The University of the State of New York

The State Education Department
State Review Officer
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No. 20-182

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 LAWRENCE UNION FREE SCHOOL DISTRICT

Appearances:
Kinzler Law Group, PLLC, attorneys for petitioners, by Ben Kinzler, Esq.

Guercio & Guercio, LLP, attorneys for respondent, by Barbara P. Aloe, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioners (the parents) appeal from the decision of an impartial hearing officer (IHO) which denied their request to be reimbursed for their son's tuition costs at Allied Achievement: Achievement Unlocked (AU) for the 2017-18 school year.[1] Respondent (the district) cross-appeals from the IHO's determination that the district failed to demonstrate that it offered the student an appropriate educational program for the 2017-18 school year. The appeal must be dismissed. The cross-appeal must be dismissed.

II. Overview—Administrative Procedures

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

[1] According to the testimony of the assistant head of AU, Allied Achievement is the company and Achievement Unlocked is the name of the school program (Jan. 10, 2020 Tr. pp. 3108, 3169-70).

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

In November 2014, the student was initially referred for a Committee on Preschool Special Education (CPSE) evaluation due to the parents' concerns about the student's behavior, speech-language development, fine and gross motor development, and sensory processing (Parent Ex. O at pp. 1, 16). The initial CPSE evaluation (psychological evaluation and functional behavioral assessment (FBA) revealed that the student's cognitive functioning was in the superior range;

however, his scores on the Conners Early Childhood Behavior Scales revealed symptoms of Attention Deficit/Hyperactivity Disorder (ADHD) (id. at pp. 2-3, 5-7, 16).

The CPSE determined that the student was eligible for special education as a preschool student with a disability and he began receiving special education itinerant teacher (SEIT) services (Dist. Ex. 10 at p. 1). Concerns regarding the student's behavioral functioning continued and, based on a recommendation made by the student's preschool teacher, the parent initiated a referral for a supplemental psychological evaluation, which was conducted on June 8, 2016 (see id.). Cognitively, the student's scores were in the average range and "no concerns regarding intellectual functioning [were] evident at [that] time" (id. at p. 9). However, on the Conners Early Childhood Behavior Scales, the parents and teacher reported concerns regarding the student's behaviors and social/emotional functioning (id.).

On June 20, 2016 the CPSE convened to develop an IEP for the 2016-17 school year, and continued to find the student eligible for special education as a preschool student with a disability (Parent Ex. A at p. 1). Based on the student's "significant delay in behavioral, social and attentional skills, which inhibit[ed] participation in age appropriate educational activities," the June 2016 CPSE recommended the following special education program and services to begin in September 2016: five hours per day of a 1:1 special class in an integrated setting in a center-based program; two 30-minute sessions per week of individual speech-language therapy; two 30-minute sessions per week of individual occupational therapy (OT); and two 30-minute sessions per week of individual physical therapy (PT) (id. at pp. 5, 9).[2]

For the 2016-17 school year, the parents placed the student at a nonpublic preschool (see Parent Ex. L). However, in November 2016, the head of the nonpublic preschool determined that it was "not an effective academic or social environment" for the student and the student was disenrolled as of November 18, 2016 (id.). Thereafter, the parents placed the student in a universal pre-kindergarten (UPK) regular education program located at one of the district's schools (Jan. 17, 2018 Tr. p. 312; Parent Ex. M at p. 2).[3]

The CPSE reconvened on December 7, 2016 and determined that the student had significant delays in speech, language, motor, behavioral, social, and attention that inhibited his participation in "age appropriate educational activities" (Dist. Ex. 4 at p. 5). Accordingly, the CSE recommended a daily, five hour 18:1+2 special class in an integrated setting in a center-based program; two 30-minute sessions per week of individual PT; a one-hour session per month of individual parent training (from September 20, 2016 – December 11, 2016); two 30-minute sessions per week of individual speech-language therapy; two 30-minute sessions per week of individual OT; two one-hour sessions per week of individual psychological counseling; two one-

[2] The student's two subsequent IEPs for the 2016-17 school year include a similar recommendation for a special class in an integrated setting in a center-based program indicating a start date of September 6, 2016, but identify the staffing ration as 18:1+2 rather than 1:1 (compare Parent Ex. A at p. 9, with Dist. Exs. 4 at p. 10; 5 at p. 11).

[3] The UPK program was run by a third party (Jan. 17, 2018 Tr. pp. 275, 315). The UPK program was held in the district building while the CPSE services were provided to the student through the Nassau County Department of Health (Jan. 17, 2018 Tr. pp. 312-13, 329). The teachers in the UPK program were not employed by the district (Jan. 17, 2018 Tr. p. 329).

hour sessions per month of individual parent training beginning on December 12, 2016; daily teacher aide services for two hours and 30 minutes per day (November 28, 2016 – December 11, 2016); and daily teacher aide services for four hours per day beginning on December 12, 2016 (id. at pp. 10-11).

On December 21, 2016, due to parental concerns regarding the student's development, an educational evaluation was performed to assess the student's "[c]ognitive, [a]daptive, [s]ocial-[e]motional, [c]ommunication, and [p]hysical" levels of functioning (Dist. Ex. 11 at p. 1). The student's scores were in the average range for cognitive, motor, and communication skills, and in the poor range for social/emotional and self-help skills (id. at pp. 2-3). Additionally, on December 21, 2016, due to the student's tantrums, impulsivity, and poor social interactions, a behavior assessment together with classroom observations were conducted as part of an FBA (see Parent Ex. B; Dist. Exs. 14, 15). It was observed that tantrums, impulsivity and difficulty interacting with peers impeded the student's learning (Dist. Ex. 14 at p. 1). Further, it was observed that the student had difficulty with transitions, interacting with peers, managing emotional responses to frustration, sharing, and seeking attention in appropriate manners (id. at pp. 1-2). As a result, a behavior intervention plan (BIP) was developed to decrease the student's impulsivity and low frustration tolerance (id. at p. 3).

On January 30, 2017, another CPSE meeting was held to review the December 2016 educational evaluation results and the FBA (Dist. Ex. 5 at pp. 1-2). The January 2017 CPSE determined that the student required a BIP for "positive behavior interventions throughout the school day including but not limited to a token system, verbal and non verbal feedback and visual aides paired with reinforcers" (id. at p. 6). The January 2017 CPSE continued to recommend a center-based program with the following related services: two 30 minute sessions per week of individual PT; two 30 minute sessions per week of individual speech-language therapy; one 60-minute session per week of individual OT; two 60-minute sessions per week of individual psychological counseling services (January 3, 2017 – February 5, 2017); two 60-minute sessions per month of individual parent training; five 60-minute sessions per week of individual psychological counseling services beginning on February 6, 2017; daily teacher aide services for four hours per day (December 12, 2016 – February 5, 2017); and daily teacher aide services for five hours per day beginning on February 6, 2017 (id. at p. 11).

