



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 21-066

**Application of the BOARD OF EDUCATION OF THE DOBBS  
FERRY UNION FREE SCHOOL DISTRICT for review of a  
determination of a hearing officer relating to the provision of  
educational services to a student with a disability**

**Appearances:**

Shaw, Perelson, May & Lambert, LLP, attorneys for petitioner, by Garrett L. Silveira, Esq.

Law Offices of H. Jeffrey Marcus, PC, attorneys for respondents, by Vanessa Jachzel, 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. Petitioner (the district) appeals from the decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to respondents' (the parents') child and ordered it to reimburse the parents for their child's tuition costs at the Flex School (Flex) for a portion of the 2019-20 school year.<sup>1</sup> The parents cross-appeal from that portion of the IHO's determination which found that the district complied with child find requirements. 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];

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<sup>1</sup> According to the parents the student identifies as "gender nonbinary" and prefers the pronouns "they/them" (see Dist. Ex. 1 at p. 2). Therefore, this decision will refer to the student using their preferred pronouns.

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 detailed facts and procedural history of the case will be discussed below. Briefly, in 2018 the student began consulting with a therapist "to process some social experiences [they] w[ere] having" (Dist. Ex. 6 at p. 1). The student attended the district's middle school for the 2018-19 school year (Tr. p. 107). The following year in seventh grade, the student's anxiety increased

at home and at school and the student experienced panic attacks, difficulty with social relationships, and depression, and although more intensive counseling was pursued the student was not receptive to it (see Tr. pp. 515-19). The school counselor began checking in with the student at school; however, the student was ultimately hospitalized due to suicidal ideation, stopped attending the district's middle school in late November 2019, and was referred to the CSE on December 5, 2019 (Tr. p. 66; Dist. Ex. 4 at pp. 1, 2). By letter dated December 19, 2019, the parents' attorney informed the district's attorney that the student was attending the Flex School (Flex) on a trial basis to determine whether it was an appropriate program for the student (Dist. Ex. 3 at p. 1).<sup>2</sup> A CSE convened an initial meeting on March 5, 2020, and determined the student was eligible for special education and related services as a student with an emotional disturbance (see generally Dist. Ex. 13).<sup>3</sup>

### **A. Due Process Complaint Notice**

In a due process complaint notice dated April 14, 2020, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2019-20 school year (see Dist. Ex. 1).<sup>4</sup> First, the parents alleged that the district violated its child find obligation prior to the student's hospitalization (id. at p. 5). Next, the parents asserted that the CSE failed to comprehensively evaluate the student in all areas of need; specifically, that the initial psychological evaluation was inadequate and the CSE failed to conduct a speech-language evaluation and a functional behavioral assessment (FBA) with a behavioral intervention plan (BIP) (id. at pp. 5-6, 7-8). The parents then argued that the March 5, 2020 CSE failed to consider a small self-contained placement, which in turn prevented the parents from meaningfully participating in the development of the student's special education program (id. at pp. 5-6). Further, the parents alleged that the March 5, 2020 IEP was inappropriate because it lacked sufficient supports and a "re-entry" plan, failed to provide adequate, measurable annual goals to address the student's social/emotional deficits, and because a general education placement was not appropriate for the student (id. at pp. 6-7). As relief, the parents requested that the district reimburse them for the tuition-related expenses they had already paid to Flex, direct funding of tuition to Flex for the remainder of the 2019-20 school year, and transportation, as well as an independent speech-language evaluation of the student by a provider selected by the parents at district expense (id. at p. 8).

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<sup>2</sup> The Commissioner of Education has not approved Flex as a school with which districts may contract to instruct students with disabilities (8 NYCRR 200.1[d], 200.7).

<sup>3</sup> The student's eligibility for special education as a student with an emotional disturbance is not in dispute (see 34 CFR 300.8 [c][4]; 8 NYCRR 200.1[zz][4]).

<sup>4</sup> The parents' due process complaint notice was entitled "TEN DAY NOTICE & IMPARTIAL HEARING REQUEST" (Dist. Ex. 1 at p. 1).

## B. Impartial Hearing Officer Decision

The impartial hearing convened on June 29, 2020 and concluded on July 29, 2020 after five days of proceedings (Tr. pp. 1-1174).<sup>5</sup> In a decision dated January 12, 2021, the IHO determined that the district had "shown by a preponderance of the evidence that it ha[d] satisfied its child-find obligations" (IHO Decision at pp. 29-30). The IHO next found that "[b]oth of [the student's] parents were at the IEP meeting and both contributed to the discussion," and that "the record show[ed] that the CSE listened to and considered [the student's] therapists' opinions" regarding the need for a self-contained program, but decided against recommending it (*id.* at p. 30). As such, the IHO determined that the district had "shown by a preponderance of the evidence that its proposed IEP was procedurally sound" (*id.*). Turning to the substantive compliance of the March 2020 IEP, the IHO determined that "[t]he IEP lack[ed] supports that [were] necessary for [the student] to progress in a general education setting, lack[ed] a re-entry plan, and fail[ed] to educate [the student] in a small classroom setting" (*id.*). Further, the IHO found that the district failed to "provide a reasonable explanation for educating [the student] in a general education setting" (*id.* at pp. 30-31).

As for the unilateral placement, the IHO determined that the parents had shown that Flex provided the student "with instruction that [was] specifically designed to meet their unique needs supported by services that [were] necessary" for them to benefit from instruction (IHO Decision at p. 33). According to the IHO, Flex provided the student "with an appropriate academic program, in an appropriate setting, with therapeutic supports that allow[ed the student] to benefit from its curriculum" (*id.*).

Finally, the IHO determined that "[t]he evidence shows that the balance of the equities favors [the student's] parents," as they "cooperated with the [d]istrict and the CSE" (IHO Decision at p. 33). In contrast, the IHO found that the district had "failed to take meaningful steps to address" the student's emotional distress in fall 2019 and did not offer an IEP until March 5, 2020 (*id.* at p. 34). The IHO stated that on December 19, 2019, the parents gave notice to the district, through counsel, that the student was "attending Flex on a trial basis" with notice of unilateral placement on April 14, 2020 (*id.*). The IHO noted an exception to the IDEA's 10-day notice requirement if such compliance "would likely result in physical or severe emotional distress to the child" (*id.*). The IHO determined that "sending [the student] back to [the district's middle school] to comply with the notice requirement would have likely resulted in physical or severe emotional distress to [the student]" and, therefore, did not warrant a denial or a reduction of the tuition reimbursement award (*id.*).

As relief, the IHO directed the district to reimburse the parents for the tuition costs of the student's attendance at Flex that they had already paid, and directly pay Flex the balance of the student's tuition costs for the remainder of the 2019-20 school year (IHO Decision at p. 35).

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<sup>5</sup> The IHO held a prehearing conference on May 18, 2020 and a status conference on September 9, 2020 and included summaries of each in the hearing record (*see* IHO Exs. I; IV).

#### **IV. Appeal for State-Level Review**

The district appeals from the IHO's finding that the March 2020 IEP was substantively inappropriate. Specifically, the district asserts that the IHO erred to the extent he found that the IEP annual goals were inadequate and that the IEP failed to provide a self-contained, smaller class placement with the supports that the student required. The district argues that the IHO failed "to give weight and credibility" to the testimony regarding why the district's IEP was appropriate and erred by examining the student's performance in fall 2019, when subsequently the student had commenced interventions that had a positive impact on their emotional well-being by the time of the March 2020 CSE meeting. Additionally, the district asserts that the IHO erred by "interjecting an issue of the dangerous exception" to the parents' requisite 10-day notice of unilateral placement to "justify [the IHO's] award of tuition relief."

In an answer, the parents respond to the district's allegations with admissions and denials and set forth a cross-appeal of the IHO's finding that the district met its child find obligations despite the student's social/emotional difficulties exhibited during fall 2019 and the district's delay in conducting the initial evaluations and convening a CSE meeting. The parents also cross-appeal the IHO's failure to expressly determine that the CSE's lack of a recommendation for dialectical behavior therapy (DBT) in the March 2020 IEP denied the student a FAPE.

#### **V. Applicable Standards**

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

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP" (Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). The Supreme Court has indicated that "[t]he IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement" (Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. \_\_\_, 137 S. Ct. 988, 999 [2017]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural

errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ. of the Chappaqua Cent. Sch. Dist., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). "The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created" (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]).<sup>6</sup>

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<sup>6</sup> 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

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 and Post-Referral Procedures**

#### **1. Child Find**

The parents cross-appeal from the IHO's finding that the district met its obligation to identify, locate, and evaluate the student pursuant to child find provisions because the student was performing well academically, despite that during the 2018-19 school year teachers reported "numerous areas of concern" with the student and despite the student's social/emotional difficulties exhibited during fall 2019.

