" (Andrew F., 137 S. Ct. at 1000).

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

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

VI. Discussion

A. Child Find

The IHO found that the parents' complaint did not raise any child find violations, and that any child find claims related to the 2015-16 school year were time-barred, but nonetheless also determined that because the district worked with the parents "to modify the curriculum and provide [the student] supports" it had met its child find obligations prior to the parents' request for an evaluation in February 2018 (IHO Decision at pp. 15-16). In so holding, the IHO relied on authority that a school district cannot be held liable for a child find violation merely because it failed to evaluate the student prior to a parental request for evaluation, where the district's delay was appropriate considering the child's age and progress made with accommodations and support prior to the referral for an evaluation (id.). On appeal, the parents argue the IHO incorrectly determined that they failed to raise child find claims in their due process complaint notice and further assert that the district violated its child find obligations because evidence in the hearing record supports a finding that although the student was struggling in school and his teachers suspected he had a disability, the district took no action until the parents requested an evaluation of the student in February 2018. In addition, the parents assert that the IHO erred in finding that child find claims relating to the 2015-16 year were time-barred and, to the extent that her finding also extended to child find claims relating to the 2016-17 and 2017-18 school years, that also was in error.

As an initial matter, the parent raised child find claims for the 2015-16, 2016-17 and 2017-18 school years in her due process complaint notice. Although not explicitly labeled as child find, the due process complaint notice included allegations that the district failed to evaluate the student although he demonstrated struggles in school that were recognized by his teachers and warranted referral to the CSE for the 2015-16, 2016-17, and 2017-18 school years (Parent Ex. D at pp. 3-5). Accordingly, the IHO erred in finding that the parent's due process complaint notice did not sufficiently raise claims related to child find. However, it is also worth noting that, in their due process complaint notice, the parents did not request any relief related to the 2015-16, 2016-17, and 2017-18 school years (Parent Ex. D at pp. 13-15) and in their request for review only vaguely

request "an order that the [district] evaluate [the student] to determine what specific compensation he may be entitled to, to compensate [him] for the [district's] failure to provide a FAPE during the school years prior to 2019-20" (Req. for Rev. at p. 10).

The purpose of the "child find" provisions of the IDEA are to identify, locate, and evaluate students who are suspected of being a student with a disability and thereby may be in need of special education and related services, but for whom no determination of eligibility as a student with a disability has been made (see Handberry v. Thompson, 446 F.3d 335, 347-48 [2d Cir. 2006]; E.T. v. Bd. of Educ., 2012 WL 5936537, at *11 [S.D.N.Y. Nov. 26, 2012]; A.P. v. Woodstock Bd. of Educ., 572 F. Supp. 2d 221, 225 [D. Conn. 2008], aff'd, 370 Fed. App'x 202 [2d Cir. Mar. 23, 2010]; see also 20 U.S.C. § 1412[a][3][A]; 34 CFR 300.111; 8 NYCRR 200.2[a][1], [7]). The IDEA places an affirmative duty on State and local educational agencies to identify, locate, and evaluate all children with disabilities residing in the State "to ensure that they receive needed special education services" (20 U.S.C. § 1412[a][3]; 34 CFR 300.111[a][1][i]; Forest Grove, 557 U.S. at 245; E.T., 2012 WL 5936537, at *11; see 20 U.S.C. § 1412[a][10][A][ii]; see also 8 NYCRR 200.2[a][1], [7]; New Paltz Cent. Sch. Dist. v. St. Pierre, 307 F. Supp. 2d 394, 400 n.13 [N.D.N.Y. 2004]). The "child find" requirements apply to "children who are suspected of being a child with a disability . . . and in need of special education, even though they are advancing from grade to grade" (34 CFR 300.111[c][1]; see 8 NYCRR 200.2[a][1], [7]; D.K. v. Abington Sch. Dist., 696 F.3d 233, 249 [3d Cir. 2012]; J.S. v. Scarsdale Union Free Sch. Dist., 826 F. Supp. 2d 635, 660 [S.D.N.Y. Nov. 18, 2011]). To satisfy the requirements, a board of education must have procedures in place that will enable it to identify, locate, and evaluate such children (34 CFR 300.111[a][1]; 8 NYCRR 200.2[a][1], [7]).

Because the child find obligation is an affirmative one, the IDEA does not require parents to request that the district evaluate their child (see Reid v. District of Columbia, 401 F.3d 516, 518 [D.C. Cir. 2005] [noting that "[s]chool districts may not ignore disabled students' needs, nor may they await parental demands before providing special instruction"]; see also Application of the Bd. of Educ., Appeal No. 11-153; Application of a Student Suspected of Having a Disability, Appeal Nos. 11-092 & 11-094). A district's child find duty is triggered when there is "reason to suspect a disability and reason to suspect that special education services may be needed to address that disability" (J.S., 826 F. Supp. 2d at 660; New Paltz Cent. Sch. Dist., 307 F. Supp. 2d at 400 n.13, quoting Dep't of Educ. v. Cari Rae S., 158 F. Supp. 2d 1190, 1194 [D. Haw. 2001]). To support a finding that a child find violation has occurred, school officials must have overlooked clear signs of disability and been negligent by failing to order testing, or have no rational justification for deciding not to evaluate the student (A.P., 572 F. Supp. 2d at 225, quoting Bd. of Educ. v. L.M., 478 F.3d 307, 313 [6th Cir. 2007]). States are encouraged to develop "effective teaching strategies and positive behavioral interventions to prevent over-identification and to assist students without an automatic default to special education" (Los Angeles Unified Sch. Dist. v. D.L., 548 F. Supp. 2d 815, 819 [C.D. Cal. 2008], citing 20 U.S.C. § 1400[c][5]).

1. Statute of Limitations

Having determined that the parent asserted child find claims in her due process complaint notice for the 2015-16, 2016-17 and 2017-18 school years, it is necessary to determine whether the IHO erred by finding that some of those claims were time barred. Claims brought pursuant to the IDEA accrue on the date that a party knew or should have known of the alleged action that

forms the basis of the complaint and, unless a state establishes a different limitations period, the party must request a due process hearing within two years of that date (20 U.S.C. § 1415[f][3][C]; see also 20 U.S.C. § 1415[b][6][B]; Educ. Law § 4404[1][a]; 34 CFR 300.507[a][2], 300.511[e]; 8 NYCRR 200.5[j][1][i]; Somoza v. New York City Dep't of Educ., 538 F.3d 106, 114-15 & n.8 [2d Cir. 2008]; M.D. v. Southington Bd. of Educ., 334 F.3d 217, 221-22 [2d Cir. 2003]). Because an IDEA claim accrues when the parents knew or should have known about the claim, "determining whether a particular claim is time-barred is necessarily a fact-specific inquiry" (K.H. v. New York City Dep't of Educ., 2014 WL 3866430, at *16 [E.D.N.Y. Aug. 6, 2014]; see K.C. v. Chappaqua Cent. Sch. Dist., 2018 WL 4757965, at *14 [S.D.N.Y. Sept. 30, 2018] [collecting cases representing different factual scenarios for when a parent may be found to have known or have had reason to know a student was denied a FAPE]). Further, two exceptions to the statute of limitations may apply to the timelines for requesting impartial hearings. The first exception applies if a parent was prevented from filing a due process complaint notice due to the district withholding information from the parent that the district was required to provide under the IDEA (20 U.S.C. § 1415[f][3][D][ii]; 34 CFR 300.511[f][2]; 8 NYCRR 200.5[j][1][i]). A second exception may apply if a parent was prevented from filing a due process complaint notice due to a "specific misrepresentation" by the district that it had resolved the issues forming the basis for the due process complaint notice (20 U.S.C. § 1415[f][3][D]; 34 CFR 300.511[f]; 8 NYCRR 200.5[j][1][i]).

To the extent the IHO determined that the parents' child find claims for the 2015-16 and 2016-17 school years were time barred, the IHO's finding is sustained.¹¹ The parents do not allege that they were unaware of the student's struggles or the district's failure to refer the student to the CSE prior to the parents' referral of the student in February 2018.¹² The parents also do not contend

¹¹ While the IHO did not directly address the statute of limitations issue for the 2016-17 year, I have conducted an independent review and find that the parents' child find claims for that school year must be dismissed as time-barred as further discussed herein.