On May 24, 2017, the CPSE held an annual review (see Dist. Ex. 6). The CPSE determined that the student was eligible for 12-month services "to prevent substantial regression" and recommended the following services for summer 2017: two 30-minute sessions per week of individual OT; three 60-minute sessions per week of individual, home-based psychological counseling; and two 60-minute sessions per month of individual parent training (Dist. Exs. 2 at p. 10; 6 at p. 10). On June 23, 2017, the CPSE amended the IEP to include teacher aide services for five-and one-half hours per day for the extended school year while the student attended "camp at preschool" (Dist. Exs. 2 at p. 10; 3 at p. 1).

A CSE meeting was held, on the same day as the May 2017 CPSE meeting, to determine the student's eligibility for special education services for the 2017-18 school year (Dist. Exs. 6; 7). The CSE determined that the student was eligible for special education and related services as a

student with an other health-impairment (Dist. Ex. 7 at p. 1).[4] The May 2017 CSE determined that the student continued to need a BIP for strategies and supports to address the student's behaviors that impeded his learning (id. at p. 5). For the 10-month school year beginning in September 2017, the May 2017 CSE recommended placement in a general education class with related services including: one 30-minute session per week of individual OT; one 30-minute session per week of small group (3:1) OT; two 30-minute sessions per week of small group (3:1) counseling services; and two 60-minute sessions per week of individual behavior intervention services (id. at p. 7; see Parent Ex. J at p. 1). In addition, the May 2017 CSE recommended one 60-minute session per week of parent training, supplementary aids and services throughout the school day including advanced warning for changes in schedule, breaks as needed, positive reinforcements by the teacher, and preferential seating (id. at pp. 7-8). The IEP also recommended that the student's teacher receive one 30-minute OT consult per week (id. at p. 8). The May 2017 CSE also recommended special transportation services for the student (id. at p. 9).

During the summer 2017, the parents placed the student in a summer camp (Dist. Ex. 16 at p. 1). He was expelled from camp on the first day for striking a student and teacher, and thereafter, transferred to a camp within the same organization for students with developmental disabilities that consisted of sports, board games, and arts and crafts, and at the camp the student received psychological counseling services (id.).

Thereafter, on August 20, 2017, the parents notified the district of their disagreement with the May 2017 IEP, and that the parents were unilaterally placing the student at AU for the 2017-18 school year and seeking tuition reimbursement from the district unless they received a response (Parent Ex. J).

On August 30, 2017, a CSE meeting was held to review an August 24, 2017 psychological counseling quarterly progress report and an August 22, 2017 letter from the student's private psychiatrist (Dist. Ex. 9 at p. 1; see Dist. Exs. 16-17). The recommended related services and program modifications remained the same as the May 2017 IEP; however, full time 1:1 aide service throughout the school day was added to the August 2017 IEP (compare Dist. Ex. 7 at pp. 7-8, with Dist. Ex. 9 at pp. 7-8). On August 30, 2017, the parents sent a letter to the district expressing their dissatisfaction with the CSE's recommendations, and of their unilateral placement of the student at AU, and that they would be seeking tuition reimbursement from the district for that placement (see Parent Ex. M).

On September 13, 2017 another CSE meeting was held to discuss the parents' request for transportation to and from AU (see Dist. Exs. 22; 23 at p. 1). At the meeting, the CSE determined that AU was not a State approved school, and therefore, the CSE could not recommend placement at AU (Dist. Ex. 23 at p. 1). After a discussion about AU, the CSE also determined that the AU program and the district's recommended programs were "not equivalent," and therefore, the September 2017 CSE denied the parents' request for transportation (id. at pp. 1-2). The September 2017 IEP program and related services recommendations remained unchanged from the August 2017 IEP (id. at p. 3).

[4] The student's eligibility for special education and related services as a student with an other health-impairment is not in dispute on appeal (see 8 NYCRR 200.1[zz][11]).

The student attended AU for the 2017-18 school year (Parent Ex. X).[5]

A. Due Process Complaint Notice

In a due process complaint notice, dated October 25, 2017, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2017-18 school year (see IHO Ex. I).

Initially, the parents sought a pendency order for the district to provide and pay for transportation to and from AU together with a paraprofessional on the bus (IHO Ex. I at p. 2).

Next, the parents argued that the district placed the student in an inappropriate educational program for the 2016-17 school year, and therefore, failed to offer the student a FAPE for the 2016-17 school year (IHO Ex. I at p. 3). The parents also alleged that the May 2017 IEP was inappropriate and denied the student a FAPE for the 2017-18 school year (id.). The parents argued that the CSE improperly classified the student as a student with an other health-impairment and improperly recommended placement in a general education classroom with related services despite the student's "significant behavioral concerns" (id.). The parents further argued that the related services listed on the IEP "were grossly inadequate" (id.). In addition, the parents argued that the CSE failed to recommend paraprofessional services on the May 2017 IEP and failed to conduct an FBA or develop a BIP for the 2017-18 school year (id.).

As relief, the parents sought funding and/or reimbursement for tuition and educational costs and expenses at AU as well as the costs and expenses related to transportation to and from AU (IHO Ex. I at p. 10).

B. Impartial Hearing Officer Decision

An impartial hearing convened on January 17, 2018 and concluded on January 10, 2020 after 20 days of proceedings (Dec. 8, 2017 Tr. pp. 1-88; Jan. 17, 2018 Tr. pp. 89-349; March 15, 2018 Tr. pp. 1-165; April 30, 2018 Tr. pp. 378-613; May 17, 2018 Tr. pp. 644-884; June 7, 2018 Tr. pp. 885-1086; June 26, 2018 Tr. pp. 1-36; July 26, 2018 Tr. pp. 1087-1203; Aug. 2, 2018 Tr. pp. 1204-1386; Aug. 15, 2018 Tr. pp. 1387-1598; Oct. 16, 2018 Tr. pp. 1599-1814; Nov. 20, 2018 Tr. pp. 1815-2067; Nov. 28, 2018 Tr. pp. 2068-2334; Feb. 28, 2019 Tr. pp. 2335-2362; May 6, 2019 Tr. pp. 2363-2432; June 13, 2019 Tr. pp. 37-68; Sept. 10, 2019 Tr. pp. 2424-2698; Nov. 1, 2019 Tr. pp. 2699-2894; Dec. 4, 2019 Tr. pp. 2895-3092; Jan. 10, 2020 Tr. pp. 3093-3336).[6]

It should be noted that there were four IHOs assigned to this proceeding. The first IHO participated in the proceedings from December 8, 2017 through February 28, 2019; however, due to illness, the IHO resigned (Feb. 28, 2019 Tr. p. 2340). Thereafter, a second IHO was appointed and participated in proceedings on May 6, 2019 (May 6, 2019 Tr. p. 2366). Due to a conflict of

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

[6] The transcript of the hearing record was not consecutively paginated, accordingly the citations to the transcripts include the date of the testimony in order to identify the correct pages.

interest, the IHO recused herself (June 13, 2019 Tr. p. 39). A third IHO was appointed and heard testimony on June 13, 2019, continuing through January 10, 2020, but later recused himself (June 13, 2019 Tr. p. 39; IHO Decision at p. 1). Finally, a fourth IHO was appointed on August 18, 2020 to issue a decision (IHO Decision at p. 1).