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. of Pine Bush Cent. Sch. Dist., 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; K.B. v. Katonah Lewisboro Union Free Sch. Dist., 2019 WL 5553292, at \*7 [S.D.N.Y. Oct. 28, 2019], aff'd, 2021 WL 745890 [2d Cir. Feb. 26, 2021]; 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

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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).

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., State of Hawaii 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 in failing to order testing," or have "no rational justification for deciding not to evaluate" the student (Mr. P v. W. Hartford Bd. of Educ., 885 F.3d 735, 750 [2d Cir. 2018], quoting Bd. of Educ. of Fayette County, Ky. v. L.M., 478 F.3d 307, 313 [6th Cir. 2007]; see A.P., 572 F. Supp. 2d at 225). 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]). Additionally, a school district must initiate a referral and promptly request parental consent to evaluate a student to determine if the student needs special education services and programs if a student has not made adequate progress after an appropriate period of time when provided instruction in a school district's response to intervention program (8 NYCRR 200.4[a]), see also 8 NYCRR 100.2[ii]).

The parents initially obtained a private neuro/psychoeducational evaluation of the student in February 2019 when the student was in sixth grade in order to explore the student's strengths, areas in need of improvement, and to gain diagnostic clarity (Dist. Ex. 6 at p. 1). The resultant report indicated that the student had begun to consult with a therapist to process some social experiences they had encountered, that they could be anxious at times, and that they had synesthesia (id.; see Tr. pp. 889-90).<sup>7</sup> Diagnostic impressions indicated that the student presented with a generalized anxiety disorder; however, the evaluator also indicated that the student was

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<sup>7</sup> The student's mother described synesthesia as a "phenomena" where a person experiences multiple sensory properties at the same time, as compared to a neurotypical brain that has separate pathways for hearing, seeing, smelling, et cetera (Tr. p. 891). Her testimony indicated that, for a person with synesthesia, the pathways are crossed or connected so, for example, in the student's case, they see a color for every number and when they hear music, they also see it (Tr. pp. 891-92). She indicated that at times it could present challenges for the student particularly in math word problems where the stories they read would evoke imaginative processes or when there was a colored page and the color and the number did not match, it could cause dissonance in the student's brain (Tr. pp. 892-93; see Dist. Ex. 6 at p. 14). She further indicated that the synesthesia interfered with the student's ability to participate in visual meditation with their therapist because they saw pictures based on the words they were hearing instead of following the visual meditation led by the therapist (Tr. p. 890).



exceptionally bright, possessed strong academic skills, was creative, musically gifted, confident with robust self esteem, and had tremendous potential (Dist. Ex. 6 at pp. 16, 17).<sup>8</sup>

On September 21, 2019, at the start of seventh grade, the student experienced an anxiety/panic attack at home that lasted about an hour and a half (Tr. pp. 516-17). The parent characterized it as "almost like a delusionary psychotic break" (Tr. p. 516). The parents sought help from several therapists; however, the student was resistant at that point and had a difficult time talking with psychologists (Tr. p. 517).

According to the student's father, around the same time, the student had a falling out with their one close friend and was distraught and very depressed about it (Tr. pp. 518-19). Shortly thereafter at school, the physical education teacher found the student crying, saying that they were feeling like they had no friends, and brought the student to the school counselor's office (Tr. pp. 55-56).

On October 3, 2019, after speaking with the student, the school counselor met with the parents and discussed the concerns that had come up, adding that the orchestra teacher also reported the student was not the same as last year and seemed depressed, anxious, and not responsive, while the parents shared that, at home, the student had had an anxiety attack, was riddled with depression and anxiety, was not sleeping, was refusing to shower, had developed a facial tic (blinking), was obsessively checking their grades, was staying up late at night to do school work, and screaming at their parents that they had to study (Tr. pp. 56-57, 518-19, 521-22; Parent Ex. M at p. 1). The parents requested untimed tests for the student as timed tests were so stressful (Tr. p. 521). According to the parent, the school counselor indicated that she would look into getting the student a "504 plan" so they could have untimed tests (Tr. p. 523).<sup>9</sup>

In an October 3, 2019 email to the parents, the school counselor summarized the plan for the student based on their conversation that day, which included that she would have weekly check-ins with the student; the student would be referred to the district social worker if they needed a higher level of care at school (e.g. individual and/or group counseling); that consultation would take place with the student's outside treatment team once it was set up (parent signed release); the parents would consider bringing the student to their previous therapist until a new therapist was found; the student would be discussed in the district pupil personnel team meeting the following Monday; and a 504 accommodation plan would be considered to provide the student supports for anxiety (Parent Ex. M at pp. 1-2).

The parents forwarded the February 2019 private neuro/psychoeducational evaluation report to the school counselor on October 8, 2019 (Tr. p. 52). The school counselor sent it via email to the district special education director and the school psychologist at the middle school for review in order to determine if there was any indication that the student might need a 504 plan (Tr. pp. 52-53). According to the school counselor, the response from the special education director

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<sup>8</sup> According to the student's father's, the parents received the neuro/psychoeducational report in September 2019 as it was not released to them until it was fully paid for (Tr. p. 515).

<sup>9</sup> A "504 plan" refers to the program developed for a student under section 504 of the Rehabilitation Act of 1973 (29 U.S.C § 794[a]).

was that there was nothing in the evaluation report indicating a substantial limitation to a major life activity such as learning (Tr. p. 53).

By email to the parent dated October 15, 2019 the school counselor summarized the student's emotional status during the previous week noting that the student seemed more guarded and still chose to eat lunch by themselves because their best friend was at another lunch table, but that the friends had been speaking to each other (Parent Ex. M at p. 1). The school counselor further indicated that she had shared the evaluation report with the district special education director and school psychologist and that, because the student's anxiety was not affecting their school work, the student did not qualify for a 504 accommodation plan (*id.*). The email also indicated that the student could access building level counseling with either the school counselor, the school psychologist, or the school social worker and that if the student's anxiety began to impact their grades the need for a 504 plan could be revisited (*id.*).<sup>10</sup>

A report card for the first marking period of the 2019-20 school year up to November 8, 2019, reflected the student received grades of A and A+ for all of their classes (Dist. Ex. 12 at p. 1). According to the student's father, he had learned from a friend that the student had been having panic attacks at school (Tr. p. 552; *see* Tr. p. 555).

A report was made to the school counselor that on November 7, 2019 the student had searched on their Chromebook at school regarding whether suffocation was a painful way to die (Tr. p. 64). In response to this, the school social worker conducted a risk assessment of the student which determined that the student was not in any imminent danger of self-harm (*id.*). However, the social worker reached out to inform the parents of the incident and recommended they follow up with outside counseling while the student continued to be monitored at school (Tr. pp. 64-65). The student continued to attend school (*see* Tr. pp. 673-74).

According to the student's father, the parents did not take the incident very seriously at first because of the "pro forma" and "flippant" nature with which the social worker treated it (Tr. pp. 529-31; *see* Tr. pp. 529, 671).<sup>11</sup> However, the parent testified that, on November 25, 2019, after contacting their pediatrician who was adamant that the student be evaluated immediately, they realized how serious the incident was (Tr. pp. 531-32). At the pediatrician's urging, the parents brought the student from the pediatrician's office to the hospital where the student underwent a three hour evaluation and was referred to Four Winds for an outpatient day program (Tr. p. 532). Four Winds determined that the student was at higher risk of harm to themselves and they were admitted to the inpatient program for 48 hours (Tr. pp. 532-33). The student was discharged around Thanksgiving 2019 after a treatment plan was developed that would allow the student to be safely monitored at home that included daily appointments with a therapist/psychiatrist (*see* Tr.

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<sup>10</sup> According to the school counselor, after a discussion with the parent, it was decided that, since the student was reluctant to speak in therapy, the school counselor would continue to check in with the student (Tr. pp. 60-61).

<sup>11</sup> The student's mother testified that she did not learn the exact phrase that the student "Googled" until the hearing and, to her, the fact that the student's search was so specific indicated that the student actually had a plan and it was much more serious that the district led her to believe (Tr. pp. 913-14).

pp. 533-35, 677).<sup>12</sup> The parent and the therapist/psychiatrist contacted the school to let them know the student was not able to return to school (Tr. pp. 536-37).<sup>13</sup> The following week the student was seen by another psychiatrist, who also contacted the school to inform them that the student was unable to return to school at that time, and who was able to establish a rapport with the student that allowed them to open up to some extent (Tr. pp. 535, 537, 538-39; see Dist. Ex. 4 at p. 2). As such, the psychiatrist made several diagnoses and the student began medication (Tr. pp. 538-39). At that time, the student was awaiting placement in a day treatment program (see Dist. Ex. 4 at p. 2).