¹² In a series of emails written in March 2016, the student's mother advised the school counselor that the student had been demonstrating anxiety over his writing homework and in class assignments (Parent Ex. L at p. 3; Parent Ex. K; see Parent Ex. RR). She noted that the student got "stuck" on writing homework assignments and when he got stuck he became short tempered (at home) anxious, nervous and complained that he did not know what to do (Parent Ex. L at p. 3). She advised the school counselor that she and the student's teacher wanted to see the student become more of a risk-taker and help him to become more independent (id.). The student's mother reported that the student would sit "paralyzed" at his desk for long periods of time without asking for help and afraid to begin work on his own for fear of "getting it wrong" (id.). The student's mother noted that the student was afraid of making a mistake and made assignments out to be much harder than they really were (id.). The student's mother informed the school counselor that she had asked the student's teachers if he should see a therapist (id. at p. 4). She opined that classes in the student's school were "quite large" and that it would not be long before the student could not catch up if he did not figure out some strategies to help him become a more fluent and less fearful writer and student (id.). She noted that the student acknowledged his struggle and was receptive to the idea of getting a "school coach" to help him work on strategies to become unstuck (id.). The student's mother stated that the parents wanted to "rule out any learning disabilities that may be a root cause" of the student's difficulty with abstract thinking (id. at p. 2). The student's mother suggested that she (and the student's teachers) thought the student might benefit from a meeting with a therapist who could help him develop strategies to assist with his anxiety (Parent Ex. K at p. 2). Moreover, according to the parents, the student's teachers requested that he be evaluated during the 2015-16 school year (Dist. Ex. 12 at p. 2). The student was subsequently evaluated by an occupational therapist, who determined that the student was not eligible for services, and an independent behavior therapist, who "felt the student wasn't severe enough at that time to be qualified to meet the requirements

that any exceptions to the statute of limitations apply. Indeed, evidence in the hearing record demonstrates that the parents communicated their concerns to the district and the student's teachers during the 2015-16 and 2016-17 school years and that the student underwent an OT evaluation during the 2015-16 school year (Parent Exs. K, L, O, RR, R).¹³

On appeal, the parents assert that there was no basis for finding that they should have known that a child find claim had accrued prior to March 19, 2018, when the student's mother met with the school social worker to, among other things, discuss the parents' special education rights. At the impartial hearing, the student's mother testified that she requested an evaluation in February 2018 because she "finally learned the vocabulary" from the school psychologist on how to do so, and it was the first time she understood it was not just about "getting a para to help you with the stairs" but that a student could also be evaluated for a learning disability (Tr. pp. 218-19). She stated that prior to the February 1, 2018 email her emails to the district were just "saying what do I do? Do you have specialists? How do we do this?" (Tr. pp. 219-20). However, the relevant accrual date for the parents' child find claims is when they discovered the factual basis for their claims and not when they learned additional information concerning the CSE referral process from school staff. As the parents were aware of the alleged child find violations, at the latest, by the conclusion of the 2015-16 and 2016-17 school years (June 2016 and June 2017 respectively), and the due process complaint notice was not filed until October 2019, any claims related to those school years are barred by the two year statute of limitations.

2. 2017-18 School Year

Turning to the 2017-18 school year, prior to the parent's referral of the student to the CSE in February 2018, the parents' due process complaint notice only includes vague allegations that the student "continued to struggle with maintaining attention, that he took "over two hours to complete homework assignments, and that he "displayed difficulties relating to his peers" (Parent Ex. D at p. 5). However, as noted above, the parents did not request any specific relief for any failure related to these allegations. Additionally, in the request for review the parents do not point to any set of facts that would have triggered the district's child find obligations during the 2017-18 school year and instead reference matters that occurred in prior school years (such as the 2016 OT evaluation) and only point to the district's failure to include evidence regarding the period of time prior to the parents' February 2018 referral for an evaluation (Req. for Rev. ¶7).¹⁴

in the school system" (Parent Ex. R at pp. 1-2; Dist. Ex. 12 at pp. 2-3; see Parent Ex. II).

¹³ In second grade, the student's mother questioned the student's teacher via email about the student's follow through and completion of class assignments, his transition from one assignment or activity to another, whether the student was working at grade level, and whether the teacher would recommend a tutor for the student (Parent Ex. O). She noted that the student talked a lot about hating school and she questioned how the student's relationships were in class and whether things continued to be difficult socially for the student (id.).

¹⁴ Similarly, while the parents' post-hearing brief included specific allegations regarding the 2015-16 and 2016-17 school years, the only allegation regarding the 2017-18 school year, prior to the February 2018 referral, was that the student's "struggles continued through the third-grade as well" (IHO Ex. IV at p. 2). The only document referenced regarding the portion of the 2017-18 school year, prior to the referral, involved a specific incident that occurred at school between the student and another child, which, although it involved a serious matter, did not

Based on the above, there is insufficient basis in the hearing record to overturn the IHO's determination that any delay in referring the student for an evaluation did not result in a denial of FAPE (see IHO Decision at p. 15-16). Additionally, even if the district violated its child find obligation by failing to refer the student to the CSE for an evaluation in the beginning of the 2017-18 school year, the parent has not requested any relief with respect to that school year in the form of, for example, compensatory education, and the parents subsequently referred the student for an evaluation in February 2018 and the student was ultimately evaluated and classified by the district.

3. 2018-19 School Year – Referral for an Initial Evaluation

The parents argue that the IHO erred in determining that the district complied with regulatory timelines because it had until February 12, 2019 to develop an IEP after the November 1, 2018 referral of the student to the CSE by the school principal. In the due process complaint notice, the parents asserted that the district failed to convene a CSE meeting until almost a year after their initial referral (Parent Ex. D at p. 7). The only relief the parents requested tied to the 2018-19 school year was a request for compensatory OT services (*id.* at pp. 13-15).

State regulation requires that a student suspected of having a disability "shall be referred in writing" to the chairperson of the district's CSE—or to a "building administrator" of the school in which the student attends—for an "individual evaluation and determination of eligibility for special education programs and services" (8 NYCRR 200.4[a]). While a parent and certain other specified individuals may refer a student for an initial evaluation (8 NYCRR 200.4[a]1[i]), a professional staff member of the school district in which the student resides and certain other specified individuals may request a referral for an initial evaluation (8 NYCRR 200.4[a]2[i][a]). If a "building administrator" or "any other employee" of a district receives a written request for referral of a student for an initial evaluation, that individual is required to immediately forward the request to the CSE chairperson and the district must, within 10 days of receipt of the referral, request the parent's consent to initiate the evaluation of the student (see 8 NYCRR 200.4[a]2[ii], [a]2[iv][a], [a]3-[a]5; see also 34 CFR 300.300[a]). State regulation also provides that, upon receiving a referral, a building administrator may request a meeting with the parent and the student (if appropriate) to determine whether the student would benefit from additional general education support services as an alternative to special education, including speech-language services, academic intervention services (AIS), and any other services designed to address the learning needs of the student (see 8 NYCRR 200.4[a]9). Any such meeting must be conducted within 10 school days of the building administrator's receipt of the referral and must not impede the CSE from continuing its duties and functions (see 8 NYCRR 200.4[a]9[iii][a]-[b]).

Once a referral is received by the CSE chairperson, the chairperson must immediately provide the parents with prior written notice, including a description of the proposed evaluation or reevaluation and the uses to be made of the information (8 NYCRR 200.4[a]6; 200.5[a]5). After parental consent has been obtained by a district, the "initial evaluation shall be completed within 60 days of receipt of consent" (8 NYCRR 200.4[b]; see also 8 NYCRR 200.4[b]7). "Within 60 school days of the receipt of consent to evaluate for a student not previously identified

include any indications that the student should be referred for special education (Parent Ex. P).

as having a disability . . . the board of education shall arrange for appropriate special programs and services" (8 NYCRR 200.4[e][1]).

Where a district fails to adhere to the requisite timelines for evaluating a student and creating an educational program post-referral, relief for such a procedural violation of the IDEA is warranted only if the violation affected the student's right to a FAPE (J.D. v. Pawlet Sch. Dist., 224 F.3d 60, 69 [2d Cir. 2000]; see A.H. v. New York City Dep't of Educ., 2010 WL 3242234, at *2 [2d Cir. Aug. 16, 2010]; Jusino v. New York City Dep't of Educ., 2016 WL 9649880, at *6 [E.D.N.Y. Aug. 8, 2016]; A.M. v. New York City Dep't of Educ., 840 F. Supp. 2d 660, 688 [E.D.N.Y. 2012], aff'd, 513 Fed. App'x 95 [2d Cir. Mar. 12, 2013]; Maus v. Wappingers Cent. Sch. Dist., 688 F. Supp. 2d 282, 294, 300 [S.D.N.Y. 2010]; M.M. v. New York City Dept. of Educ. Region 9 (Dist. 2), 583 F. Supp. 2d 498, 501; [S.D.N.Y. 2008]; Warton v. New Fairfield Bd. of Educ., 217 F. Supp. 2d 261, 279 [D. Conn. 2002]).

Here, the IHO incorrectly determined that the district was not at fault for its failure to complete a timely evaluation of the student or to have an IEP in place for the student within the regulatory timelines and prior to the beginning of the 2018-19 school year. Moreover, because of her failure to find a procedural violation by the district, the IHO also did not consider whether the delayed completion of the student's initial evaluation and eligibility determination deprived the student of 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]).

In her decision the IHO stated in relevant part:

Finally, the parent argues the IEP is invalid as the timelines were not followed. The parent requested an evaluation February 9, 2018 but withdrew that request on May 8, 2018. The parent claims she was asked to withdraw the request when she informed the [district] she planned to get a private neuropsychological. She testified she gave a copy of the evaluation to the [district] June 2018. The parent presented an e-mail as evidence. However, the e-mail does not contain an attachment. Parent Evidence: V-1. Had the attachment existed it would have been presented. The parent's claim is incredulous as she has presented changed evidence concerning the neuropsychological report. [The school's] principal asked for an evaluation November 1, 2018. The [district] had until February 12, 2019 to complete an IEP. The IEP meeting was held on January 9, 2019 well within the mandated timelines.