The first IHO held a pendency hearing on January 17, 2018 wherein the parent testified, as well as two district witnesses (Jan. 17, 2018 Tr. pp. 150-342). The parties agreed that the June 2016 IEP set the student's placement for the purpose of pendency and that the IEP did not include special transportation services (Parent Ex. A at p. 11; IHO Ex. V at p. 3). In a February 13, 2018 interim decision, the first IHO assigned to this matter held that because transportation was not a related service included on the student's IEP, "but rather was provided as a service given to all UPK students, transportation is not subject to pendency" (IHO Ex. V at p. 4). Accordingly, the IHO denied the parents' request for pendency to include transportation and a transportation paraprofessional to and from AU (id.).

In a decision dated November 4, 2020, the fourth IHO determined that the district failed to offer the student a FAPE for the 2017-18 school year, and that AU was not an appropriate unilateral placement thereby denying the parents' request for tuition reimbursement and funding at AU (IHO Decision at p. 42).[7]

First, the IHO upheld the May and August 2017 CSE's classification of the student as a student with an other health-impairment (IHO Decision at p. 30). Next, the IHO determined that the May and August 2017 CSE's had "sufficient information to make appropriate recommendations for the student's problematic behaviors" and therefore, "it was appropriate to defer the FBA until September" and further, that the district did not deny the student a FAPE in terms of the behavioral recommendations (id. at p. 31). The IHO found that the eight annual goals included in the student's IEP were measurable, "reasonable and appropriate to address the student's social/emotional/behavioral needs" (id. at p. 32). As to the parents' argument that they were denied meaningful participation at the CSE meetings, the IHO determined that the parents' concerns and requests were listened to but "ultimately not heeded," which did not equate to a denial of meaningful participation (id.). Finally, as to the recommended placement, the IHO held that "the CSE was too hopeful given [the student's] prior school experiences and his continuing frequent disruptive and aggressive behaviors" (id. at p. 37). Accordingly, the IHO found that the placement recommendation did not offer the student a FAPE for the 2017-18 school year because it did not provide sufficient supports to make it likely the student would have made meaningful progress (id.).

Next, the IHO determined that the parents failed to meet their burden of proof that AU was an appropriate unilateral placement for the student for the 2017-18 school year (IHO Decision at p. 37). Initially, the IHO held that the instability caused by the student's teacher and related service providers leaving in the middle of the school year "was likely a serious impediment to [the student's] social/emotional progress at school" (id. at p. 38). The IHO pointed out that there were "serious omissions" at AU, for example, no FBA was conducted, there were no annual goals, the

[7] The fourth IHO rendered a decision solely on the hearing record without hearing the testimony of any witnesses (IHO Decision at p. 1).

daily report cards were subjective and "essentially meaningless," there was no parent counseling and training, and the related services recommended by the district were not provided (id. at pp. 38-40). Further, the IHO held that there was no evidence in the hearing record as to the student's social/emotional and behavioral progress (id. at p. 40). Ultimately, the IHO held that the parents failed to meet their burden of proof that AU "provided 'educational instruction specially designed to meet the unique needs' of the student" (id. at p. 41).

IV. Appeal for State-Level Review

The parents appeal claiming that the IHO erred in determining that AU was an inappropriate unilateral placement to address the student's needs. The main issue on appeal is whether the IHO erred in determining that the program at AU was not appropriate to address the student's needs, and in denying the parents' request for tuition reimbursement and funding for AU for the 2017-18 school year.

In an answer and cross-appeal, the district generally admits or denies the allegations contained in the parents' request for review. The district also cross-appeals from the IHO's determination that the district denied the student a FAPE for the 2017-18 school year. The district argues that the standard in determining "an appropriate educational placement is one which can implement the IEP." The district also contends that although the student continued to experience behavioral difficulties during the 2016-17 school year, he had made improvement with transitions, his aggressive play decreased, he was throwing less, and he had not eloped in several months. Further, the district argues that notwithstanding his behavioral difficulties, the student "maintained academic achievement appropriate for his age" which "was a strong indicator that a program continuing those supports and adding new ones would continue to enable [the student] to make progress." Furthermore, the district argues that the IHO found that the IEP goals were appropriate and the CSE had "sufficient information" regarding the student's behavioral needs to develop an IEP, and the IHO failed to find other deficiencies with the IEP. Ultimately, the district argues that the IEP could be implemented, and his needs met within the general education environment.

In an answer to the cross-appeal, the parents generally deny the allegations contained in the district's cross-appeal.[8] The parents contend that the IHO was correct in holding that the district failed to recommend an appropriate placement for the student and denied the student a FAPE for the 2017-18 school year. Although not raised in their request for review, the parents argue that the IHO was incorrect in determining that the CSE properly classified the student as a student with an other health-impairment; that the IHO erred in determining that the FBA could be completed in September 2017; that the IHO erred in determining that the CSE had sufficient information to make "appropriate recommendations for the student's behaviors in developing the 2017-[]18 IEP"; that the IHO erred in determining that the student's annual goals were appropriate; and that the IHO erred in holding that the parents were "provided meaningful participation" in the CSE process.

[8] The parents label the answer to cross-appeal as a reply; however, under the terminology used in State regulation, the document is an answer to the cross-appeal and is identified as such in this decision (see 8 NYCRR 279.5[b]).

The district submitted a verified reply to the parents' answer to the district's cross-appeal.[9]

V. Applicable Standards

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

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

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]).

[9] State regulations direct that "[n]o pleading other than a request for review, answer, answer with cross-appeal, or answer to a cross-appeal, will be accepted or considered" by an SRO, "except a reply to any claims raised for review by the answer or answer with cross-appeal that were not addressed in the request for review, to any procedural defenses interposed in an answer, answer with cross-appeal or answer to a cross-appeal, or to any additional documentary evidence served with the answer or answer with cross-appeal" (8 NYCRR 279.6[a]).

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

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

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

[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" (Endrew F., 137 S. Ct. at 1000).

have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

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

VI. Discussion

Upon careful review, the hearing record reflects that the IHO, in a well-reasoned and well-supported decision, correctly determined that the district failed to provide the student with a FAPE during the 2017-18 school year (see IHO Decision at pp. 25-37) and that AU was not an appropriate unilateral placement for the student (see id. at pp. 37-41). The IHO accurately recounted the facts of the case, addressed the specific issues identified in the parents' due process complaint notice, set forth the proper legal standard to determine whether the district offered the student a FAPE, and applied that standard to the facts at hand (id. at pp 25-37). The IHO similarly addressed the specific factual and legal claims related to whether AU was an appropriate unilateral placement for which the parents were entitled to tuition reimbursement by setting forth the proper legal standards and applying those standards to the evidence developed in the hearing record (id. at 37-31). The decision shows that the IHO carefully considered the testimonial and documentary evidence presented by both parties, and further, that she weighed the evidence and properly supported her conclusions (id.). Furthermore, an independent review of the entire hearing record reveals that the impartial hearing was conducted in a manner consistent with the requirements of due process and that there is no reason appearing in the hearing record to modify the determinations of the IHO (see 20 U.S.C. § 1415[g][2]; 34 CFR 300.514[b][2]). Thus, the conclusions of the IHO are hereby adopted as explained more fully below.