On December 3, 2019, a response to intervention meeting was held to discuss the student (Dist. Ex. 4 at pp. 4-5). As a result, a decision was made to refer the student to the CSE, to provide school work during the student's absence from school, and to continue communication between the school via the social worker and school counselor and the parents and outside agencies (Dist. Ex. 4 at p. 5).

The student was referred to the CSE on December 5, 2019 (Tr. p. 66; Dist. Ex. 4 at p. 1).

In this instance, the referral of the student for special education came close in time to the district's notice of the student's heightened emotional state during the beginning of the 2019-20 school year, such that there was no child find violation. The parents argue the student's teachers reported concerns about the student as early as the 2018-19 school year and cite the February 2019 private neuro/psychoeducational evaluation report as evidence of these concerns (Parent Mem. of Law at p. 10; see Tr. p. 107; Dist. Ex. 5 at pp. 22-23). The teachers' responses to the Behavior Assessment System for Children-Third Edition (BASC-3) identified that the student was "At-Risk" in the areas of anxiety, adaptability, and social skills (Dist. Ex. 6 at p. 23). However, the neuropsychologist who completed the February 2019 evaluation acknowledged that behavior concerns seen at home "were not mirrored in the school setting" (id. at p. 12). While the teachers may have identified some areas of weakness, the student was also reported to transition well in school, recover quickly after a setback, communicate clearly, and exhibit high motivation and creativity (id.). Thus, the district did not, at this point, have reason to suspect a disability or that the student needed special education (see J.S., 826 F. Supp. 2d at 660).

As for the student's increased social/emotional struggles in fall 2019, the December 2019 referral was timely made once the student's needs were revealed to be sustained and of a degree that might require special education. While the district became aware in October 2019 that the student was experiencing anxiety and a depressed mood (see Tr. pp. 52, 56-57, 518-19, 521-22; Parent Ex. M at p. 1), it was not unreasonable for the district to first consult with the parents and outside providers, monitor the student's functioning in school, and attempt general education

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<sup>12</sup> Due to the student's anxiety and depression, they were not able to cope with the presence of other patients who were violent and screaming, and accordingly, a treatment plan was developed so the student could be discharged (Tr. p. 533; Dist. Ex. 4 at p. 2). The parent testified that the student was discharged from the partial hospitalization program under the conditions that the student would be seen daily by a psychiatrist, that all sharp knives were secured, and that the student was not left alone for any period of time (Tr. pp. 535, 675-76).

<sup>13</sup> According to the school counselor, on November 25, 2019, she learned that the student was no longer attending school and had been hospitalized (Tr. p. 66; see Dist. Ex. 4 at p. 2).

accommodations including weekly check-ins with the school counselor and consideration of accommodations under section 504, before referring the student for special education (see Tr. pp. 60-62, 523; Parent Ex. M at pp. 1-2). This is particularly so given that the student continued to achieve high marks in their classes (see Dist. Ex. 12 at p. 1). The parents also take issue with the way that the district handled the November 2019 incident when it was learned that the student had researched suicide; ultimately, however, the district social worker conducted a risk assessment, offered to provide the student with in-school counseling, and recommended that the parents consult with the student's outside provider(s) (Tr. pp. 64-65, 530-31). There is not a record basis for finding that this was an unreasonable or negligent response to the situation except for retrospective evidence of information and opinions collected after this time period (see Tr. pp. 531-35).

Based on the foregoing, for the period prior to the December 2019 referral, there is no evidence that the district overlooked clear signs of disability, was "negligent in failing to order testing, or had no rational justification for deciding not to evaluate the student (Mr. P, 885 F.3d at 750). While it is understandable that the parents may have preferred the CSE to have found the student eligible for special education earlier, "[t]he IDEA does not call for instantaneous classification of a student upon suspicion of a disability". . . rather, "[o]nce a school has 'reason to suspect a disability,' the school must conduct an evaluation of the child within a reasonable time" (W.A. v. Hendrick Hudson Cent. Sch. Dist., 2016 WL 6915271, at \*24 [S.D.N.Y. Nov. 23, 2016] [quoting Murphy v. Town of Wallingford, 2011 WL 1106234, at \*3 (D. Conn. Mar. 23, 2011)], aff'd in part, vacated in part, rev'd in part, 927 F.3d 126 [2d Cir. 2019]). The referral of the student in this instance was made within in reasonable time. Based on the foregoing, the evidence in the hearing record supports the IHO's determination that the district did not commit a child find violation.

## **2. Timeliness of the CSE**

The parents also assert that the IHO erred by not faulting the district for failing to evaluate the student and convene a CSE meeting within the 60-day timeline.

Upon receipt of a written request of a referral, a district must initiate an individual evaluation of a student (see Educ. Law § 4401-a[1]-[3]; 8 NYCRR 200.4[a][1]-[2]; [b]; see also 20 U.S.C. § 1414[a][1][B]; 34 CFR 300.301[b]). Once a referral is received by the CSE chairperson, the chairperson must 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]). In addition, 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][iv][a]; see also 34 CFR 300.300[a]).<sup>14</sup> After parental consent has been obtained by the district, the "initial evaluation shall be completed within 60 days of receipt of consent" (8

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<sup>14</sup> 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, 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]).

NYCRR 200.4[b][1]; see also 20 U.S.C. § 1414[a][1][C][i][I]; 34 CFR 300.301[c][1]; 8 NYCRR 200.4[b][7]). "Within 60 school days of the receipt of consent to evaluate for a student not previously identified as having a disability . . . the board of education shall arrange for appropriate special programs and services" (8 NYCRR 200.4[e][1]).<sup>15</sup>

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 (e.g., Mr. P., 885 F.3d at 752 n.10 [finding no evidence "that any procedural violation occasioned by the failure to find [the student] eligible for special education about thirty days earlier constituted the denial of a FAPE, particularly in view of the fact that the District continued to provide [the student] with Section 504 accommodations, including homebound tutoring"]).

Subsequent to the student's referral on December 5, 2019, on December 19, 2019, the district timely sent the parent prior written notice of the proposed referral for evaluation and a request for consent to conduct an evaluation to determine the student's initial eligibility for special education (Dist. Ex. 15 at p. 1; see 8 NYCRR 200.4[a][2][iv]).<sup>16</sup>

By letter dated December 19, 2019, the parents' attorney informed the district's attorney that the parents would sign and return the consent immediately upon receipt and further advised the district that the student was attending Flex on a trial basis to determine whether it was an appropriate program for the student (Dist. Ex. 3 at p. 1).

According to the district special education director, the district noted the parents' signed consent in their records "as January 8, 2020" (Tr. p. 478). The hearing record does not contain a signed or dated consent to evaluate.

On February 11, 2020, a district special education teacher completed an observation of the student at Flex (Tr. p. 332; Dist. Ex. 7). The observation report indicated that overall the student engaged well and participated appropriately in the activity and discussion in the class (see Dist. Ex. 7 at pp. 1-3).

The district social worker completed a social history of the student on February 24, 2020 with the student's mother as the informant (Dist. Ex. 8 at p. 1). The parent's responses highlighted the student's history of anxiety and social challenges and described the student as serious, sad, anxious, and as having a negative outlook (id. at p. 2). The social worker reported that the student had become much more angry and frustrated that fall and further noted the student had experienced suicidal thoughts (id.).

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<sup>15</sup> A "school day" is defined as "any day, including a partial day, that students are in attendance at school for instructional purposes" (8 NYCRR 200.1[n][1]).

<sup>16</sup> The copy of the attached consent for initial evaluation form included in the hearing record is unsigned (see Dist. Ex. 15 at p. 3).

On March 3, 2020 the district completed a psychological evaluation of the student as part of the student's initial evaluation (Dist. Ex. 5 at p. 1).<sup>17</sup> The psychological evaluation report indicated that the student's academic skills continued to be in the above average to superior range on the Wechsler Individual Achievement Test-Third Edition (WIAT-III) in reading, writing, and math and that, based on results of the BASC-3 and the Multidimensional Anxiety Scale for Children-Second Edition (MASC-2), the student continued to demonstrate behaviors stemming from worry to fear and experienced obsessive thoughts and compulsive behaviors (id. at p. 7).<sup>18</sup> The report noted that during the evaluation the student expressed nervousness but was able to persist given minimal breaks (id.).