The IHO failed to provide any authority for her finding that the timeline for the evaluation of the student commenced upon what she described as a referral of the student by the principal on November 1, 2018. It is undisputed that the parent referred the student to the CSE for an evaluation on February 1, 2018. In addition, the parents sent a follow-up referral for an evaluation on February 9, 2018 (Parent Ex. S). The district acknowledged receipt of the parents' referral of the student for an evaluation on February 9, 2018 and indicated the parents "should expect to hear

from one of our team members soon" (*id.*). The district did not demonstrate that it took any other steps to evaluate the student after the parents' referral other than sending the parents a February 28, 2018 prior written notice indicating an intention to evaluate the student (Dist. Ex. 2), which the parents claim they did not receive (Tr. p. 279). The school social worker then reached out to the parents on March 7, 2018 to schedule a meeting on March 19, 2018, which the social worker described as "[t]he first part of the process. . . to go over your concerns" (Parent Ex. T). In a March 7, 2018 notice to the parents, the district described the March 19, 2018 meeting as being "to review your due process rights, discuss the evaluation process, and to conduct a social history interview/update" (Dist. Ex. 1 at p. 1). On May 16, 2018, the parents executed a handwritten note indicating they wanted to close the student's evaluation until completion of a private neuropsychological evaluation (Dist. Ex. 7 at p. 2).¹⁵ On the same day, the district sent the parents a notice indicating that it would not evaluate the student because the district had requested consent from the parents and the parents had not responded (Dist. Ex. 6 at p. 2). However, in a district document titled "case closing," the reason provided was that "[t]he referral is withdrawn by the referring party" (Dist. Ex. 5).¹⁶

Initially, at the time of the parents' withdrawal (May 16, 2018), over 100 days had already passed from the parents' initial referral of the student for an evaluation (February 1, 2018). Further, although the district initiated the evaluation process by scheduling a social history for March 19, 2018, there is no indication that the social history took place on March 19, 2018 or that the district attempted to obtain the parents' consent to evaluate the student. Additionally, the student's mother testified that she signed a consent for evaluations in November 2018 and that she had not been asked to sign any such form prior to that (Tr. pp. 281-282). If a district does not obtain parental consent within 30 days from the date of the referral for an initial evaluation, the chairperson of the CSE "shall document attempts, including, but not limited to, telephone calls made or attempted and the results of those calls and correspondence sent to the parents and any responses received, made by the chairperson or other representatives of the committee to obtain parental consent" (8 NYCRR 200.4[a][8]). In this instance, the hearing record does not include any documentation of the district's efforts to obtain parental consent, and accordingly, the failure to complete the initial evaluation after the student was referred by the parent must be considered a procedural violation.

Further, even if the parents' withdrawal of the referral for an evaluation in May were a valid basis for pausing the evaluation process until completion of the private neuropsychological evaluation, the parent notified the school psychologist of the completion of the evaluation by email on June 13, 2018 (Parent Ex. V). The IHO's determination that the neuropsychological evaluation report was not attached to the June 2018 email was not relevant to whether the parents' referral of the student for an evaluation should proceed as the parents only requested time to complete their own evaluation of the student prior to having the district complete the initial evaluation of the student (*see* Dist. Ex. 7 at p. 2). Additionally, in the June 2018 email, the parents noted that the

¹⁵ In a March 29, 2019 letter to the district, the parents indicated that after the student completed State testing in April 2018, the parents reached out to the district and had been informed that the district began an educational evaluation that was "about halfway through" and at that point the parents told the district representative that they intended on having their own evaluation conducted (Parent Ex. A at p. 3).

¹⁶ The parent testified that prior to the hearing she had not seen the "case closing" document or the notice indicating the case was being closed (Tr. p. 280).

end of the school year was approaching and they wanted to know where they should have the evaluation process reopened (Parent Ex. V). The regulations establishing the timelines for the evaluation of students under the IDEA do not provide for the cessation of the CSE process over the summer. Based on the above, the district's considerable delay in evaluating the student and providing him with an IEP for the 2018-19 school year constituted a procedural violation.

With respect to whether the district's delay resulted in a denial of FAPE to the student, the parent argues that the student required OT services during the 2018-19 school year and should receive compensatory OT for the district's procedural violation.

The student was evaluated on November 20, 2018 by a district OT evaluator (see Dist. Ex. 21). The November 2018 OT evaluation was conducted as part of the student's initial evaluation and was conducted in response to fine motor difficulties identified in the May 2018 neuropsychological report (id. at p. 1). The evaluation included classroom and clinical observations, parent, teacher, and student reports, a review of documents, and formal assessments (id. at p. 1). The OT evaluator examined the student's functioning in the areas of activities of daily living, fine motor skills, visual-spatial skills, visual motor skills, handwriting, sensory integration abilities, and work behaviors (Tr. p. 169; Dist. Ex. 21 at pp. 3, 4, 5, 6). In all of these areas, the student was found to be functioning age appropriately and at grade level (Tr. pp. 170-175; see Dist. Ex. 21).

The district occupational therapist who attended the January 2019 CSE meeting and interpreted the OT evaluation results reported that she reviewed the student's records and spoke to the OT evaluator prior to the meeting (Tr. pp. 164-66, 177-78). The district occupational therapist testified that the OT who evaluated the student determined before the meeting that the student would not receive OT services and further testified that she reviewed the OT evaluation report and, based on the report, agreed with the evaluator's decision that the student did not require OT services (Tr. pp. 180-81). The district occupational therapist explained that although the May 2018 neuropsychological evaluation report did recommend OT services, that recommendation was based on the student's fine motor function on one speed test, which did not indicate his actual ability to use classroom tools and materials (Tr. pp. 190-91). In addition, when asked about any contradictions regarding the student's OT needs in the neuropsychological evaluation and the OT evaluation, the district occupational therapist, testified that there was only one OT evaluation and that the psychologist who conducted the neuropsychological evaluation is not an occupational therapist (Tr. p. 190-91).

According to the November 2018 OT evaluation report, the student was polite, friendly, and cooperative, and he participated in all tasks presented (Dist. Ex. 21 at p. 2). According to the OT evaluator, despite numerous distractions during the evaluation, the student was able to focus on tasks independently without adult cues, and sustained effort for the duration of the testing (id.). The district occupational therapist confirmed that the OT evaluator examined the student's ability to access and navigate the school setting through her observation of the student and teacher report (Tr. pp. 174-75).

The November 2018 OT evaluation report stated that during the classroom observation the student was able to transition to and from all activities, participate in class, follow directions, and interact appropriately with peers and teachers (Tr. p. 170; Dist. Ex. 21 at p. 2). The student was

able to initiate the task of writing in his notebook, wrote four lines, stopped writing to think, and returned to writing without adult cues (Dist. Ex. 21 at p. 2). During an interview, the student reported that the hardest part about writing was coming up with ideas (id. at p. 3).

The November 2018 OT evaluation report indicated that the student did not demonstrate any difficulties with activities of daily living during the evaluation, as he was able to independently manipulate fasteners for dressing and undressing, open containers at lunchtime, use utensils, and carry items on a tray and step over and move obstacles out of the way without dropping the items (Tr. pp. 170, 175; Dist. Ex. 21 at p. 3). The student exhibited no problems in the manipulation of classroom tools and materials (Dist. Ex. 21 at p. 4). According to the report, the student exhibited normal fine motor coordination, hand strength, individuation of digits, grasping, cutting, and writing abilities (id.). Overall, the student exhibited the ability to use and coordinate his fingers in order to manipulate classroom tools and materials (id.).

The November 2018 OT evaluation report also noted that the student did not demonstrate any difficulty with the management of classroom tools or materials (Dist. Ex. 21 at p. 4). He was able to manipulate beads, demonstrate individuation of digits, control a pencil with his dominant hand and use his non dominant hand to stabilize paper, maintain a thumbs up position when cutting, and coordinate his hands to use classroom materials (id.). In addition, the evaluator reported that the student did not exhibit any significant difficulties within visual motor integration (Tr. pp. 170-71; Dist. Ex. 21 at p. 4). On the test of visual motor integration, the student demonstrated average performance on all subtests, indicating normal writing and drawing abilities of visual perception and motor coordination (Tr. pp. 171-72; Dist. Ex. 21 at pp. 4-5). On a timed test of sentence copying, the student wrote at an average speed; legibly, accurately, uniformly, and with appropriate spacing (Tr. p. 195; Dist. Ex. 21 at p. 5). Consistent with teacher, parent, and self-report, the student had more difficulty generating independent written work, as he wrote slower and had to stop several times to think (Dist. Ex. 21 at p. 5). According to the OT evaluation report, this indicated that the student's difficulties with writing were cognitive rather than physical, and would not be best addressed by OT, but rather through classroom supports and strategies (Tr. pp. 171-72, 407; Dist. Ex. 21 at pp. 9-10; see Tr. p.. 407).