A. Preliminary Matter - IHO Bias

Before reaching the merits, a determination must be made regarding the parents' claim that the IHO's decision reflects bias in favor of the school district. More specifically, the parents contend that the IHO was "unduly critical of the parents' failures and shortcomings." For example, the parents point out that the IHO found the district did not have to conduct an FBA until the start of the school year, but held the lack of an FBA as one of the reasons AU was not an appropriate placement. The parents further argue that the IHO was dismissive of the testimony of the assistant head of AU and ignored the testimony of the student's progress at AU. Further, the parents contend that the IHO required objective evidence of the student's progress at AU and failed to consider the "totality of the circumstances" as to whether AU met the student's needs.

It is well settled that an IHO must be fair and impartial and must avoid even the appearance of impropriety or prejudice (see, e.g., Application of a Student with a Disability, Appeal No. 12-066). Moreover, an IHO, like a judge, must be patient, dignified, and courteous in dealings with litigants and others with whom the IHO interacts in an official capacity and must perform all duties without bias or prejudice against or in favor of any person, according each party the right to be heard, and shall not, by words or conduct, manifest bias or prejudice (e.g., Application of a Student with a Disability, Appeal No. 12-064). An IHO may not be an employee of the district that is involved in the education or care of the child, may not have any personal or professional interest

that conflicts with the IHO's objectivity, must be knowledgeable of the provisions of the IDEA and State and federal regulations and the legal interpretations of the IDEA and its implementing regulations, and must possess the knowledge and ability to conduct hearings and render and write decisions in accordance with appropriate, standard legal practice (20 U.S.C. § 1415[f][3][A]; 34 CFR 300.511[c][1]; 8 NYCRR 200.1[x]).

In the instant matter, the hearing record does not support a finding that the IHO demonstrated bias in favor of the district. Initially, to the extent that the parents disagree with the conclusion reached by the IHO, such disagreement does not provide a basis for finding actual or apparent bias by the IHO (see Chen v. Chen Qualified Settlement Fund, 552 F.3d 218, 227 [2d Cir. 2009] [finding that "[g]enerally, claims of judicial bias must be based on extrajudicial matters, and adverse rulings, without more, will rarely suffice to provide a reasonable basis for questioning a judge's impartiality"]; see also Liteky v. United States, 510 U.S. 540, 555 [1994] [identifying that "judicial rulings alone almost never constitute a valid basis for a bias or partiality motion"]; Application of a Student with a Disability, Appeal No. 13-083). Moreover, as noted above, the IHO's decision was well reasoned and her findings are supported by the hearing record. Accordingly, I decline to find that the IHO exhibited bias in this matter.

B. 2017-18 School Year

The district cross-appeals from the IHO's determination that it failed to offer the student a FAPE for the 2017-18 school year (IHO Decision at pp. 37, 42).[11] The district contends that the "IHO's determination that the CSE failed to recommend an appropriate educational placement because the CSE was 'too hopeful' and thus failed to provide [the student] with FAPE was in error" (id. at p. 37). The district argues that its kindergarten program was "more structured" than the UPK program the student attended during the 2016-17 school year, that the district's teachers were experienced with students who had "academic challenges" in conjunction with behavioral difficulties, and that the curriculum was "focused on social skills and emotional regulation" (Answer and Cross-Appeal at ¶¶ 8-10). In addition, the district argues that the August 2017 CSE recommended behavior intervention services to be implemented by a board-certified behavior analyst (BCBA) together with "advanced warning for changes, which had been noted to improve [the student's] behavior, breaks, positive reinforcement, preferential seating, and occupational therapy consult" (id. at ¶ 8). The district contends that the student's progress during the 2016-17 school year, together with the structure of the kindergarten program and addition of the behavioral supports "would enable the student to make appropriate progress in the general education curriculum" (id.). However, consistent with the IHO's findings, the hearing record supports the conclusion that the recommended program—considering the student's behaviors and social/emotional needs as identified at the time of the August 2017 CSE meeting—was not appropriate.

[11] At the outset it should be noted that there were three separate IEPs for the 2017-18 school year: May 24, 2017, August 30, 2017, and September 13, 2017 (see Dist. Exs. 7, 9, 22). The recommended related services and program modifications remained the same from both the May 2017 and August 2017 IEPs (Dist. Exs. 7 at pp. 7-8; 9 at pp. 7-8; 22 at pp. 7-8). For purposes of this appeal, the focus of the review will be on the August 30, 2017 IEP, which was the IEP in place at the start of the 2017-18 school year and at the time the student began attending AU (see Parent Exs. J; X; Dist. Ex. 9).

Upon entering the UPK program in late November 2016, the UPK administration reduced the student's day to two and a half hours due to his significantly disruptive behaviors and then over the course of the year, increased his attendance to four hours in December 2016 and to five hours in February 2017; each time the length of the student's day was increased, the CSE reconvened to increase the length of time of the student was provided with 1:1 aide support to match (Jan. 17, 2018 Tr. p. 312; May 17, 2018 Tr. pp. 673-75, 679-80; Nov. 28, 2018 Tr. p. 2148; see Dist. Exs. 4 at p. 10; 5 at pp. 1, 6, 11). The parents testified that the student was not returned to a full day schedule until approximately three weeks before the end of the school year (Nov. 28, 2018 Tr. pp. 2150-51; Dec. 4, 2019 Tr. pp. 2947, 2984).

During the 2016-17 school year, to address the student's behaviors, an FBA was conducted and a BIP was developed for the student (March 15, 2018 Tr. pp. 114-18; see Dist. Ex. 14). Among other things, the BIP included three goals to decrease the student's target behaviors of impulsivity and low frustration tolerance, related to: following classroom rules and teacher directives; using words, rather than physical behaviors, expressing feelings and needs to adults and peers when frustrated; and increasing appropriate socialization with peers (Dist. Ex. 14 at p. 3). The BIP also included interventions for the student including a reward system to discourage tantrums linked to turn taking and sharing, and a behavior chart that was to be broken down into smaller increments of time (id.). The hearing record supports that the BIP was implemented during the 2016-17 school year. Specifically, the occupational therapist reported that she utilized the token system from the student's classroom during her sessions with the student and the student's teacher reported that the student's 1:1 aide was also following the behavioral system and took him for sensory breaks (see April 30, 2018 Tr. p. 388; Dist. Ex. 8 at p. 1).