The CSE convened an initial meeting on March 5, 2020 and determined the student was eligible for special education and related services as a student with an emotional disturbance (see generally Dist. Ex. 13). The CSE recommended a 10:1 special class for study skills, every other day for 44 minutes per class, and that the student receive daily 30-minute sessions of individual psychological counseling services and one 30-minute session per week of group psychological counseling services (id. at p. 8). The March 2020 IEP also recommended one 60-minute session per month of individual parent counseling and training and supports for school personnel on behalf of the student including two 15-minute sessions per month of counseling consultation for the student's teachers to support the student in the classroom and one 20-minute team meeting per month (id. at pp. 8, 9; see Tr. pp. 88-90). The IEP also included strategies to address the student's management needs as well as testing accommodations and annual goals related to study skills, writing, and social/emotional/behavioral deficits (id. at pp. 6-10). The CSE also recommended a speech-language evaluation be conducted to determine if the student had any deficits in the area of pragmatics (id. at p 2).

As noted above, the hearing record does not contain a signed, dated consent from the parents to evaluate the student. However, whether the parents' consent was provided on or around December 19, 2019 (when the district provided the consent form and the parents' attorney represented that the parents would sign immediately) (see Dist. Exs. 3 at p. 1; 15 at p. 1) or January 8, 2020 (when the district noted the parents signed consent in its records) (see Tr. p. 68), the evidence in the hearing record does not support a finding that any delay resulted in a denial of a FAPE to the student. Assuming the December 19, 2019 date, the district's evaluation of the student was technically completed beyond 60 calendar days after December 19, 2019 (by just over two weeks) (see Dist. Exs. 5; 7; 8; IHO Ex. VI at p. 2; see also 8 NYCRR 200.4[b][1]). However, the CSE meeting was timely convened within 60 school days of the December 19, 2019 date (see Dist. Ex. 13; see also 8 NYCRR 200.4[e][1]).<sup>19</sup> In this instance, since the CSE timely convened and

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<sup>17</sup> Although this exhibit appeared to be undated, the parents' attorney stipulated that the "Psychological Education [sic] . . . entered into evidence as School District Exhibit 5 was completed on March 3, 2020" (IHO Ex. VI at p. 2; see also Dist. Exs. 5 at pp. 1, 7; 13 at p. 3).

<sup>18</sup> The March 3, 2020 psychological evaluation report indicated that the Parent Form, the Self-Report, and the Teacher Form of the BASC-3 and the Parent Form and the Self-Report of the MASC-2 were completed in February 2020, as well as behavioral testing observations (Dist. Ex. 5 at p. 1).

<sup>19</sup> While the hearing record does not include a district calendar, between mid-December and early March, in addition to weekends, public schools are generally closed for a holiday recess, Martin Luther King Day, and

developed an IEP for the student consistent with State regulation, any delay in the completion of the initial evaluations does not rise to the level of a denial of a FAPE.

### **B. March 2020 IEP**

According to the March 5, 2020 IEP, the CSE had available for review an August 2019 physical report, a February 11, 2020 classroom observation, a February 24, 2020 social history, a February 24, 2020 psychological evaluation report, a March 1, 2020 psychiatric summary update, a March 4, 2020 psychoeducational evaluation report, and teacher progress summaries and parent report provided at the meeting (Dist. Ex. 13 at pp. 3-4; see Dist. Exs. 5-9; 11). The IEP also reflected that the student self-reported at the CSE meeting (Dist. Ex. 13 at p. 1).

The district evaluations of the student are briefly summarized above. As for the psychiatric summary update of the student dated March 1, 2020, the student's private psychiatrist noted that the student had been under his care related to a complicated mixture of psychiatric disorders including severe obsessive compulsive disorder (OCD); major depressive disorder, recurrent; generalized anxiety disorder; panic disorder with social anxiety disorder; and separation anxiety disorder; as well as a high functioning autism spectrum disorder (Dist. Ex. 11 at p. 1).<sup>20</sup> The summary indicated that the student's symptoms included obsessive ruminations, constant doubting, rituals such as arranging, ordering and counting, depressed moods accompanied by indecisiveness, helplessness, hopelessness, suicidal ideations, as well as sleep difficulties and fatigue (id.). The student was also described as being constantly anxious, thinking about catastrophic consequences, sensitive to criticism and rejection, and as having panic attacks (id.). The psychiatrist indicated that the student's symptoms had been so intense that they had been unable to attend school and had been hospitalized briefly (id.). He indicated that the student's symptoms related to autism spectrum disorder included deficits in social communication, inflexibility and rigidity, difficulty understanding other people's feelings, processing information, interpreting social cues, and adapting to changes, and that the student exhibited out of proportion emotional reactions when routines were changed (id.). The student was also described as often exhibiting severe or bizarre obsessions and compulsions as part of the syndrome, which manifested differently than symptoms characteristic of OCD due to the odd and complex quality (id. at pp. 1-2). The psychiatrist further noted that worries and concerns regarding gender are often extreme in young adolescents with autism spectrum disorder (id. at p. 2). The psychiatrist recommended that the student be classified as a student with a disability, provided with an IEP, and placed in a supportive, self-contained program while continuing in psychotherapy and taking medication to help control their symptoms (id.). The psychiatrist indicated that the student's symptoms had decreased in intensity during the past month in part due to treatment but in large measure because of the school program the student was attending and opined that the student should continue in their current placement for the foreseeable future (id.).

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winter recess.

<sup>20</sup> An earlier psychiatric summary was completed by the student's treating psychiatrist on December 21, 2019 (Dist. Ex. 10 at p. 1). Testimony by the school counselor indicated that neither she nor anyone else at the district was aware of or saw this summary until March 5, 2020 at the student's initial CSE meeting (Tr. p. 68).

Although not in dispute on appeal, a discussion of the student's present levels of performance according to the March 2020 IEP is necessary to determine whether the annual goals, supports and services the CSE recommended were appropriate to address their special education needs. The student's needs as described in the March 2020 IEP indicated that the student continued to demonstrate academic skills in the above average to superior range of functioning as measured by the WIAT-III (Dist. Ex. 13 at p. 3). The student was described overall as extremely intelligent and creative and as one who enjoyed learning new things and challenging themselves with higher grade level material (*id.*). However, based on results of the BASC-3 and MASC-2, the IEP reflected that the student continued to demonstrate behaviors stemming from worry and fear and experience obsessive thoughts and compulsive behaviors (*id.*).

More specifically, the March 2020 IEP reflected the BASC-3 ratings of the student's teacher which indicated ratings of average on the adaptive skills composite, externalizing problems, and school problems, a rating in the at-risk range on the behavioral symptoms index, and a rating in the clinically significant range on internalizing problems (Tr. pp. 244-45; Dist. Ex. 13 at p. 3). The parent's BASC-3 ratings reflected functioning in the average range in externalizing problems, at-risk functioning in adaptive skills and the behavioral symptoms index, and in the clinically significant range in internalizing problems (Tr. p. 244; Dist. Ex. 13 at p. 4). The student's self-report reflected ratings in the average range in inattentive/hyperactivity and on the school problems composite, in the at-risk range for the personal adjustment composite, and in the clinically significant range in the areas of atypicality and social stress (Dist. Ex. 13 at p. 4). In addition, the IEP reflected the parent's rating on the MASC-2 related to the student's anxiety, which was in the very elevated range (*id.*; *see* Dist. Ex. 5 at p. 10).

With regard to study skills, the March 2020 IEP indicated that the student was very intelligent and thrived when challenged and permitted to choose a topic but experienced some anxiety when working on topics that were advanced for their chronological age (Dist. Ex. 13 at p. 4). The IEP noted that the student could become overwhelmed with situational factors, becoming physically restless and emotionally dysregulated in the classroom, but had improved their ability to retain more focus in the present moment and take steps to calm themselves when distressed, given reminders and developing strategies (*id.*). The student also required reminders to stay on task when engaged in a non-preferred task (*id.*).

With regard to academics, overall, the March 2020 IEP reflected that the student presented with strong skills in reading, writing, and mathematics, and exhibited enthusiasm for learning and strong ability to plan and complete assignments on time (*see* Dist. Ex. 13 at pp. 4-5). However, the IEP reflected that, in reading, the student needed to take more time with closer reading and using more details when answering questions (*id.* at p. 4). In writing, the student needed to streamline their thoughts as they tended to go off topic when providing insight resulting in details that may not directly relate to the task but rather were about the student's internalization, connections, and/or beliefs about the topic or content (*id.* at p. 5). With regard to mathematics, while the student's skills were strong, their need to understand every topic on a deep, philosophical level at times led them to become frustrated (*id.*).