The November 2018 OT evaluation report included an assessment by the student's teachers that the student's sensory processing was "typical" with respect to hearing, body awareness, balance and motion, and planning and ideas, but that he exhibited "some problems" in social participation and exhibited "definite dysfunction" in vision and touch (Dist. Ex. 21 at p. 6). However, the OT evaluator noted that these difficulties were not observed during the evaluation (id.). Specifically, based on her own observation, the OT evaluator noted that while transitioning, the student was able to stay in his place in line and walk without touching peers or items in the hallway (id.). The student was not bothered by his proximity to others, crowded space or noise, and appeared engaged and attentive during class (id.). When asked about the sensory processing measure test, the district occupational therapist who attended the January 2019 CSE meeting testified that the student's teachers reported that the student was "a little tactile defensive," but noted that the OT evaluator found "no serious [or] significant concerns" (Tr. p. 173). Although the student appeared to have some difficulties within the area of sensory processing, according to his teachers it was not interfering with his ability to function in the classroom (Tr. pp. 185, 187; Dist. Ex. 21 at p. 5).

According to the OT evaluator, the student was able to independently attend for the duration of the formal testing, did not fidget in his seat, and was not distracted by activity around him (Dist. Ex. 21 at p. 6). Consistent with his self-report, the student exhibited some difficulty initiating his work during a classroom writing task, and the evaluator was unsure if he was distracted or thinking about what to write (id.). The evaluator noted that the student was able to return to the task without needing adult prompts (id.). The student's teachers reported that he exhibited social and emotional learning comparable to his peers (id.). The OT evaluator noted that the student's range of motion and muscle strength were normal and he demonstrated the ability to ascend/descend stairs, using reciprocal stepping and his ability to navigate the classroom setting was normal (id. at p. 7). Contrary to the May 2018 neuropsychological report, the OT evaluator found that the student did not require OT in order to function and participate in his school setting (id. at p. 8).

As described above, the hearing record supports a finding that at the time the student was evaluated in November 2018, he did not qualify for OT services. Accordingly, although the district violated procedural requirements by delaying its evaluation of the student and provision of an educational program well beyond the regulatory timelines, in doing so it did not deny the student a FAPE for the 2018-19 school year based on the allegations contained in the due process complaint notice or request for review. While the parent disagrees with some of the conclusions included in the November 2018 OT evaluation report and the May 2018 neuropsychological report recommended OT for the student, the hearing record overall supports the district's decision not to recommend OT services for the student. Accordingly, the IHO correctly determined that the student was not eligible for OT services as compensatory education.

B. FAPE – 2019-20 School Year

The parent alleges that the IHO erred in finding that the January 2019 IEP was appropriate for the student. The parent challenges several aspects of the January 2019 IEP and the educational program recommended by the CSE, including the present levels of performance, curriculum, methodology, staff credentials, peer groupings, annual goals, and transportation accommodations. The parent further contends that the January 2019 IEP failed to include all of the testing accommodations recommended in the 2018 independent neuropsychologist report, and that the IEP did not address the student's needs in the areas of assistive technology, counseling and social skills instruction, and OT. While the parent challenges certain aspects of the student's present levels of performance on appeal, she does not dispute the adequacy of the evaluative information the CSE used to make their recommendations for the 2019-20 school year. Thus, a description of the evaluative information, while not in dispute, provides context for the discussion regarding whether or not the January 2019 IEP addressed the student's needs.

Among the other elements of an IEP is a statement of a student's academic achievement and functional performance and how the student's disability affects his or her progress in relation to the general education curriculum (20 U.S.C. § 1414[d][1][A][i][I]; 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; see 8 NYCRR 200.1[ww][3][i]). In developing the recommendations for a student's IEP, the CSE must consider the results of the initial or most recent evaluation; the student's strengths; the concerns of the parents for enhancing the education of their child; the academic, developmental and functional needs of the student, including, as appropriate, the

student's performance on any general State or district-wide assessments as well as any special factors as set forth in federal and State regulations (34 CFR 300.324[a]; 8 NYCRR 200.4[d][2]).

According to a January 14, 2019 prior written notice, the January 9, 2019 CSE had before it a November 2018 psychoeducational evaluation, a November 2018 OT evaluation, a January 2019 social history, a January 2019 classroom observation, and a copy of a draft IEP (Dist. Ex. 32 at p. 2; see Dist. Exs. 21, 23, 27).¹⁷ In addition, the CSE had available to it the results of the parents' May 26, 2018 independent neuropsychological evaluation (Tr. p. 189; see Dist. Exs. 19).¹⁸

The psychologists who evaluated the student in May 2018 described him as "shy and anxious" (Dist. Ex. 19 at p. 3). They noted that his motor skills appeared to be within normal limits for the purpose of the assessment, but that he exhibited "mild inattention and hyperactivity" (id.). The evaluators characterized the student's affect as "restricted in range" (id.). They reported that the student's speech was intelligible and normal in rate, rhythm, and volume but that he frequently did not initiate speech and often responded using one and two-word sentences (id.). The student seemed to understand all interview questions and test instructions (id.). According to the evaluators, the student was engaged during testing and appeared to put forth his best effort (id.).

The evaluators administered numerous measures to assess the student's cognitive, academic, and social/emotional/behavioral needs, and abilities (Dist. Ex. 19 at pp. 3-4). Their May 2018 independent 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-II); the Behavior Assessment System for Children-Third Edition (BASC-3), Parent and Teacher rating scales; the Connors Continuous Performance Test, 3rd Edition (CPT-3); the Delis-Kaplan Executive Functioning System (D-KEFS); Behavior Rating Inventory of Executive Functioning, Second Edition (BRIEF-2); ADHD Rating Scale (ADHD-RS), home and school versions; the Clinical Evaluation of Language Fundamentals – Fifth Edition (CELF-5); the Comprehensive Test of Phonological Processing (CTOPP); the Boston Naming Test (BNT), the Test of Language Competence, selected subtests (TLC), Beery-Buktenica Developmental Test of Visual-Motor Integration – Fifth Edition (VMI); the California Verbal Learning Test—Children's Version (CVLT-C); Roy-Osterrieth Complex Figure Drawing (ROCF); the Social Responsiveness Scale -

¹⁷ The hearing record does not contain a November 2018 psychoeducational evaluation. The social history evaluation was conducted on November 14, 2018, but the report is dated January 2, 2019 (Dist. Ex. 12 at pp. 1, 8).

¹⁸ There are three versions of the neuropsychological report in the record (see Parent Exs. A; FF; Dist. Ex. 19; IHO Ex. II). Initially, the district withdrew its copy because the parent was entering the report into evidence, however, the district subsequently found the reports were not identical and submitted its own copy of the report into evidence. Both the district's copy and the parents' copy are admitted as part of the hearing record as the reports differ (Parent Ex. FF; Dist. Ex. 19). However, in the discussion of the January 2019 CSE, I only refer to the district's copy of the report as that was the version that was in possession of the January 2019 CSE (see Tr. pp. 91-92; Dist. Ex. 19). Additionally, although the prior written notice for the January 2019 CSE meeting does not list the May 2018 neuropsychological evaluation as being used in the CSE's decision making, the parties agree that the CSE had the neuropsychological evaluation (Tr. pp. 94-47, 102-03, 247).

Second Edition (SRS-2), Parent and Teacher Version; the Trail Making Test A & B, Intermediate version; Beck Youth Inventories; and Grooved Pegboard Test (Dist. Ex. 19 at pp. 3-4).

Based on their assessment, the evaluators reported that the student scored in the high average range of general cognitive functioning (Dist. Ex. 19 at pp. 4, 7). Specifically, he exhibited high average and comparably developed verbal comprehension, visual spatial ability, fluid reasoning, and working memory skills (id. at p. 4). In contrast, the evaluators reported that the student exhibited low average graphomotor processing speed, which according to his scores was a clinically significant weakness (id.). The evaluators noted significant weaknesses in aspects of the student's attention and executive functioning (id.). Notably, the student exhibited severe inattention, slow and variable response time, and moderately impaired vigilance when having to sustain his attention for a lengthy period of time (id. at pp. 4, 7). The student also exhibited poor planning (id.).

According to the evaluators, the student's receptive, expressive, and pragmatic language skills fell in the average to very superior range (Dist. Ex. 19 at p. 5). Specifically, he was able to understand all questions and instructions without difficulty (id.). He was able to answer both descriptive and inferential questions about orally presented material, his sentence repetition ability was very superior, and his ability to "orally formulate sentences with increasingly complex syntax" was in the superior range (id.). The evaluators reported that the student's need for phonemic cueing during an assessment of confrontation naming indicated a mild, relative weakness in word retrieval (id.). They noted that the student exhibited average to above average ability related to phonological awareness, semantic fluency, semantic knowledge, verbal abstract reasoning, pragmatic language, and comprehension of ambiguous and figurative language (id.).