However, the hearing record only contains a BIP progress monitoring report completed by the social worker from May 2, to May 18, 2017 related to the student's target behaviors of impulsivity (elopement, calling out, touching), aggression to others, and tantrums (crying, throwing things, refusal) (Parent Ex. F). The report documented the continuation of the student's impulsive and aggressive behaviors, the increase in his tantrum behaviors, and provided feedback regarding strategies that were successful in decreasing behaviors such as providing sensory aids for impulsive behaviors, as well as noting frequent triggers of aggression (change in routine and transition times) and ways to address them including advance notice of change in routines/activities, verbal praise, and incentives for cooperation (id. at p. 1). Testimony by the district school psychologist indicated that the May 2017 CSE reviewed whether the student had met the goals on his then current BIP, determined he had not, and that as such, the student continued to need a BIP to address his significant behavioral needs for the 2017-18 school year (March 15, 2018 Tr. pp. 118-19).[12]

[12] The parents raised a challenge to the IHO's determination that "the CSE had sufficient information to make appropriate recommendations for the student's problematic behaviors ... [therefore] it was appropriate to defer the FBA until September and did not in this case amount to a denial of FAPE" (IHO Decision at p. 31). I agree that the IHO properly determined that the CSE was not required to conduct another FBA or develop another BIP for the student until the commencement of the 2017-18 school year. An FBA is intended to be environment-specific, meaning an assessment of the student's behaviors in a different environment (i.e., preschool or summer camp) might yield a different understanding of what supports or plan might benefit the student (see 8 NYCRR 200.1[r] [defining an FBA

The student's related service providers also described the student's behaviors during their sessions over the 2016-17 school year (April 17, 2017 OT annual review summary, April 24, 2017 PT annual review progress report, and May 22, 2017 counseling annual review progress report) (see Parent Ex. N; Dist. Exs. 7 at p. 1; 12-13). The social worker indicated in her May 22, 2017 annual review progress report that the student's progress continued to be "slow and inconsistent" (Dist. Ex. 13 at p. 1).[13] She indicated that in general, the student seemed more anxious as evidenced by his verbalizations and body movements, and that he had the greatest difficulty during transition times when he displayed tantrums and aggressive behavior that was primarily directed toward adults (id. at pp. 1-2). The social worker further reported that the student seemed more sensitive and he was easily provoked to scream at peers if they touched his toys or belongings, if they did not pay attention to him, or if they did not go along with his changing rules during play (id. at p. 2). The student was reported to be aware of social skills and safety rules but needed prompting to comply (id.). His social worker indicated that he tended to be accident prone because of his impulsivity and inattentiveness (id.). The social worker indicated that while the student's noncompliance had "slightly decreased," "tantrums, impulsivity and aggressive behavior remain[ed] problematic" (id.).

Testimony by the school psychologist indicated that the April 17, 2017 OT annual review summary reflected that the occupational therapist addressed the student's sensory regulation deficits (March 15, 2018 Tr. pp. 90-92; Dist. Ex. 12). The OT annual review summary indicated that the student's academic and functional needs included improving his frustration tolerance, self-regulation, his ability to follow teacher instructions, and perform tasks presented (Dist. Ex. 12; see March 15, 2018 Tr. p. 91 Dist. Ex. 12). At the time of the May 2017 CSE meeting, the student's teacher indicated that "screaming, crying and pushing continu[ed] to occur," the student did not always follow teacher directives, and that the student could be "upset or rigid about routine changes," would "get upset," and that "[h]is rigidity [could] lead to distress" (Dist. Ex. 8 at p. 1).

The student's physical therapist also commented on the student's behavior in his April 24, 2017 annual review of progress report noting that the student continued to have difficulty transitioning to activities during sessions and that he was inconsistent with his behavior and participation (Parent Ex. N at p. 1). He indicated that the student continued to demonstrate an "unwillingness to cooperate," was "self-directed" most of the time, showed "defiance, [was] easily agitated, and continue[d] to exhibit threatening behavior" (id.). He further indicated that the student had poor awareness due to his impulsive behavior (id.).

When comparing the student's program contained in the January 2017 CPSE IEP to the program the May 2017 CSE recommended (which was the basis for the August 2017 IEP), the hearing record shows that the student's individual OT services were modified from one 60-minute session per week to one 30-minute session per week and one 30-minute session per week of small group OT (compare Dist. Ex. 5 at p. 11 with Dist. Ex. 7 at pp. 7, 8). Speech-language therapy and 1:1 aide services were discontinued (compare Dist. Ex. 5 at p. 11, with Dist. Ex. 7 at pp. 7, 8). The

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as "the process of determining why the student engages in behaviors that impede learning and how the student's behavior relates to the environment] [emphasis added]).

[13] The social worker was an independent CPSE provider for Nassau County (Nov. 1, 2019 Tr. pp. 2714, 2761-62).

May 2017 CSE decreased the student's counseling services from five 60-minute sessions per week of individual counseling at school to two 30-minute sessions per week of individual counseling at school and discontinued the two 60-minute counseling sessions per week that the student had been receiving at home (compare Dist. Ex. 5 at p. 11 with Dist. Ex. 7 at p. 7). Parent training services were increased from two 60-minute sessions per month to one 60-minute session per week (compare Dist. Ex. 5 at p. 11 with Dist. Ex. 7 at p. 7). Additions to the May 2017 IEP included two 60-minute sessions per week of individual behavior intervention services, one 30-minute session per week of OT consult, and program modifications of advanced warning for changes in schedule, breaks as needed, positive reinforcement, and preferential seating (compare Dist. Ex. 5 at p. 11, with Dist. Ex. 7 at pp. 7-8).

According to testimony, the parents wanted the student to attend a mainstream camp during summer 2017 because they wanted the student to have a mainstream experience, as the district had determined he would attend "a mainstream program in the fall" (Nov. 1, 2019 Tr. pp. 2820-22). During the first day of the mainstream summer camp the student struck a teacher and another student and therefore, he was transferred to different camp for students with disabilities (Nov. 1, 2019 Tr. pp. 2746-47, 2822-24; Dist. Ex. 16 at p. 1). At summer camp the student continued to receive 1:1 aide and counseling services through his June 2017 CPSE IEP (Nov. 1, 2019 Tr. pp. 2824, 2831-32; Dist. Exs. 2 at p. 10; 3 at p. 1; 16 at p. 1).[14]

The hearing record includes information regarding a serious behavioral incident that occurred during summer 2017, which was documented in the August 24, 2017 parent counseling progress report completed by the student's social worker and brought to the attention of the August 2017 CSE (May 17, 2018 Tr. pp. 810-11; Parent Exs. G at p. 1; P at pp. 3, 5). The report indicated that the student and his father participated in a family-based treatment program for students with ADHD at a hospital where the student participated in a social skills group (Parent Ex. G at p. 1). On July 26, 2017 after attending five sessions, they were asked to leave the program after the student displayed an aggressive tantrum and was sent to the emergency room for psychiatric observation (Nov. 28, 2018 Tr. pp. 2211, 2220; Parent Exs. G at p. 1; P at pp. 3, 5).