The student's March 2020 IEP reflected that the student had received diagnoses including OCD, major depressive disorder, generalized anxiety disorder, panic disorder, social anxiety disorder, and separation anxiety disorder and that their symptoms had significantly impacted their



day to day experiences (Dist. Ex. 13 at p. 5). The IEP indicated that the student had been constantly anxious, thought about catastrophic consequences, was sensitive to criticism and rejection, and experienced panic attacks, and further indicated that the student's symptoms were accompanied by indecisiveness, helplessness, and hopelessness (id.). The student was also reported to "melt down" when they perceived minor academic setbacks (id.). The IEP indicated the student's needs related to social development included working on identifying negative and difficult thoughts/feeling and/or circumstances, reframing their mindset, and learning to radically accept difficult situations and thoughts; generalizing learned skills regarding their ability to read social cues; and recognizing when they were getting emotionally dysregulated and developing effective coping strategies (id. at p. 6).

With regard to the student's physical development the March 2020 IEP indicated that the student did not have needs that required special education supports at that time; however, it was noted that the student could vomit in times of severe stress or anxiety (Dist. Ex. 13 at p. 6).

The March 2020 IEP also included meeting comments reflecting additional needs of the student that were reported to the CSE by the parents (Dist. Ex. 13 at p. 1). Specifically, the parents reported the student was deeply sensitive, had not always maintained close friendships, that they suffered a panic attack in fall 2019, that the student self-reported having feelings of isolation, did not always seek help when they felt they needed it, that a teacher at school had attempted to help the student but that attempts to help at times backfired, and that the student had previously googled "how to die" (id.). The meeting comments indicated that a psychiatric update was reviewed and that, in addition to the diagnoses mentioned above, the student had also received a diagnosis of an autism spectrum disorder (id.; see Dist. Ex. 11). The meeting comments further noted that earlier testing indicated that the student had demonstrated above average cognitive skills, average to superior academic abilities, a strong work ethic, and that social/emotional data related to the student revealed a confident student, with robust self-esteem, as well as instances of anxiety and perfectionism, and that the student needed to improve their distress tolerance and strengthen coping mechanisms (Dist. Ex. 13 at p. 1).<sup>21</sup> Comments also documented that current testing revealed evidence of self-doubt and a desire to succeed as well as that the student struggled with sleeping and eating habits (id. at p. 2). The student reported to the CSE that they felt Flex better met their needs (id. at p. 1). The student's hospitalization was not mentioned in the IEP (see id. at pp. 1-11).

## **1. Annual Goals**

The district appeals the IHO's finding that the March 2020 IEP annual goals were "inadequate" without any analysis as to why such goals were inappropriate. Review of the IHO's decision does not reveal that the IHO made such a finding but rather described the parents' allegation that the goals were inadequate (see IHO Decision at p. 30). In any event, review of the March 2020 IEP annual goals shows that they were measurable and appropriate to meet the student's identified needs. As the parents' due process complaint notice alleged that the IEP failed to recommend adequate goals to address the student's social/emotional deficits, and included

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<sup>21</sup> This information appears to be from the earlier private neuro/psychoeducational evaluation dated February 2019 and not a description of the student at the time of the March 2020 CSE meeting (compare Dist. Ex. 6 at pp. 1, 16, with Dist. Ex. 13 at p. 1).

vague, unmeasurable goals, the following discussion will focus on these aspects of the goals contained in the IEP (see Dist. Ex. 1 at p. 7).

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

The first social/emotional annual goal in the March 2020 IEP addressed the student's need to generalize skills they learned regarding social cues, such as recognizing facial cues and body language, to settings outside of the counseling room (recess, classroom settings, halls) and to exhibit appropriate responses to those cues (Dist. Ex. 13 at p. 7). The criteria for mastery of this annual goal was 75 percent success over four weeks, that the student's progress would be measured via structured interview of the student, and that the student's progress would be measured monthly (id.). The second social/emotional annual goal addressed the student's needs related to identifying negative and/or difficult thoughts, feelings or circumstances that impacted their ability to be flexible and to learn to be accepting of themselves, others, and the circumstances in the moment (e.g., dialectical viewpoints) (id.). The IEP indicated that for this annual goal, the criteria for mastery was 75 percent success over four weeks and that progress would be measured using structured interview, on a monthly basis (id.). The last social/emotional goal addressed the student's needs related to their ability to identify and appropriately use a coping skill, for example, perspective-taking, assertive-communication, deep breathing, problem solving, or planned positive activities, to maintain appropriate social behavior, when expressing a negative emotion at school (e.g., frustration, anger, anxiety, sadness, impulsivity) (id. at pp. 7-8). The IEP reflected the same criteria of mastery, method of measurement, and schedule of when progress would be measured as the other social/emotional annual goals (see id. at pp. 7-8). In addition, these goals were consistent with the social development needs of the student as they were described in the IEP (compare Dist. Ex. 13 at p. 6 with Dist. Ex. 13 at pp. 7-8).

The district school counselor testified that the first social/emotional annual goal was developed to assist the student with their interpersonal skills and interpersonal effectiveness with input from the student's private social worker, their therapist, parents, possibly from the school psychologist, as well as from herself (Tr. pp. 47, 76-77). She stated that no one at the CSE meeting raised any objection to the goal (Tr. p. 77). The district school counselor's testimony indicated that discussion regarding the second social/emotional annual goal on the IEP included that the student had difficulty regulating their emotions at school so this goal was designed to help teach the student coping strategies using DBT skills, to help the student regulate their emotions (Tr. pp. 77-78). She indicated that input was provided by the district school psychologist, the student's private therapist, their parents, the CSE chairperson, a district DBT trained special education teacher, and herself (Tr. p. 78). She further indicated that no one objected to this goal (id.). With regard to the student's third social/emotional annual goal, the district school counselor testified that this goal was also developed to address the student's self-regulation and coping strategies with

input from the student's private therapist, the district school psychologist, the district special education teacher, the CSE chairperson, and herself (Tr. pp. 78-79). Her testimony indicated that no one at the CSE meeting indicated that this was not an appropriate goal for the student and no one at the meeting recommended that any additional social/emotional goals should be on the student's IEP (Tr. pp. 79-80).

Similarly, testimony by the district school psychologist reflected that the student's first social/emotional annual goal was developed to address the student's interpersonal effectiveness as it was noted at the CSE meeting that the student may isolate themselves at times or find it difficult to interact with others (Tr. pp. 184, 209-10). The second social/emotional annual goal was developed to address the student's distress tolerance skills such as managing difficult situations in an appropriate and effective manner because information gathered indicated it was difficult for the student to remain calm in difficult situations and to identify their emotions during times of stress (Tr. p. 210). With regard to the third social/emotional annual goal, the district school psychologist testified that this goal was to address the student's emotional regulation, to help them identify and accept those emotions and learn how to move forward emotionally (Tr. p. 211). She stated that it was appropriate to find strategies and skills to help the student navigate stressful circumstances they may be experiencing at any given moment (*id.*). She further testified that she did not recall that anyone at the CSE meeting believed the goals were inappropriate (Tr. pp. 210-12).

Testimony by the CSE chairperson indicated that the CSE generated the student's social/emotional goals from statements from Flex, the parents, and from the student's private social worker (Tr. p. 355; *see* Dist. Ex. 13 at p. 1). Her testimony indicated that the first social/emotional annual goal was the CSE's way of addressing some pragmatic needs of the student based on information reported that the student struggled with letting others have a turn and maintaining a wide array of friendships (Tr. pp. 355-56). She further indicated that the second social/emotional annual goal addressed Flex's focus on making sure that the student did not associate their achievement with their self-worth (Tr. pp. 356-57). With regard to the third social/emotional annual goal, the CSE chairperson indicated that this goal was selected as an appropriate goal because it addressed the student's ability to use a coping skill when they experienced a negative emotion (Tr. p. 359). She gave as an example when the student experienced feelings of perfectionism and wanting to do their best that dysregulation or anxiety occurred and the student needed to be able to recognize and self-monitor those emotions and develop those coping mechanisms (Tr. pp. 359-60). She also testified that no one at the CSE meeting suggested there needed to be any additional social/emotional or behavioral goals (Tr. p. 360).

Given the evidence in the hearing record as described above, the March 2020 IEP social/emotional annual goals addressed the student's needs based on information shared during the CSE and the description of the student's needs in the IEP. As such, the hearing record demonstrates that the student's social/emotional goals were appropriate and adequate.