The evaluators reported that the student's basic visual perception and nonverbal abstract reasoning skills were high average but that he exhibited mild difficulty in visuospatial construction tasks and in his ability to copy increasingly complex figures (Dist. Ex. 19 at p. 5). The student's learning and memory skills were intact (id.). Specifically, the evaluation report stated that the student exhibited mild weakness related to executive functioning skills but overall, his recall was average (id.). The evaluators indicated that the student exhibited severely impaired and moderately impaired fine motor dexterity in his dominant and non-dominant hand respectively (id. at pp. 5-6).

According to the evaluators, the student's academic skills were "overall intact for his age and grade level" but the student demonstrated mild weaknesses that were likely secondary to attention/executive speed functioning and processing speed deficiencies (Dist. Ex. 19 at p. 6). With regard to reading, the evaluators described the student's single word reading as "superior," decoding skills as "high average," reading comprehension as "at the uppermost limits of the average range" and oral reading as "high average" (id.). They noted that the student appeared to sacrifice accuracy for speed when reading out loud (id.) With regard to writing, the evaluators reported that the student's spelling was "high average" and the student was able to generate simple, grammatically correct sentences when presented with a target word and asked to combine ideas into one cohesive sentence (id.). However, the evaluators noted that qualitatively many of the student's sentences were run-ons and he often omitted the appropriate traditional punctuation and/or words (id.). In the area of mathematics, the student's ability to solve complex problems was "high average" and his ability to solve mathematical word problems was "superior" (id.). The evaluators indicated that, in contrast, the student's rapid use of math facts fell in the "low average

range" and his performance on timed tasks was significantly weaker than during untimed conditions (id.). The evaluators characterized the student's "rapid subtraction" as "borderline impaired" (id.).

In terms of social cognition, the student fell in the high average range in his ability to recognize facial affect and take the perspective of others and understand that they had thoughts, emotions, and beliefs separate from his own (theory of mind) (Dist. Ex. 19 at p. 6). The evaluators administered an informant rating scale of social and behavioral issues related to autism spectrum disorders, which yielded discrepancies between the parent and teacher reports (id.). The parents rated the student as having severe difficulties with social awareness and communication, moderate difficulty with social cognition and social awareness, and also reported the presence of restricted interests and repetitive behavior (id.). However, the student's teacher reported only mild difficulty with the student's social motivation and mildly restricted interests and repetitive behaviors (id.). The teacher did not express concern regarding the student's social awareness, social cognition, or social communication within the academic setting and the evaluators indicated that taken together the teacher's rating suggested that the student did not demonstrate social impairment (id.). According to the evaluators, the student reported experiencing mildly elevated levels of anxiety, but no symptoms of depression, poor self-confidence, anger, or disruptive behavior (id.). The parents reported the student exhibited mild inattention and hyperactivity, moderate somatization and withdrawal, and moderate difficulty with social skills and activities of daily living (id.). The student's teacher reported that the student exhibited a moderate level of anxiety and somatization (id.).

The evaluators concluded that the student's profile was notable for poor motor skills and significant inattention and executive functioning weaknesses and noted that the student's anxiety might reduce the attentional control and efficiency with which he completed tasks (Dist. Ex. 19 at p. 8). The evaluators determined that the student's constellation of difficulties appeared to be consistent with a diagnosis of attention-deficit/hyperactivity disorder – predominantly inattentive type and noted that poor sensorimotor functioning, which the student demonstrated, was often seen with this diagnosis (id.). The evaluators indicated that given the parents' report of social difficulty, inflexibility, restricted interests and motor coordination difficulties that a diagnosis of autism spectrum disorder (ASD) "formerly known as Asperger's syndrome" was considered but was not warranted due to the student's minimal social difficulties and normal pragmatic, social, cognitive, and "theory of mind" skills (id.). However, the evaluators noted that the student's anxiety and concrete thinking could interfere with his ability to implement his cognitive strengths consistently and effectively in daily life, which might contribute to his level of anxiety and social difficulties (id.).

Based on their findings, the evaluators recommended, among other things, consultation with a psychiatrist regarding pharmacological intervention, cognitive-behavioral therapy, participation in a social skills group, parent training, "academic accommodations and modifications" in an "inclusion program," extended time on tests, a non-distracting environment, preferential seating, tasks broken down, breaks, pre-prepared class notes, checklists, reinforcement, use of a computer, and OT due to "mild weakness" in motor sequence learning and a "history of difficulty with fine motor skills" (Dist. Ex. 19 at p. 10).

Turning to the January 2019 classroom observation – the observation was conducted by a school social worker as part of the student's initial evaluation (Dist. Exs. 23 at p. 2; 32 at pp. 1-2; see Dist. Ex. 28). The school social worker reported that during the observation the student was engaged in a writing activity where she observed him writing letters and words correctly and neatly (Dist. Ex. 23 at p. 1). She noted that he sat quietly and did his work and was not distracted by the other students (id.). The student was engaged and attentive during a whole class discussion and volunteered to read at one point (id.). The student's teacher reported that it was a typical day for the student (id.). According to the school social worker, the student's teacher described him as "very bright and very literal" (id.). The student followed directions and classroom routines (id.). He had some difficulty initiating and producing written work, making connections, and organizing his thoughts (id.). The school social worker noted that, during a reading assignment, the student was allowed a modification in which he could complete his reading prior to answering questions rather than stopping intermittently, which "worked better for him" (id. at p. 2). According to the school social worker, the teacher stated that the student had difficulty with open ended questions, note taking, and book choice (id. at p. 2). The teacher also reported that the student was "fine" socially and that he got along with peers (id. at p. 2).

According to the January 2019 teacher report, the student's estimated computation and decoding skills fell at the late fourth grade level, and his applied word problems and reading comprehension skills fell at the middle fourth grade level (Dist. Exs. 24 at p. 1; 27 at p. 1).¹⁹ The student enjoyed reading and his skills were reportedly above grade level (Dist. Exs. 24 at p. 1; 27 at p. 1). The teacher reported that the student's reading strengths included his strong decoding skills, fluency, and vocabulary (Dist. Ex. 24 at p. 1). He was able to identify characters' feelings, follow and remember events, and report his findings (Dist. Exs. 24 at p. 1; 27 at p. 1). In addition, the student was able to identify the problem and solution and highlight the most important information in text (Dist. Exs. 24 at p. 1; 27 at p. 1). With respect to the student's reading needs, the teacher reported that the student often needed guidance choosing appropriate books for independent reading (Dist. Exs. 24 at p. 1; 27 at p. 2). In addition, he was working on inferential thinking, making connections to text, and developing written responses to literature (Dist. Exs. 24 at pp. 1-2; 27 at p. 2). According to the teacher, the student was able to develop strong claims and opinions and his spelling and mechanics were above grade level (Dist. Ex. 24 at p. 2). The teacher noted that the student benefitted from teacher support to initiate writing and noted his difficulty generating ideas when given open-ended tasks (Dist. Exs. 24 at p. 2; 27 at p. 1). The student benefitted from using graphic organizers, technology, and check-ins with his teachers to keep him motivated (Dist. Exs. 24 at p. 2; 27 at p. 2).

The teacher report indicated that the student was above grade level standards in math (Dist. Ex. 24 at p. 2). He exhibited strong computation skills and understanding of place value, an understanding of basic benchmark fractions, and the ability to interpret and create line plots (Dist. Exs. 24 at p. 2; 27 at p. 1). The teacher described the student as engaged and noted that he actively participated in science activities, worked well in small groups of peers, and was able to advocate for himself when unsure of something (Dist. Exs. 24 at p. 3; 27 at p. 1). According to the teacher,

¹⁹ Although the teacher report was not listed in the prior written notice as a document that was considered by the CSE, portions of the report are included in the January 2019 IEP (compare Dist. Ex.24, with Dist. Ex. 27 at pp. 1-3).

the student's parents were concerned about his attention, focus, and production, and wanted him to advocate more for himself in academic and social situations (Dist. Ex. 24 at p. 4). The teacher described the student as "very self-aware" and a "rule follower" and noted that in a survey he indicated that he "need[ed] a lot of reminders to work and be productive" (Dist. Exs. 24 at p. 4; 27 at p. 2). The student was able to get along with peers, showed respect for others, and actively participated in classroom discussions (Dist. Exs. 24 at p. 4; 27 at p. 2). The teacher reported that the student benefitted from preferential seating, additional time on assignments and tests, interactive activities, and check ins by his teacher, especially during writing tasks (Dist. Exs. 24 at p. 5; 27 at p. 2).