The student's social worker who provided the student's counseling services, indicated in her August 24, 2017 quarterly progress report that, based on the BIP progress monitoring, she did not believe that she had reached the goal of maintaining the student's emotional and social skills and preventing further regression (Dist. Ex. 16 at p. 2). The social worker detailed the student's behavioral difficulties at camp during summer 2017 (id. at pp. 1-2). The report indicated that the student's impulsivity and propensity for competitive and/or aggressive play frequently caused conflict with both peers and adults and that in organized sports he had difficulty abiding by the rules and easily engaged in conflict with the coach or other children (id. at p. 2). Based on her interaction with the student over the 2016-17 school year as well as the summer, the social worker opined that the student could "benefit from a small structured sensory based educational program where trained professionals [could] closely monitor and actively manage [the student's] social interactions and challenge him academically" (id.). The social worker testified that despite her

[14] The June 2017 CPSE recommended two 30-minute sessions per week of individual OT for summer 2017; however, according to the social worker, OT was not provided "on site at his summer camp" (Dist. Exs. 2 at p. 10; 16 at p. 2).

interventions, the student continued to display impulsivity, aggression, and difficulty socializing/interacting with other students (Nov. 1, 2019 Tr. pp. 2748-49).

With respect to the student's behaviors over summer 2017, in addition to reviewing the August 24, 2017 counseling progress report, the August 2017 CSE also reviewed an August 22, 2017 letter from the student's private psychiatrist (April 30, 2018 Tr. pp. 464-66; Aug. 2, 2018 Tr. pp. 1229-30; Dist. Exs. 9 at p. 1; 17 at pp. 1-2; see Dist. Ex. 16). The psychiatrist's letter indicated the student had been under his care since July 24, 2017 and that the student carried diagnoses of Autism Spectrum Disorder, ADHD, combined presentation, and Oppositional Defiant Disorder (Dist. Ex. 17 at p. 1). According to the psychiatrist, the student "present[ed] outwardly as an irritable, disruptive and violent child" (id.). He described the student's behavior as marked by poor social reciprocity, temper outbursts, low frustration tolerance, impulsive behavior, and at times violence (id.). On the other hand, he indicated that the student also presented with interests not appropriate for his age, such as chess and complex mathematical calculation without the use of a calculator, and demonstrated a clear ability to engage in calm, cooperative play and show appreciation of self-competence when stimulated properly (id.). The psychiatrist opined that with those "discrepant presentations juxtaposed" it "ha[d] become clear that the student "struggle[d] to manage himself in a neurotypical environment" but his "twice exceptional" status required careful treatment planning (id.). Noting that the student thrived when he was able to demonstrate mastery over a topic or activity, the psychiatrist indicated that the student's "developmental trajectory" would most typically end in "Mood and Anxiety Disorders" (id.). The psychiatrist recommended the student be placed "in a highly specialized setting that [was] both emotionally guiding and academically stimulating" in an alternative setting (such as AU), with a 1:1 crisis paraprofessional to provide frequent behavioral prompting, and ongoing parental participation in parenting skills necessary for children such as the student (id. at p. 2).

Review of the student's May 2017 and August 2017 IEPs shows that the August 2017 CSE added full time 1:1 aide services for the student, but did not otherwise modify the special education program and services the CSE had recommended in the May 2017 IEP (compare Dist. Ex. 7 at pp. 7-8, with Dist. Ex. 9 at pp. 7-8). When looking at the additions the CSE made to the student's programming from his preschool IEP, I agree with the IHO that the behavior intervention services would have been valuable to the student; according to the district school psychologist and the supervisor of pupil personnel services a BCBA would have worked with the student and the staff to complete an FBA, develop a BIP, instruct staff to implement and monitor the BIP, assist with any recommendations or changes to the BIP, as well as strategies and approaches for helping students change their behavior (see IHO Decision at p. 35; April 30, 2018 Tr. pp. 441-42; July 26, 2018 Tr. pp. 1144-46; Dist. Exs. 7 at p. 11; 9 at p. 7). However, I also agree with the IHO that given the frequency and severity of the student's behaviors, as described in detail above and including those events that occurred during summer 2017, the hearing record does not support that two hours per week of BCBA support would have been sufficient to enable the student to be maintained in a general education classroom (IHO Decision at p. 35).[15] Furthermore, some of the behavioral supports that the district noted were recommended in the student's August 2017 IEP

[15] The IHO held that it was "clear" the district "had very limited placement choices for a bright student with significant social and behavioral issues" (IHO Decision at p. 37). And in fact, the supervisor of pupil personnel services testified that the district did not have a special education class that had students with average to above average cognitive abilities the same as this student (Oct. 16, 2018 Tr. p. 1751).

including advanced warning for changes, the provision of breaks, positive reinforcement, and preferential seating, as described above, had in some form previously been provided to the student and were not new or additional behavior supports (see Parent Ex. F at p. 1; Dist. Ex. 14 at pp. 2-3). Additionally, despite the August 2017 addition of 1:1 aide support for the student from the May 2017 IEP, the hearing record shows that the student had received aide support during the 2016-17 school year at the UPK program and during summer 2017, yet continued to exhibit aggressive and disruptive behaviors, had difficulty engaging with peers appropriately, and failed to achieve his goal of maintaining his emotional and social skills (compare Dist. Ex. 7 at pp. 7-8, with Dist. Ex. 9 at p. 8; see Parent Exs. F; N; Dist. Exs. 13, 16).

While the district maintains that the CSE considered reports of progress and improvement when determining the behavioral supports the student required on his August 2017 IEP, based on the above, the hearing record does not reflect that the student had made significant progress behaviorally in the general education UPK program, nor does it support a finding that, as the district argues, the general education kindergarten class would have provided a significantly more supportive program to address the student's behavioral needs than the UPK program the student had struggled in during the 2016-17 school year. Specifically, although the school psychologist opined that a kindergarten classroom "typically" was "more academically focused, [and] more highly structured" than a preschool class which she further opined "might be more exploratory and less academically focused," the hearing record did not contain evidence regarding the structure of the student's UPK program in order to make such a comparison (Tr. p. 430). In addition, as discussed above, the student was supported by a BIP in the UPK program, which included supports such as a picture schedule, sticker/behavior chart, and reward system—an indication that the UPK program included some structure.

As the student did not attend the district's kindergarten, there was only general testimony regarding the general education kindergarten program offered by the district. When questioned about the kindergarten program, the school psychologist testified that students learned different social and emotional behaviors appropriate for their age through themes during the year such as identifying and learning about feelings, problem solving, and conflict resolution (April 30, 2018 Tr. pp. 455-58). She further indicated that the way these were taught included that teachers were given lessons, and the school psychologist, the social worker, and the interns would push into classes for those different topics and that they also did small pull-out groups about those topics (April 30, 2018 Tr. p. 456). The school psychologist testified that all teachers utilized the social emotional learning and positive behavioral support program to teach the children how to interact appropriately, how to identify their feelings, use appropriate language, how to stop and take turns and that all those foundation skills are about social interaction and self-control (April 30, 2018 Tr. pp. 457-58). In addition, the school psychologist testified that the kindergarten classrooms included structured times set aside for certain types of academic learning and structured play where teachers model, teach and enforce different social skills (April 30, 2018 Tr. pp. 458-59). However, the description of the social-emotional learning system that was employed in the district kindergarten program, while appearing to be an appropriate program for typically developing kindergarten students, and even taking into consideration the recommended supports, did not take into consideration the severity of the student's behavioral and social/emotional dysfunction and dysregulation and in particular, the level of aggression and violence the student often displayed (see April 30, 2018 Tr. pp. 455-60).