## 2. Dialectical Behavior Therapy

The parents assert in a cross-appeal that the IHO erred by not "expressly" determining that the IEP was inappropriate because it did not include DBT.<sup>22</sup>

Generally, a CSE is not required to specify methodology on an IEP, and the precise teaching methodology to be used by a student's teacher is usually a matter to be left to the teacher's discretion—absent evidence that a specific methodology is necessary (Rowley, 458 U.S. at 204; R.B. v. New York City Dep't of Educ., 589 Fed. App'x 572, 575-76 [2d Cir. Oct. 29, 2014]; A.S. v. New York City Dep't of Educ., 573 Fed. App'x 63, 66 [2d Cir. July 29, 2014], aff'g 2011 WL 12882793, at \*16 [E.D.N.Y. May 26, 2011] [noting the "broad methodological latitude" conferred by the IDEA]; K.L. v. New York City Dep't of Educ., 530 Fed. App'x 81, 86 [2d Cir. July 24, 2013]; R.E., 694 F.3d at 192-94; M.H., 685 F.3d at 257 [indicating the district's "broad discretion to adopt programs that, in its educational judgment, are most pedagogically effective"]; see M.L. v. New York City Dep't of Educ., 2014 WL 1301957, at \*12 [S.D.N.Y. Mar. 31, 2014] [finding in favor of a district where the hearing record did not "demonstrate[] that [the student] would not be responsive to a different methodology"]). Although the Second Circuit recently ruled in favor of a parent who challenged lack of methodology in an IEP, the Court specifically noted that in that case "when the reports and evaluative materials present at the CSE meeting yield a clear consensus" regarding methodology, the CSE needed to sufficiently explain why the recommended program would be appropriate absent the designation of that methodology on the IEP (A.M. v. New York City Dep't of Educ., 845 F.3d 523, 541-45 [2d Cir. 2017]).

Here, there is no evidence that the student required DBT in order to receive a FAPE. The district's director of special education testified that the CSE discussed using DBT with the student and added that she believed Flex had used DBT "in their therapeutic writing component, so it seemed to make sense [the district] would be using a similar method" (Tr. p. 486). However, there was no evaluative information before the CSE that specifically recommended DBT or progress reports from Flex that specified that the student required DBT in order to receive educational benefit. Thus, there was no consensus that the student needed the methodology. Further, the CSE chairperson explained that a methodology is not necessarily included on an IEP because "you don't

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<sup>22</sup> The district argues that the parents did not raise an issue in their due process complaint notice pertaining to the CSE's failure to recommend DBT on the IEP. Under the IDEA and its implementing regulations, the party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.508[d][3][i]; 300.511[d]; 8 NYCRR 200.5[j][1][ii]), or the original due process complaint is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.508[d][3][ii]; 8 NYCRR 200.5[i][7][b]). Here, the due process complaint notice does not reference DBT (see Dist. Ex. 1). However, the Second Circuit has held that issues not included in a due process complaint notice may be ruled on by an administrative hearing officer when the district "opens the door" to such issues with the purpose of defeating a claim that was raised in the due process complaint notice (M.H., 685 F.3d at 250-51; see B.M. v. New York City Dep't of Educ., 569 Fed. App'x 57, 59 [2d Cir. June 18, 2014]; N.K. v. New York City Dep't of Educ., 961 F. Supp. 2d 577, 585 [S.D.N.Y. 2013]; A.M. v. New York City Dep't of Educ., 964 F. Supp. 2d 270, 282-84 [S.D.N.Y. 2013]; J.C.S. v. Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, at \*9 [Aug. 5, 2013]). Here, references to DBT first arose in the testimony of a district witness and the district's attorney inquired in her direct examination about the "intention of the DBT service" (see Tr. pp. 78, 83). Accordingly, as the district appears to have open the door to the issue, I decline to dismiss the parents' cross-appeal on the ground that the issue of the DBT was not raised as an issue for review at the impartial hearing.

want to be stuck with the methodology if it didn't work" or "exclud[e] any methodology that would be equally or more successful with [the student]" (Tr. pp. 446, 485).

While the lack of recommendation for DBT in the IEP did not deny the student a FAPE as the parent alleges, it is necessary to consider whether the testimony at the impartial hearing regarding DBT may be relied upon to assess the appropriateness of the IEP. That is, the Second Circuit has held that a district cannot rely on after-the fact testimony in order to "rehabilitate a deficient IEP"; however, testimony that "explains or justifies the services listed in the IEP" is permissible and may be considered (see R.E., 694 F.3d at 186-88; see also E.M. v. New York City Dep't of Educ., 758 F.3d 442, 462 [2d Cir. 2014] [explaining that "[b]y way of example, we explained that 'testimony may be received that explains or justifies the services listed in the IEP,' but the district 'may not introduce testimony that a different teaching method, not mentioned in the IEP, would have been used'"] [internal citations omitted]; P.C. v. Rye City Sch. Dist., 232 F. Supp. 3d 394, 416 [S.D.N.Y. 2017] [noting that the "few additional details" about the CSE's recommendations described in testimony did not materially alter the written plan or prevent the parents from making an informed decision]). The prohibition against retrospective testimony is intended to reflect the fact that "[a]t the time the parents . . . choose whether to accept the school district recommendation or to place the child elsewhere, they have only the IEP to rely on" (R.E., 694 F.3d at 186). Therefore, "[i]n determining the adequacy of an IEP, both parties are limited to discussing the placement and services specified in the written plan and . . . reasonably known to the parties at the time of the placement decision" (id. at 187).

Here, district staff testified that the CSE discussed the DBT program at the March 2020 meeting "and how it was structured in the school setting" (Tr. pp. 269, 486). Thus, if the parents had notice of the program that the district intended for the student at the time of their placement decision, it would not be necessary to divorce the IEP recommendations from the programmatic elements intended by the CSE. The testimony of the parents' witnesses who attended the March 2020 CSE meeting was silent regarding whether DBT was discussed at the CSE meeting. Putting aside the parents' notice of the district's DBT program, while the testimony of district staff frequently refers to the anticipated use of DBT in the program recommended for the student, this is with little detail that is specific to this method. For example, the most specific description of the method is the district school psychologist's testimony that DBT "means two things can be true at the same time" in that "it's okay to feel what you are feeling but how can we navigate this situation appropriately" (Tr. p. 214). In describing the counseling consult, the CSE chairperson gave an example of DBT, which she termed "benign invalidation," and, in essence, described that adults had to "be so cognizant of the language that [they] use" when responding to a "a high-functioning student with anxiety" and be aware that "a lot of times that anxiety is going to brim under the surface" (Tr. p. 375). With regard to the study skills class, the district school counselor indicated that "the intention" of DBT in that class "would be to mitigate some of the emotional issues that [the student] was experiencing . . . and to teach coping skills," as well as address study skills and executive functioning (Tr. pp. 83-84). There are several references in the testimony to "DBT skills" and "coping strategies" (see, e.g., Tr. pp. 78, 83, 84, 162, 214-15, 345) but such skills and strategies are not defined and are not relied upon to supplement the references to skills and strategies in the IEP.

As such, much of the testimony in the hearing record that references DBT is so nonspecific regarding the methodology that it does not seem to amount to an attempt to rehabilitate the IEP

and, instead, tends to mirror supports recommended in the IEP. That is, while the IEP does not mandate DBT, it does reflect that the student needs to work on identifying, reframing, and learning to accept difficult situations or thoughts, generalize the ability to read social cues, and develop coping strategies when they get emotionally dysregulated, and recommends a 10:1 special class-study skills, individual and group counseling, and counseling consult services, among other things (Dist. Ex. 13 at pp. 6-8). In any event, as set forth below, even considering the testimony, there is insufficient basis in the hearing record to modify the IHO's determination that the recommendations in the March 2020 IEP were not appropriate for the student.

### **3. General Education with Related Services**

On appeal, the district contends that the IHO erred in determining that the special education program in the March 2020 IEP was not appropriate to meet the student's needs because it failed to provide self-contained, smaller class sizes with supports. The district further argues that the IHO failed to give weight to testimony as to why the recommended program was appropriate, and by examining how the student performed in fall 2019 rather than how she presented at the time of the March 2020 CSE meeting.

To address the student's needs, the March 2020 CSE recommended the student attend a 10:1 special class for study skills, every other day for 44-minutes per class, and also receive daily, 30-minute sessions of individual psychological counseling services and one 30-minute session per week of group psychological counseling services (Dist. Ex. 13 at p. 8). The CSE also recommended supports for school personnel on behalf of the student including two 15-minute sessions per month of counseling consultation for the student's teachers to support the student in the classroom and one 20-minute team meeting per month (*id.* at p. 9; *see* Tr. pp. 88-90). One 60-minute session per month of individual parent counseling and training was also recommended to assist the parents (Dist. Ex. 13 at p. 8). The IEP included strategies to address the student's management needs, testing accommodations, and annual goals related to study skills, writing, and social/emotional/behavioral deficits (*id.* at pp. 6-10). The CSE further recommended a speech-language evaluation be conducted to determine if the student had any deficits in the area of pragmatics, once they learned of the student's autism spectrum diagnosis (*id.* at p. 2; *see* Tr. pp. 360-61).

The district's director of special education who served as the CSE chairperson at the March 2020 CSE meeting testified that the CSE based its recommendations for the student's program on other districts' programs that she had researched for students with similar needs to the student in the instant case (Tr. pp. 307, 363-65; Dist. Ex. 13 at p. 1).