To address the student's needs as detailed above, the January 2019 CSE recommended that the student receive integrated co-teaching services in math (6 periods per week), ELA (10 periods per week), and social studies (5 periods per week) (Dist. Ex. 27 at p. 6).²⁰ The CSE did not recommend any related services, supplementary aids and services/program modifications/accommodations, assistive technology devices or services, or supports for school personnel on behalf of the student (*see id.*). With regard to the student's management needs, the IEP indicated that the student benefitted from preferential seating that was in close proximity to the teaching area, that he enjoyed hands-on and interactive assignments, and enjoyed sitting in a chair during mini-lessons to help him focus (*id.* at p. 2). The IEP noted that during independent practice, particularly writing, it was helpful to the student to have adults check with him to make sure he was productive and on task, as he could be easily distracted (*id.*). The IEP further noted that the student enjoyed using technology during writing tasks to help with his engagement, production, and focus (*id.*). According to the IEP, the student was comfortable with gmail and could navigate the internet appropriately (*id.*). The IEP indicated that during an interview, the student mentioned that he would benefit from additional time for longer writing assignments (*id.*). In terms of annual goals, the January 2019 CSE recommended three annual goals related to writing, specifically: producing writing that included a topic sentence, two supporting details, and a concluding sentence; providing two pieces of textual evidence to support his claims; and producing an informational piece that examined a topic clearly and group related ideas into paragraphs (*id.* at pp. 4-5). The fourth annual goal targeted the student's ability to work independently for 15 minutes without teacher prompting (*id.* at p. 4). The January 2019 IEP afforded the student testing accommodations of extended time, separate location, and breaks (*id.* at p. 7). The student's revised IEP included an additional goal that targeted his ability to choose an independent reading book based on his ability to comprehend the text (Dist. Ex. 30 at p. 8).

On appeal the parents assert that the recommended IEP omitted many of the student's "significant and pervasive educational needs" including anxiety, severe inattention, need for frequent prompting and 1:1 attention, a scribe, weak graphomotor skills, weak executive functioning skills, slow and variable response times, frequent paralysis when faced with open-ended work, failure to comprehend classroom assignments and instructions, odd behaviors such as randomly staring out windows, and emotional distress resulting from anxiety and severe social dysfunction.

²⁰ The CSE found the student eligible for special education services as a student with an other health impairment (Dist. Exs. 27 at p. 1; 30 at p. 1). The hearing record does not explain the basis for the CSE's determination.

A review of the present levels of performance shows that some of the difficulties endorsed by the student's fourth grade teachers in response to information solicited by the occupational therapist were not reflected in the student's IEP. Notably, the teachers' report of "[f]unction and [p]articipation" indicated that the student's ability to regulate alertness, sit still, and screen out distractions was somewhat below that of his classmates and his ability to adjust to change and transition between activities was significantly below that of his classmates (Dist. Ex. 18 at p. 2). The teachers noted that the student was not very flexible and that he asked a lot of questions (*id.*). With regard to work behavior the teachers reported that the student's ability to sustain effort to complete tasks and complete his work on time and independently was also somewhat below his classmates (*id.*). On the Sensory Processing Measure (SPM), the student's teachers rated his behavior related to social participation, vision, hearing, touch, taste and smell, body awareness, balance and motion, and planning and ideas (Dist. Ex. 18 at pp. 3-4).²¹ The rating scale included the following descriptors: never, occasionally, frequently, and always (*id.*). As related to social skills, the student's teachers reported that he occasionally worked as part of a team, resolved peer conflict without teacher intervention, handled conflict without outbursts or aggressive behavior, willingly played with peers, used and understood humor, and shifted conversation topics in accordance with peers' interests (*id.* at p. 3). In terms of vision, the teachers reported that he always became distracted by nearby visual stimuli and frequently stared intensely at people or objects (*id.*). With regard to touch, the teachers reported that the student always showed distress when his hands or face were dirty or in response to the accidental touch of peers (*id.* at p. 4). Turning to planning and ideas, the student's teachers reported that the student frequently did not perform consistently in daily tasks and was unable to solve problems effectively (*id.*). In addition, the teachers noted that the student always failed to complete tasks with multiple steps and occasionally had difficulty completing tasks from a presented model (*id.*). The teachers who completed the SPM and provided information to the OT regarding the student's classroom functioning participated in the student's CSE meeting (compare Dist. Ex. 18 at pp. 1, 3, with Dist. Exs. 28, 31).

The student's special education teacher for fourth grade described the student as "quirky" and having his "own unique needs" (Tr. pp. 67, 124). She testified that the student performed above grade level in math and also read above his grade level, but his writing was a challenge (Tr. p. 68). She reported that writing production and writing initiation were the areas in which the teachers had to help the student the most and noted that the student had a very hard time with open-ended writing assignments (Tr. p. 68). She reported that there were five computers in the classroom and the student always had a computer (Tr. p. 70; see Tr. pp. 71, 74). The teacher reported that the student was more motivated using a computer (Tr. p. 87). The teacher acknowledged that the student was anxious but also noted that a lot of students in the class were anxious and were given the opportunity to take a break or get some water (Tr. p. 75). The teacher explained that teachers would "try to negotiate with [the student]," describing that if the student was stuck on a writing task, the teachers would ask if he wanted to set the task aside and come back to it later or type his answer (Tr. pp. 75-76). She testified that the teachers understood writing and open-ended learning were difficult for the student and explained that it did not matter to the

²¹ The teacher's responses to the SPM are globally reflected in the OT evaluation report (see Dist. Ex. 21 at pp. 5-6). According to the evaluating occupational therapist, review of the SPM after scoring suggested that the student's functioning was "typical" in hearing, body awareness, balance and motion, and planning and ideas; that the student evidenced "some problems" in social participation; and definite dysfunction in vision and touch (*id.* at p. 6).

teachers if the student could not complete the task in that moment and they would advise the student not to worry about it and that he could take the work home or try it the next day (Tr. p. 76). When asked if the teachers' methods helped the student deal with his anxiety the teacher stated that the student was a "rule follower" and "an anxious kid overall" (Tr. p. 76). She opined that the teachers' methods "probably made [the student] feel better" and they did not see him get visibly upset (Tr. p. 76). She suggested that the student "probably felt a little badly about it" but less bad than if the teachers left the student with the assignment the whole time and gave him a grade on it (Tr. p. 77). The teacher testified that the student was "often stressed and a little bit anxious" and surmised that it was difficult for the student to communicate to the teachers that he wanted to do better in writing and ask for help (Tr. p. 89). However, she suggested that this was "kind of grade level appropriate" (Tr. p. 89).

The teacher recalled that the student's social/emotional development was discussed at the January 2019 CSE meeting (Tr. p. 98; see Tr p. 92). She testified that the CSE talked about how the student sometimes got anxious and how sometimes forming relationships with his peers was "a little bit challenging" because the student was a bit unique and quirky (Tr. p. 98). The teacher reported that the student got along well with everybody but that the teachers were trying to have him find "more of a kind of best friend situation or a close group of friends" (Tr. pp. 98, 124-25). She noted that at times, it was probably hard for the student but that he loved his class and enjoyed being part of the community (Tr. p. 98). The teacher acknowledged that the CSE did not develop "social-emotional management needs" for the student and explained that she and her co-teacher were aware of the student's "kind of anxieties . . . around writing" and paid attention to it but did not put "counseling or anything like that in place" (Tr. pp. 98-99). According to the teacher, if something came up staff would email the student's parents, or they could have reached out to the "counselor at-risk" but they did not (Tr. p. 99). She explained that if at any point there was an issue with the student, the teachers could have him meet with the counselor at-risk but that the student did not meet with the counselor regularly because the teachers did not see that it was necessary at the time (Tr. p. 99).

The teacher testified that writing probably made the student "feel pretty anxious and overwhelmed" (Tr. pp. 118-19). She explained that the student would "freeze up" and put his pencil down and stare at the paper for however long the paper was in front of him (Tr. p. 119). She noted that the teachers did not want to overwhelm the student too much, so after 15 minutes or so they would take the assignment away and the student would read (Tr. p. 119). The teacher reported that this strategy worked and that the teachers mentioned that the student needed more time to complete assignments, but she did not remember if that was put in the student's IEP (Tr. p. 119). The teacher also reported that when the student became overwhelmed by a writing assignment she or her co teacher would meet individually with the student, which was sometimes productive; however, sometimes the student would "still be a little bit in his own head" (Tr. p. 147). She noted again that the teachers tried different tools to help the student including offering him a computer or organizer (Tr. pp. 147-48). The teacher confirmed that she did not recommend the student for counseling and explained that based on her observation that the school's service provider recommended counseling more for students who were having conflicts with other students or who had [difficulty with] impulse control, trouble communicating and negotiating with peers, and were outwardly very loud (Tr. p. 120). She noted that the student was more of an "inward kind of person" (Tr. p. 120). She reported that the teachers and parent had talked about the student's anxiety and how he would sometimes get overwhelmed but that this behavior was

"almost grade appropriate" and the teachers did not see the student having major issues with peers (Tr. p. 120). Therefore, at the time of the CSE meeting they did not consider adding counseling and taking the student away from academic time (Tr. pp. 120-21). She suggested that it might be that a recommendation for counseling would have come from the psychologist or social worker because she was not in charge of programming for the meeting (Tr. p. 121).

Although both the parents and student's teachers reported that the student experienced anxiety, they differed in their perception of the severity of the student's anxiety. As noted above, the May 2018 neuropsychological evaluation report indicated that the student's teacher observed the student demonstrating "only mild difficulty with social motivation and mild restrictive interests and repetitive behaviors," while the parents endorsed the presence of restricted interests and repetitive behaviors (Dist. Ex. 19 at p. 6). In addition, the parents rated the student as having an "overall severe level of social difficulties," while his teacher's ratings suggested that the student did not demonstrate social impairment (*id.*). With respect to mood the student's teacher rated the student as exhibiting a moderate level of internalizing symptoms, specifically anxiety and somatization (*id.* at pp. 6, 7). The student reported experiencing mildly elevated levels of anxiety (Dist. Ex. 19 at p. 6).