Based on the above, the hearing record supports the IHO's determination that the program recommended in the August 2017 IEP did not provide sufficient supports and services to address the student's behavioral needs. More specifically, although the addition of BCBA services would have been beneficial for the student, the hearing record does not support finding that the recommended program would have met the student's significant deficits in the areas of social/emotional skills and behavior management, especially considering that the student continued to exhibit aggressive and disruptive behaviors throughout the student's prior school year despite the support of 1:1 aide services and the use of a BIP.

C. Unilateral Placement

Having found that the district's program recommendation for the student resulted in a denial of a FAPE for the 2017-18 school year, I next proceed to the parents' appeal from the IHO's determination that AU was not an appropriate program for the student for the 2017-18 school year. The student's needs have been identified above and need not be repeated here, rather the discussion focuses on whether or not AU provided the student with instruction specially designed to meet his unique behavioral needs and the student's progress in his areas of greatest need at AU during the 2017-18 school year.[16]

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

[16] The parents contend that evidence in the hearing record demonstrates the student made progress while at AU (Jan. 10, 2020 Tr. pp. 3135, 3137, 3152, 3307-08, 3329; Parent Exs. Z at pp. 1-6; AA at pp. 1-3). While a student's progress is not dispositive of the appropriateness of a unilateral placement, a finding of some progress is, nevertheless, a relevant factor to be considered (Gagliardo, 489 F.3d at 115, citing Berger, 348 F.3d at 522 and Rafferty, 315 F.3d at 26-27; Lexington County Sch. Dist. One v. Frazier, 2011 WL 4435690, at *11 [D.S.C. Sept. 22, 2011] [holding that "evidence of actual progress is also a relevant factor to a determination of whether a parental placement was reasonably calculated to confer some educational benefit"]). However, despite the parents' indications of progress, the assistant head of AU testified that the student's average scores in academic and social/emotional performance on the student's report card went down from the fall to the spring (Jan. 10, 2020 Tr. pp. 3283-84, 3305). Furthermore, she testified that although the student's behaviors improved from the beginning of the school year, the student's behaviors in May and June 2018 regressed from where he was previously (Jan. 10, 2020 Tr. pp. 3284-85, 3327).

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).

Testimony by the assistant head of AU indicated that the school served students with average to high IQs and academic potential but who have poor behavior due to lacking social and emotional growth (Jan. 10, 2020 Tr. pp. 3108-09, 3175). She testified that the school had small classes and a lot of staff such that if behaviors erupted during class, they could provide a 1:1 or 2:1 student to staff ratio (Jan. 10, 2020 Tr. pp. 3109-10). Staff included four head classroom teachers, a "number of support staff" who were like "teaching assistant[s]," and two administrators (Jan. 10, 2020 Tr. pp. 3213-14). She further indicated that during the 2017-18 school year there were 14 students in the school which was located in an 1,800 square foot room that was "subdivided into several classes" with three different groups of children from ages 5 to 14 years old (kindergarten through eighth grade) (Jan. 10, 2020 Tr. pp. 3110-11, 3124, 3172-75). Depending on the day, the student received instruction in a group of seven, or a group of three or four (Jan. 10, 2020 Tr. p. 3150). When the assistant head of AU started teaching the student in April 2018, the student was the only one left in his age group (Jan. 10, 2020 Tr. pp. 3111, 3290-91).[17]

Review of the student's fall 2017 and spring 2018 report cards provided some limited information regarding how AU addressed the student's behavioral needs (see Parent Exs. Z; AA).

[17] The student had another teacher from September 2017 through April 2018 who had "personal issues" that required her to leave AU in April 2018 (Jan. 10, 2020 Tr. p. 3134). The assistant head of AU testified that when she began teaching the student in April 2018, she did not review the student's IEP (Jan. 10, 2020 Tr. pp. 3111, 3134, 3169, 3324).

Specifically, the fall 2017 report card reflected that during drama class, the teacher discussed the emotions of others and addressed how to appropriately identify and express his own emotions (Parent Ex. Z at p. 9). The report card reflected that, in drama and physical education classes, the student was encouraged to be a team player through following game rules, using his imagination appropriately, and demonstrating positive audience behavior and sportsmanship skills (id. at pp. 9, 11). The student's counseling sessions, as reflected in the fall report card, focused on building a relationship with the student and building his emotional vocabulary and his tolerance for frustration and disappointment (id. at p. 13). The spring 2018 report card indicated that a goal for the student moving forward was to start to internalize strategies that help him independently focus on assigned work (Parent Ex. AA at p. 1). In science, the student's behavioral goal was to lessen his initial resistance to science class by attempting to remember his success in science (id. at p. 2). In reading and writing, "proper motivation" was utilized to address the student's difficulty sustaining his effort and dealing with frustration (id. at pp. 3-4). In drama class, the teacher employed the option of allowing the student to step out of class to read or work on academics of his choice when he became bored with a less active drama game the older students were playing (id. at p. 6). Regarding counseling, the spring report card reflected that a focus of counseling sessions were the identification and expression of feelings, and building confidence interpersonally, frustration tolerance, and positive communication through the use of cooperative games and play modalities (id.).

However, despite the brief report card references to the types of instructional techniques provided and methods AU used to address the student's behavior, review of the assistant head of AU's testimony shows that more extreme behavioral interventions, such as hands on restraint and isolating the student from his peers, were routinely used throughout the 2017-18 school year. She testified that, in the event of a behavior eruption, which for the student could include "punching people and spinning out," staff had been "trained in CPI, Crisis Prevention Institute, de-escalation training" and accordingly, would first attempt to "verbally de-escalate [the student], reason with him, talk him down" (Jan. 10, 2020 Tr. pp. 3145-46). She indicated they used humor as the student responded very well to it (Jan. 10, 2020 Tr. p. 3146).[18] If the student did not respond to verbal de-escalation—which "worked half of the time"—staff placed "a gentle hand on his shoulder" and if that was not enough to de-escalate the student, they sometimes needed to use "hands-on" restraint (Jan. 10, 2020 Tr. p. 3146). Although the assistant head of AU testified that restraint and short periods of isolation were utilized so both the student and others could be safe, she also testified that isolating the student from other students occurred "on a regular basis throughout the [2017-18] school year" (Jan. 10, 2020 Tr. p. 3186). Additionally, she testified that staff were always aware of the student's triggers and for example, would not partner the student with another student he was known to have difficulty working with (Jan. 10, 2020 Tr. p. 3145).