Specifically, the CSE chairperson testified that the CSE's recommendation for the 10:1 special class-study skills one time every other day was appropriate because the student did not have significant academic needs and the two academic goals in their IEP could be addressed in this class (*see* Tr. pp. 367-68). She indicated the CSE wanted to provide the student with an opportunity to apply different dialectical strategies to both their social/emotional functioning as well as to their classroom functioning in a small class environment so the student could then practice generalizing the strategies to a larger environment (*see* Tr. pp. 368-69). She indicated, for example, that according to DBT the student needed to understand that with regard to writing, she could know a lot about a given topic and could probably write a well-written essay about it but

needed to also understand that that is not always part of the parameter of what's going on in the classroom, despite the student's desire to go above and beyond and exhibit perfectionism (see Tr. p. 368).

Testimony by the district school psychologist indicated that the CSE recommended the 10:1 special class for study skills every other day based on the discussion of the student's executive functioning abilities and to give the student space where they could improve their time management and organizational skills (Tr. pp. 212-13). In addition, the district school counselor testified that the CSE believed the 44-minute 10:1 special class-study skills that the student would attend every other day was an appropriate service for the student because in it the student "would receive some type of coaching for DBT skills and strategies through meeting with [the district's] DBT staff" (Tr. pp. 82-83). She further indicated that the student's study skills annual goal would be implemented during the study skills class and that the intention of the DBT services was to "mitigate some of the emotional issues that [the student was] experiencing, and to teach coping skills" (Tr. pp. 83-84).

The CSE chairperson further testified that the daily, individual psychological counseling services were recommended to provide the student with social/emotional support via daily check-ins and daily practice for those strategies upon re-entering the district school program and also to allow the district to thoroughly monitor some of the needs that Flex was identifying that the district had not identified when the student was in the district (Tr. p. 370). With regard to counseling services, her testimony indicated that the CSE was trying to go beyond what had been demonstrated as the "footprint of all therapeutic support programs" that they had observed in other districts and add additional elements of counseling in order to be thorough in assessing the student's needs when they returned to the district (Tr. p. 371).

The district school psychologist testified that the recommendation for the student's daily individual counseling was discussed and deemed appropriate for the student as the individual counseling was "directly correlated with the DBT group setting where the therapist acts as a coach daily for [the student] [or] for any student receiving that service throughout the day when needed" (Tr. pp. 213-14). Likewise, the district school counselor testified that the CSE recommended the daily 30-minute individual counseling sessions for the student in order to provide the student with a time when they "could be coached and helped to reinforce the DBT skills and strategies that [the student] would be learning through the DBT program" (Tr. p. 84).

With regard to the CSE's recommendation for once weekly small group counseling services, the CSE chairperson stated that small group counseling was recommended once per week because it would be helpful when working with students in generalizing DBT skills to be able to do them in a group of peers and would also help address the student's goal to recognize social cues in others (Tr. p. 370). The district counselor testified that the CSE was concerned about the student's social, interpersonal relationships with other students, and social skills, such as reading social cues, and that the small group counseling would support the student in those areas (Tr. pp. 86-87). She indicated that it was an appropriate recommendation because students who are learning skills and strategies need to have an opportunity to practice those skills and strategies with peers in a safe environment (Tr. p. 87). The district school psychologist testified that the once per week group counseling services were recommended since DBT is structured at the first period of the day, it provided the student with the opportunity to come in and have a safe place with a small

group of students and instructors, including herself and the district social worker, who would help navigate through social scenarios and typical and hypothetical situations and how to overcome them (Tr. p. 215). According to the district school psychologist, the group counseling also provided the student with the opportunity to discuss ideas and strategies with other students who have similar difficulties, which would be appropriate for the student because it would provide them with an opportunity to improve relationships with those peers and adults in the classroom in a safe space in a small setting where they can enter the day with a clear mind (Tr. pp. 215-16).

According to the school psychologist, the CSE made the recommendation for counseling consultation so that the therapist working with the student could meet with any staff who also worked with the student to provide them with language to use with the student or to provide the staff with a skill that the student was working on so the staff could implement it directly in the classroom setting (Tr. pp. 217-18). Similarly, the district school counselor testified that the counseling consultation services included in the IEP referred to either the school psychologist or social worker consulting with the teachers to provide strategies for the teachers to use to support the student in the classroom and that the 15-minute twice monthly consults were the typical amount of time that the CSE provided to support staff in dealing with a student who has an IEP (Tr. p. 89).

With regard to the team meeting, both the district school psychologist and the district counselor indicated that this was recommended so that staff who work with the student could meet regularly to discuss any progress or anything that needed to be changed, altered, or modified (Tr. pp. 90, 218). The district school counselor testified that the combination of the counseling consultation and the team meeting would "really provide the teachers with the tools and strategies that they would need in order to work successfully in the classroom with [the student] and support [the student's] needs" (Tr. p. 90).

With regard to parent counseling and training, the district school psychologist testified that she believed the CSE's recommendation for this service was appropriate because it would give the team an opportunity to meet with the parents and discuss skills and strategies they were using in school that could be reinforced at home (Tr. pp. 216-17). The district school counselor further testified that the parent counseling and training services on the IEP were recommended by the CSE because the parents had expressed some concerns regarding the student at home and because of the student's recent autism spectrum diagnosis (Tr. pp. 87-88).

Testimony by the student's private social worker indicated that at the CSE meeting he discussed in-depth and was "pretty insistent" that the student's sensory needs should be addressed in the IEP (Tr. p. 736; see Dist. Ex. 13 at p. 1). He shared his opinion at the CSE meeting that the student needed to be in a small classroom because they became overwhelmed in large groups by sounds and movement and over things going on (Tr. pp. 736-37). He further testified that the student needed additional support as they needed to dive deeper into a topic to fully comprehend it and feel comfortable with it and that this required some individualized attention and the ability to ask and have answered a lot of questions (Tr. p. 737). The social worker testified that in response to his request for a smaller class setting the CSE indicated that the only small class they had available was a 12:1+1 which they indicated would not be appropriate because the student would not fit in that group based on academic intellectual abilities (id.). He further testified that the parents shared at the meeting that they were in agreement that the student needed a smaller setting to address their sensory needs and their need for 1:1 and smaller group support from their teacher



(Tr. pp. 737-38). In addition, the social worker stated that the CSE had before it at the beginning of the meeting the March 1, 2020 psychiatric summary update that discussed the additional diagnosis of autism spectrum disorder (Tr. p. 738; see Dist. Ex. 11). The update described the student's symptoms underlying the autism spectrum disorder including deficits in social communication, inflexibility and rigidity, difficulties relating to peers and adults, understanding others' feelings, processing information, and adapting to changes, that they misinterpreted social cues, had intense out of proportion emotional reactions when routines changed, and exhibited often severe and at times bizarre obsessions and compulsions, as well as worries and concerns regarding their gender (Dist. Ex. 11 at pp. 1-2). The student's psychiatrist recommended the student be provided with an IEP and placed in a supportive, self-contained program (id. at p. 2). He further noted that the student's symptoms had decreased in intensity during the last month, in part due to treatment but also due to the student's school program at Flex (id.). He recommended that, due to the student's emotional fragility and rigidity, the student should continue in their current program for the foreseeable future (id.).

The CSE chairperson and the district school psychologist testified that the CSE discussed the recommendation of the student's private social worker that the student required a small setting (Tr. pp. 218-19, 377-78). The psychologist indicated that the private social worker discussed that the student benefitted from a smaller setting and was currently thriving at Flex in a small setting but, after discussing the idea, considering the student's strengths and needs, the CSE decided that a smaller setting would be too restrictive for the student and their abilities (Tr. p. 219). The CSE chairperson testified that the CSE had no evidence to support the fact that the student could not be academically successful in the larger class setting because up until November the student had always been successful in the larger setting, even more successful than most of their peers, with regard to their grades (Tr. p. 378). She further stated that the CSE had no evidence that the student could not perform in that setting and that it felt like the small class was not only overly restrictive but would not necessarily be able to provide the student with opportunities to generalize those goals in a larger group of peers (id.). Based on this, the CSE decided, despite the private social worker's recommendation, that the small class was too restrictive and that they could adequately and appropriately provide a program for the student in the district (Tr. pp. 378-79). In addition, the CSE chairperson indicated that a big part of the CSE's confidence that it could provide an appropriate program for the student was that it had "spent years building that disability program and that class and specifically this year [district staff] spent an intensive amount of time visiting other school programs that offered similar therapeutic supports to identify ways that [the district's] program could be substantiated," and after that "yearlong inquiry" determined that their program was "highly supportive" (Tr. p. 379). She added that the district had a specific population of high functioning students with some emotional needs and was able to "really bespoke that program to that specific student subset" (Tr. pp. 379-80).