The student's first quarter report card for the 2018-19 school year indicated that he was proficient in all academic areas except for writing and that his ability to manage his time and consistently demonstrate effort to independently achieve goals, work in an organized manner, and persist through challenges to complete a task trying different strategies were below standards (Dist. Ex. 34 at pp. 20-21). The report card stated that the student produced strong writing when he had clear expectations and focused ideas (Dist. Ex. 34 at p. 20). It noted that he benefitted from verbalizing his ideas and participating in the processes of the writing cycle to build his craft (*id.*).

The February 2019 IEP does not state that the student experienced anxiety with respect to writing nor does it reflect the degree to which the student required support to complete writing assignments. The student's difficulty initiating and completing writing tasks appeared to have an emotional basis. While the student's teacher testified that the student's level of anxiety in the classroom was "almost grade appropriate" and that the student did not need to meet with the counselor at-risk because it was not necessary at the time (Tr. pp. 99, 120), it was also apparent that the student's anxiety was impacting on his classroom performance, particularly with respect to writing (Tr. pp. 98-99, 119). Additionally, as writing was one of the student's main areas of need, with three of the four annual goals in the January 2019 IEP directed at addressing writing skills (Dist. Ex. 27 at pp. 4-5), the failure to address the student's anxiety within the IEP is substantial. IEP statements that "with support [the student] can develop strong claims and opinions," "[the student] enjoys using graphic organizers and technology to help initiate writing and organize his ideas," and "the student benefits from teacher support to initiate writing tasks" do not convey the level of angst experienced by the student or the degree of modification made by the student's teachers with respect to writing tasks. In addition, the IEP did not acknowledge the student's lack of flexibility and difficulty with transitions, distractibility, or inability to complete multi-step tasks, all reported by his teachers (*see* Dist. Ex. 18). The private psychologists who evaluated the student recommended cognitive behavioral therapy to address the student's anxiety, ADHD, inflexibility, and social skills (Dist. Ex. 19 at p. 8). The hearing record as a whole suggests, as the parents assert, that the CSE should have addressed the student's social/emotional needs and the impact they had on his academic functioning, particularly with respect to his anxiety

as manifested in the classroom setting. Accordingly, based on the IEP's failure to address what was a significant area of need, the district did not offer the student a FAPE for the 2018-19 school year.

C. Unilateral Placement

I turn next to the parents' assertion that Lang was an appropriate unilateral placement for the student for the 2019-20 school year. Although the district does not raise any concerns regarding the student's placement at Lang, I have conducted a review of the program offered at Lang and, for the reasons set forth below, find that the evidence in the hearing record supports the conclusion that Lang provided the student with instruction specially designed to meet his unique needs.

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 Lang school psychologist, Lang is a nonpublic school that specializes in the education of twice-exceptional students (Tr. p. 303). The school serves approximately 52 or 53 students in grades two through twelve (Tr. p. 306). The school's approach to classroom management and shaping behavior includes the use of positive behavior supports, daily report cards, and Collaborative and Proactive Solutions (CPS), which, as reported by the school, are designed to help students develop self/social awareness, self-advocacy skills, affective communication skills, and to foster cognitive and behavioral flexibility, as well as prosocial skills (Parent Ex. BB). The school asserts that its push-in, weekly support of school psychologists and speech-language pathologists for group work in each class promotes the development of social skills, pragmatic language skills, and an understanding of the challenges of giftedness and learning differences (Tr. p. 308; Parent Ex. BB). Fine motor and gross motor development, along with self-regulation skills, are worked on in the school's sensory gym (Parent Ex. BB). According to a summary of its curriculum, Lang uses a combination of project-based group learning, fluid math and literacy subgroups, 1:1 tutoring for individualized remediation and acceleration, and a multi-tiered talent development program (id.). Because many gifted and twice exceptional learners are resistant writers, the school helps students explore "writing" in a variety of non-traditional ways that build on traditional writing skills (id.). All students at the school receive individual and group counseling (Tr. p. 305). The staff at the school are licensed or certified in their field (Tr. pp. 310-14).

During the 2019-20 school year the student attended a fourth/fifth grade classroom of 13 students ranging from 9 to 11 years old (Tr. p. 371). The Lang school psychologist reported that the student was assigned to her caseload (Tr. p. 315). She also reported that the student received OT in both a small group and large group and he was also part of a speech group that focused on social dynamics such as flexibility and being able to tolerate people who don't agree with you and what to do in certain situations (Tr. pp. 323-24).

According to the Lang school psychologist, when the student started at Lang he presented as very quiet and reserved (Tr. p. 316). He would not go out to recess, did not speak with peers, and did not show signs of positive affect (Tr. pp. 316-17). She noted that the student had a history of anxiety and she had seen some signs of that related to school in general and in writing in particular (Tr. pp. 317-18). The school psychologist reported that she saw the student on a regular basis in both formal and informal capacities including individual counseling, recess one day per week, morning meeting at least once per week, and frequent visits to the classroom (Tr. p. 319). The psychologist reported that she addressed the student's difficulty interacting with peers and

making friends by pairing him with a preferred peer during OT sessions and working with his teacher on strategic placement of his desk next to students he had the potential to connect with (Tr. p. 322). With regard to the student's anxiety, the school psychologist testified that staff worked carefully and closely to make sure the student felt supported and she coordinated frequently with the student's outside psychologist regarding interventions (Tr. pp. 324-25). The school psychologist indicated that the focus of her counseling was assisting the student with accepting help and advocacy for academic needs and addressing anxiety and/or social dynamics as they presented in school (Tr. p. 325-26). The school psychologist described how the use of CPS worked with the student with regard to writing homework assignments, including how she met with the student to identify barriers to completing homework and problem solving how to do things differently (Tr. p. 327). She also worked with the student's teachers to make sure the student's homework was "just right for him," challenging but not outside his ability (id.).

The student's teacher, who was certified as a regular education teacher, reported that there were two adults other than herself in the classroom, a licensed special education teacher and a paraprofessional who was a licensed social worker (Tr. pp. 356-57, 361, 369; see Tr. pp.376-77). The teacher explained that a large component of her classroom literacy program, especially writing, was self-regulated strategy development (SRSD) which is a program that helps scaffold students' organization and planning and supports students' executive functioning skills (Tr. p. 354). She reported that staff taught students how to organize their thoughts, how to plan, and how to move step-by-step through the plan to produce finished work (Tr. p. 364). The teacher opined that with twice exceptional students there was a disconnect between what they were talking about and what they were able to independently produce on paper and that was where SRSD came in (Tr. pp. 365-66). She explained how SRSD broke a writing assignment down "into pieces," which enabled students to focus on one part at a time and made the task a "little less anxiety provoking and overwhelming" (Tr. p. 367). The students also had a whole chart of the assignment to refer back to (Tr. pp. 366-67).

The teacher reported that when the student entered the school in September "there was almost no task initiation, in terms of writing" (Tr. p. 379; see Parent Ex. KK). She noted that staff observed a lot of signs of anxiety (Tr. p. 381). She reported that if the student was hesitant to start something, he would just look at the paper and it was very difficult for him to ask for help (id.). She opined that the student's anxiety "impeded a lot of the writing process" not just in writing class but in all areas (Tr. p. 382). She indicated that it was almost easier or less anxiety provoking for the student to write nothing than it was for him to write something and not have it turn out the way he thought it should (id.). The teacher reported that when the student entered the school he required a lot of support in planning and organization, especially when it came to writing, in whatever subject writing was required and not just writing class specifically (Tr. p. 383; see Tr. pp. 386-89, 393-94). The teacher suggested that the student was physically capable of writing but preferred to type (Tr. p. 407). She indicated that the staff's impression was that the student knew what he wanted to say in his mind but the planning and organization and what to write next was so overwhelming that "that's where the freezing up happen[ed]" (id.).

A September 2019 to January 2020 Lang School progress report provided grades for achievement and effort, as well as a narrative description of the student's school performance in applied logic (software programming), civics, creative lab (art), drama, engineering, kidworks (talent development), math, music, physical education, science, social studies, and Spanish classes

(Parent Ex. LL). The progress report indicated that the student showed his motivation to learn by consistently contributing his knowledge during class discussions and assignments (id. at p. 2). The student engaged in responsible and civil discussions with his peers, consistently participated in the "morning meeting," and was able to wait for his turn to ask a question or make a comment (id.). The progress report described the student as a "leader" because he was able to initiate and demonstrate new games and activities to the class (id.). The progress report noted that the student benefitted from using a planner for organization, which supported his consistent and timely homework completion (id.). In addition, the student benefitted from adult support, movement breaks, graphic organizers, previewing or reviewing his work, and clear, consistent instructions and expectations (id.). According to the progress report, the student's overall academic achievement fell in the "exceeds" proficient to "exceptional" range, as did the student's effort (id. at pp. 2-3). The progress report indicated that in civics class the student was "engaged and thoughtful" during classroom discussions and that during restorative justice work he was able to wait his turn and "actively" listen (id. at p. 6). The progress report indicated that the student's interactions with peers increased throughout the semester (id.). The progress report indicated that in art the student required "close guidance or specific steps to follow" due to his difficulty initiating projects (id. at p. 8). During preferred tasks the student was focused and diligent, but during non-preferred tasks he needed a "few reminders to stay on task" (id.). The student "often self-advocated for his work" and could ask for help when needed (id.).