In terms of tracking the student's progress, the assistant head of AU testified that the school utilized a daily system to rate and record each student's academic and behavioral performance for each class period called a daily report card (DRC) and further testified that the information was

[18] Additionally, AU provided the student with instruction in American Sign Language (ASL) which was used in part, to support the student's behavior by communicating his wants and needs when he was unable to do so verbally and without interrupting the class (Nov. 28, 2018 Tr. p. 2286; Jan. 10, 2020 Tr. pp. 3142-43; Parent Exs. Z at p. 8; AA at pp. 4-5).

then used to determine an average which was reflected on the student's fall and spring report cards (Jan. 10, 2020 Tr. pp. 3126-27, 3178, 3255-56, 3259; see Parent Exs. Z; AA). She indicated that for each class period the student received a rating for his academic performance and a rating for his social/emotional performance (Jan. 10, 2020 Tr. pp. 3127, 3190). A score of 4 meant the student was able to independently complete the assigned task successfully, without any prompts; a score of three meant the student was successful but required one prompt; a two indicated the student required multiple prompts; and a score of one meant the student was completely unsuccessful no matter how many prompts were provided (Jan. 10, 2020 Tr. p. 3127). When asked how the numbers were assigned to the student, the assistant head of AU indicated that the scores were not subjective but rather "very clear" in that the staff were trained to use the DRC and knew based on the number of prompts the rating the student should receive (Jan. 10, 2020 Tr. pp. 3258-61). Review of the DRC data was limited in that it reflected information only about the number of prompts the student required and did not provide information such as the type or level of the prompts that were given to the student in order for him to participate appropriately. Based on this, the IHO was correct in determining that the DRC scores had limited meaning without additional details and context (IHO Decision at p. 39).

In addition, AU did not complete an FBA on the student (Jan. 10, 2020 Tr. p. 3192). AU also did not have any kind of certified or licensed behaviorist working with the student or consulting with the student's team (Jan. 10, 2020 Tr. pp. 3288-89).[19] The hearing record also reflects, as the IHO noted, that there are no documents in evidence describing the specific goals the school was addressing and according to the testimony of the assistant head of AU "there were no baselines or measurable criteria to assess progress in many areas and no normed standardized tests administered" (Jan. 10, 2020 Tr. pp. 3297-98; IHO Decision at pp. 38-39).

The parents assert that the IHO's decision was inconsistent in that the IHO found it was appropriate for the district to wait until the start of the school year to conduct an FBA of the student, but found that the lack of an FBA at AU was a reason for finding it inappropriate. However, this argument misconstrues the IHO's findings; the IHO found that it was appropriate to defer conducting a new FBA until the start of the school year, but also found that if the CSE had not recommended a new FBA it would have been a denial of FAPE (IHO Decision at p. 31). Additionally, the IHO repeatedly cited to the student's psychiatrist's testimony that an FBA and BIP were imperative for the student (IHO Decision at pp. 20, 38).[20] In addition, the IHO's decision did not just rely on the lack of an FBA at AU, but, more importantly, the IHO noted that AU did not identify any goals that it was working on with the student or how the student's progress was

[19] For example, testimony from the assistant head of AU focused on a series of behavior incidents on May 31, 2018 wherein the student refused to eat, kicked the head of the school, kicked the assistant head of AU, and was consequently restrained and isolated from other students (Jan. 10, 2020 Tr. pp. 3179, 3182-84, 3186; see Dist. Ex. 33). There was no social worker called to help with the behaviors on that day (Jan. 10, 2020 Tr. p. 3195). The assistant head of AU testified that this was not the first time the student hit or kicked her or the head of school or other adults (Jan. 10, 2020 Tr. pp. 3183-84).

[20] The psychiatrist testified that an FBA was "absolutely essential" to the development of an educational plan for the student "because the primary interference with his psychoeducational progress is behavioral in nature" (Sept. 10, 2019 Tr. pp. 2470-74). Yet, the psychiatrist also testified that the student's behaviors improved at AU, noting improvement in his ability to control his impulses and refrain from aggressive behaviors (Sept. 10, 2019 Tr. pp. 2479-80).

being tracked—other than the DRC scores (IHO Decision at pp. 38-39). The IHO was correct to require objective evidence of the student's progress at AU as opposed to the anecdotal information provided (see R.H. v. Bd. of Educ. Saugerties C. Sch. Dist., 2018 WL 2304740, at *7 [N.D.N.Y. May 21, 2018], aff'd, 776 Fed. Appx. 719 [2d Cir. 2019] [finding insufficient evidence of a student's progress at a unilateral placement where the hearing record did not include objective evidence, such as report cards, progress notes, work samples, standardized assessments, or progress towards written goals]).

Based on the above, and considering the student's aggressive behaviors toward others and the need for consistent use of restraints and periods of isolation while the student attended AU, together with a lack of information regarding the student's behavioral goals and progress monitoring, the IHO was correct in determining that the hearing record did not contain a sufficient basis to find that AU provided the student with specially designed instruction to meet his unique needs.

In addition to the above, the hearing record demonstrates that the student received related services while attending AU, but the hearing record does not provide much detail as to what related services were provided to the student (see Jan. 10, 2020 Tr. p. 3151).[21] While the assistant head of AU testified that the student received OT and counseling during the 2017-18 school year, the student's report cards reflect that the student received counseling and speech-language therapy during the fall semester and only one 30-minute session per week of counseling during the spring semester beginning in March 2018 (compare Jan. 10, 2020 Tr. p. 3151, with Parent Exs. Z at p. 13; AA at p. 6). The assistant head of AU testified that the student was receiving OT services in May 2018, however, there were no clinical notes from an occupational therapist contained within the hearing record (Jan. 10, 2020 Tr. pp. 3198-99). Additionally, as the IHO noted, the parent testified that AU did not provide parent counseling/training (Dec. 4, 2019 Tr. p. 3000; IHO Decision at p. 40).

VII. Conclusion

Having determined that the IHO's determinations are supported by the hearing record, that the district failed to offer the student a FAPE for the 2017-18 school year, and that AU was not an appropriate unilateral placement for the student for the 2017-18 school year, the necessary inquiry is at an end.

[21] In an email dated January 3, 2018 from the AU team to the parents, the parents were informed that The Speak, Learn Play team, consisting of the school counselor, speech pathologist, and occupational therapist, was phasing out of the AU program as they were unable to "get close enough to the needs of [the school's] student base and have asked for their aid in finding adequate replacements who have the time and resources to come closer to each student's service mandate" (Dist. Ex. 38 at pp. 1-2; see Jan. 10, 2020 Tr. p. 3229). The email also indicated that the student's speech pathologist had already departed and that the social worker would stay with AU until early February (Dist. Ex. 38 at p. 2). The assistant head of AU testified that she thought she remembered seeing the therapists at AU through the beginning of March 2018; however, she agreed that based on the email, the student was no longer receiving speech therapy by January 2018 and that while a search for a replacement speech pathologist was conducted, they never found one (Jan. 10, 2020 Tr. pp. 3229-30; Dist. Ex. 38 at p. 2).

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

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS DISMISSED.

Dated: Albany, New York
February 4, 2021

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STEVEN KROLAK
STATE REVIEW OFFICER