The student's psychiatrist testified that he had shared concerns with the parents regarding the student's safety based on the fact that the student had looked on the internet at how to commit suicide, and his concerns about the student returning to school (Tr. pp. 602-03). The student's private social worker testified that he had "very big concerns" about the student returning to a mainstream school general education setting because in his opinion that "environment could promote some of the same feelings and occurrences that put them where they were in September, October, November" and would be a "regression of sorts" (Tr. pp. 742-43). He further testified that the student had expressed to him their concern about returning to the district including thinking

about being in a school that large, with that amount of people and because of the pre-existing social/emotional needs that the student felt were not being met at the district, mostly related to their ability to make and maintain friendships and the social reciprocity that went with that (Tr. p. 741). The student's mother testified that she was concerned that if the student returned to the recommended program in the district that they would lose the progress they had gained, regress and potentially become extremely unsafe and likely become suicidal again (Tr. pp. 956-57). She testified that her first concern with the district's program was the class size and her second concern was the lack of social/emotional curriculum and support throughout the day, not at scheduled times but as needed (Tr. pp. 954-55).

The district school psychologist testified that she recalled the parents were "really concerned" as to whether the student would be okay returning to the same district general education program she had previously attended (Tr. p. 258; see Tr. p. 271). She indicated she remembered the parents shared their concerns at the CSE meeting about the student's re-entry into the district and when the district school psychologist was asked if the parents were specifically concerned with putting the student back in the same class they were in when they "previously decompensated" the psychologist responded, "[y]es, they were in favor of a smaller setting" (Tr. p. 260). The school psychologist further testified that she did not remember if the IEP included a re-entry program or transition program for the student but that she "would assume that [the district] include[s] that for all [its] students" (Tr. p. 259). A review of the March 2020 IEP does not reflect a re-entry or transition plan (see Dist. Ex. 13).<sup>23</sup> However, the district school psychologist testified that it was her experience that when everyone had come to the table and agreed on services, recommendations and goals, they then discuss a plan for transitioning (Tr. p. 271).

The testimony of the district staff offered some reasonable rationales for the CSE's recommendations, not the least of which involves considerations regarding whether the student could be educated in the general education classroom with the use of supplemental aids and services (see 20 U.S.C. § 1412[a][5][A]; see 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.6[a][1]; Newington, 546 F.3d at 112, 120-21). On the other hand, the district did not articulate how the student would function in the general education classroom given their sensory needs and anxiety described by the parents and private providers. The IHO characterized that the district's account of what actually occurred at the CSE meeting as "limited" (IHO Decision at p. 20). In contrast, the IHO found that the parents and the student's private social worker credibly testified "that they shared much more information about [the student's] needs, the reasons the District's proposed placement did not meet them, and the District's reasons for rejecting their proposal" (id.). In particular, the IHO found credible testimony that, during the CSE meeting, it was stated that the district understood the student needed a small class and high-level learning but that the district did not and could not provide such a program (id. at pp. 20-21, 32, citing Tr. pp. 553-54, 737). Further, the IHO found credible the private psychiatrist's testimony that, if the student was to return to the

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<sup>23</sup> Generally, the IDEA does not require a "transition plan" as part of a student's IEP when a student moves from one school to another (A.D. v. New York City Dep't of Educ., 2013 WL 1155570, at \*8 [S.D.N.Y. Mar. 19, 2013]; F.L. v. New York City Dep't of Educ., 2012 WL 4891748, at \*9 [S.D.N.Y. Oct. 16, 2012], aff'd, 553 Fed. App'x 2 [2d Cir. Jan. 8, 2014]; A.L. v. New York City Dep't of Educ., 812 F. Supp. 2d 492, 505 [S.D.N.Y. 2011]; E.Z.-L. v. New York City Dep't of Educ., 763 F. Supp. 2d 584, 598 [S.D.N.Y. 2011], aff'd sub nom., R.E., 694 F.3d 167; see R.E., 694 F.3d at 195).

public school, they would return to hopelessness and would act on their suicidal ideation (IHO Decision at p. 21, citing Tr. p. 612).

Generally, an SRO gives due deference to the credibility findings of an IHO, unless non-testimonial evidence in the hearing record justifies a contrary conclusion or the hearing record, read in its entirety, compels a contrary conclusion (see Carlisle Area Sch. v. Scott P., 62 F.3d 520, 524, 528-29 [3d Cir. 1995]; P.G. v. City Sch. Dist. of New York, 2015 WL 787008, at \*16 [S.D.N.Y. Feb. 25, 2015]; M.W. v. New York City Dep't of Educ., 869 F. Supp. 2d 320, 330 [E.D.N.Y. 2012], aff'd, 725 F.3d 131 [2d Cir. 2013]; Bd. of Educ. of Hicksville Union Free Sch. Dist. v. Schaefer, 84 A.D.3d 795, 796 [2d Dep't 2011]; Application of a Student with a Disability, Appeal No. 12-076).

Here, there is no non-testimonial evidence in the hearing record to justify a contrary conclusion, nor does the hearing record as a whole compel a contrary conclusion. Thus, in light of the IHO's finding that the district members of the CSE acknowledged the student's need for a more supportive setting but made less supportive recommendations based on considerations other than the student's needs, there is insufficient basis in the hearing record to reverse the IHO's determination that the district denied the student a FAPE for the 2019-20 school year.

### **C. Equitable Considerations**

The IHO determined that the "[p]arents have shown by a preponderance of the evidence that the Flex School provid[ed] [the student] with instruction that [was] specifically designed to meet their unique needs supported by services that [were] necessary for [them] to benefit from [their] instruction," and that "Flex provide[d] [the student] with an appropriate academic program, in an appropriate setting, with the therapeutic supports that allow[ed] [the student] to benefit from its curriculum" (IHO Decision at p. 33). The district has not appealed the IHO's finding that Flex was an appropriate unilateral placement for the 2019-20 school year and, therefore, that determination has become final and binding on the parties and shall not be reviewed (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; 279.8[c][4]).

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., 758 F.3d at 461 [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. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 840 [2d Cir. 2014] [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. v. Bd. of Educ. of Hyde Park, 459 F.3d 356, 376 [2d Cir. 2006]; Voluntown, 226 F.3d at 68).

The IDEA provides that the amount of tuition reimbursement must not be reduced or denied if the provision of the 10-day notice would "likely result in physical harm to the child" (20 U.S.C. § 1412[a][10][C][iv][I][cc]; see 34 CFR 300.148[e][1][iii]). In addition, a hearing officer may, in his or her discretion, excuse the lack of a 10-day notice if compliance "would likely [have] result[ed] in serious emotional harm to the child" (20 U.S.C. § 1412[a][10][C][iv][II][bb]; see 34 CFR 300.148[e][2][ii]).

The district asserts that the IHO erred by "interjecting" the "dangerous exception" principle into the analysis of the timing of the parents' 10-day notice of unilateral placement to improperly support a tuition reimbursement award back to the time the student began attending Flex.<sup>24</sup> The district does not otherwise raise any allegations that the IHO erred in his application of the exception or in his weighing of equitable considerations.

Here, the lack of a 10-day notice is an equitable consideration and it was within the IHO's discretion to weigh the lack of notice in determining whether to reduce or deny tuition reimbursement. The IHO acknowledged other evidence in the hearing record regarding the parents' participation in the CSE process and provision to the district of notice of the student's initial attendance at Flex on a trial basis prior to the CSE meeting. Overall, there is insufficient basis in the hearing record to modify the IHO's weighing of the equitable circumstances in this instance.

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<sup>24</sup> The district's only real argument regarding the IHO's application of the dangerous exception is that the parents did not assert in their due process complaint notice that the 10-day notice was delayed due to anticipated danger to the student; however, as the notice or lack thereof is an equitable consideration for the IHO to weigh, there is no requirement that the parents raise it in the due process complaint notice.

## **VII. Conclusion**

There is insufficient basis in the hearing record to disturb the IHO's determinations that the district did not violate its child find obligations but that it failed to offer the student a FAPE for the 2019-20 school year. In addition, the IHO's determination that Flex was an appropriate unilateral placement for the student for the 2019-20 school year is final and binding and there is insufficient basis in the hearing record to disturb the IHO's finding that equitable considerations weigh in favor of the parents' requested relief.

**THE APPEAL IS DISMISSED.**

**THE CROSS-APPEAL IS DISMISSED.**

**Dated: Albany, New York  
April 15, 2021**

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**SARAH L. HARRINGTON  
STATE REVIEW OFFICER**