In the area of ELA, the progress report stated that the student demonstrated that he was able to read text on a sixth-grade level (Parent Ex. LL at p. 11). When first assessed, the student exhibited difficulty answering comprehension questions requiring "inferencing and interpretation"; however, during reassessment the student was able to use "text evidence to make strong inferences" about the story (id.). According to the progress report, the student began the semester "very hesitant" to begin writing assignments on his own, and he benefitted from having a "clear plan" and organizing his thoughts before beginning (id.). In order to support his executive functioning during writing tasks the student reportedly used SRSD (id.). In addition, he benefitted from graphic organizers, one-to-one support, and "peer meetings" to edit his work (id.). The progress report noted that the student would benefit from frequent one-to-one support, feedback, and continued use of SRSD organizers in the future (id.). In the area of math, the progress report indicated that the student benefitted from using multisensory activities and needed more practice with order of operations (id. at p. 17). The student reportedly would be provided ongoing review, coaching, and feedback to support his learning (id.). In physical education, the student benefitted from cues when he had difficulty regulating his activity level which could impede his safety awareness, decision making, and interactions with peers (id. at p. 22). In science class, the student benefitted from both one-to-one support and group work (id. at p. 23). The progress report indicated that the student was "extremely thorough and accurate" with his research and produced a "visually engaging" presentation (id.). In Spanish class the student required "multiple prompts" during writing tasks to prevent becoming distracted and failing to complete his work (id. at p. 27). In order to address his writing and time management skills, the progress report stated that the student would be provided scaffolding and frequent check ins when he became "stuck" (id.).

A Lang School therapy team progress report indicated that the student participated in weekly, 30-minute individual counseling sessions (Parent Ex. MM at p. 1). The progress report indicated that as the year went on the student moved from answering questions when asked, to engaging in more reciprocal conversations related to identifying areas in which he needed support

and learning ways to advocate for that support (id.). The progress report noted that the student initially presented as reserved but had become an active member of his peer community (id.). With respect to peer interactions, the counseling sessions focused on perspective taking and advocacy (id.). The progress note indicated that as part of community building, the student and his class discussed bullying, mindfulness, growth mindset, and stress tolerance (id.). The students were learning about physical manifestations of stress and how to cope with and alleviate them (id.). The progress report indicated that the student was an active participant and had become more willing to share his feelings with the group (id.).

The therapy progress report indicated that the student received speech-language therapy during the first semester in the form of a weekly in-class speech group and weekly push-ins during lunch for carry over (Parent Ex. MM at p. 2). The primary focus of the group was on collaborative brainstorming, perspective taking, thinking flexibly in social situations, and self-advocacy (id.). According to the progress report, the student consistently engaged in the presented lessons and willingly showed marked improvement in his ability to advocate in class for missed material (id.). The student made gains in maintaining conversations about non-preferred topics and waiting for peers to finish their thoughts before sharing his related comments (id.). With respect to OT, the therapy progress report indicated that the student was pulled with a peer for a once weekly 30 minute session in the sensory gym and that the occupational therapist also led a once weekly 60-minute session in the classroom related to handwriting/typing and sensory support and a once weekly 60-minute PE/movement class (id.). The progress report indicated that the student continued to work on improving his core and upper body strength and endurance, complex motor planning, and self-regulatory control of his activity level (id.). The report noted that the student was able to consistently complete tying tasks despite auditory and visual distractions in the classroom (id. at p. 3). With regard to the PE/movement class, the report indicated that the student had challenges monitoring his activity level which on occasion impacted his ability to interact safely with his peers and environment, register important sensory information, and modulate his activity level (id.). The report noted that less-structured, group-based activities appeared to be most difficult for the student (id.). The student benefitted from frequent check-ins and clear directives and in most instances was able to modify his behavior with consistent feedback (id.).

D. Equitable Considerations

The parents contend that equitable considerations support their request for reimbursement or direct payment for the costs of tuition at Lang for the 2019-20 school year. The district's only reason for requesting that an award be reduced or denied is that the district asserts the parents acted unreasonably in submitting a "revised evaluation" for admission into evidence at the hearing that contained recommendations different from the evaluation in possession of the district.

The final criterion for a reimbursement award is that the parents' claim must be supported by equitable considerations. Equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; R.E., 694 F.3d at 185, 194; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 68 [2d Cir. 2000]; see Carter, 510 U.S. at 16 ["Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable"]; L.K. v. New York City Dep't of Educ., 674 Fed. App'x 100, 101 [2d Cir. Jan. 19, 2017]). With respect

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

Reimbursement may be reduced or denied if parents do not provide notice of the unilateral placement either at the most recent CSE meeting prior to their removal of the student from public school, or by written notice ten business days before such removal, "that they were rejecting the placement proposed by the public agency to provide a [FAPE] to their child, including stating their concerns and their intent to enroll their child in a private school at public expense" (20 U.S.C. § 1412[a][10][C][iii][I]; see 34 CFR 300.148[d][1]). This statutory provision "serves the important purpose of giving the school system an opportunity, before the child is removed, to assemble a team, evaluate the child, devise an appropriate plan, and determine whether a [FAPE] can be provided in the public schools" (Greenland Sch. Dist. v. Amy N., 358 F.3d 150, 160 [1st Cir. 2004]). Although a reduction in reimbursement is discretionary, courts have upheld the denial of reimbursement in cases where it was shown that parents failed to comply with this statutory provision (Greenland, 358 F.3d at 160; Ms. M. v. Portland Sch. Comm., 360 F.3d 267 [1st Cir. 2004]; Berger v. Medina City Sch. Dist., 348 F.3d 513, 523-24 [6th Cir. 2003]; Rafferty v. Cranston Public Sch. Comm., 315 F.3d 21, 27 [1st Cir. 2002]); see Frank G., 459 F.3d at 376; Voluntown, 226 F.3d at 68).

In this instance, the hearing record shows that the parents submitted their copy of the neuropsychological evaluation report into evidence without objection (Tr. pp. 46-54; Parent Ex. FF). Earlier in the hearing, the district had attempted to submit its copy of the neuropsychological evaluation report into evidence; however, the parents' attorney objected to its inclusion as being repetitive with the parents' package of evidence; at that time the district attorney agreed it was not necessary to include the district exhibit (Tr. pp. 32-33). Subsequent to the conclusion of the hearing, the district attorney sent an email to the IHO requesting the inclusion of the district's copy of the report into the hearing record noting a difference in the recommendations contained in the two reports (Req. for Rev. Ex. A at p. 2). More specifically, the district's attorney noted that the report in the district's possession recommended placement of the student in an inclusion classroom, while the parent's "revised" report omitted this recommendation (id.; compare Parent Ex. FF at p. 9, with Dist. Ex. 19 at p. 9). The parents' attorney indicated that he did not believe the reports were different, but further indicated that "[i]f the documents are indeed different, we would consent to the admission of the [district's] proposed report" (Req. for Rev. Ex. A at p. 1). The IHO then accepted the district's copy of the report into evidence and it is part of the hearing record (id.). Overall, although the district's frustration in finding out the reports were not identical as represented at the hearing is understandable, it does not appear to have been an intentional misrepresentation that would warrant a reduction in an award of tuition reimbursement.

Additionally, the hearing record shows that the parents otherwise cooperated with the district and did not obstruct or interfere with the district's efforts to meet its obligations under the IDEA. For example, the parents communicated their concerns regarding the student to the district (Parent Exs. A; B; R; Dist. Ex. 4), cooperated with the district in having the student evaluated (Parent Ex. T; Dist. Exs. 12-15), provided the district with a copy of the privately obtained neuropsychological evaluation report (Parent Exs. V; X), and provided the district with notice of their intention to place the student at Lang for the 2019-20 school year at district expense (Parent Ex. C). Considering the above, the hearing record does not support a reduction in an award of reimbursement for the cost of the student's tuition at Lang for the 2019-20 school year.

VII. Conclusion

Having determined that the evidence in the hearing record supports finding that the January 2019 IEP did not offer the student a FAPE, that Lang was an appropriate placement for the student for the 2019-20 school year, and that equitable considerations support the parents, the parents are entitled to reimbursement for the cost of the student's tuition at Lang for the 2019-20 school year.

I have considered the remaining contentions and find it is unnecessary to address them in light of my determinations above.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision dated May 10, 2020, is modified by reversing those portions which found that the district offered the student a FAPE for the 2019-20 school year; and

IT IS FURTHER ORDERED that the district shall reimburse the parents for the full cost of the students' attendance at Lang for the 2019-20 school year.

Dated: **Albany, New York**
 September 8, 2020

STEVEN KROLAK
STATE REVIEW OFFICER