



The University of the State of New York

The State Education Department

State Review Officer

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No. 21-071

Application of the BOARD OF EDUCATION OF THE EAST RAMAPO CENTRAL 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:

Harris Beach, PLLC, attorneys for petitioner, by Howard J. Goldsmith, Esq., and Anne M. McGinnis, 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 the district failed to offer an appropriate educational program to respondents' (the parents') son for the 2019-20 and 2020-21 school years and ordered the district to partially reimburse the parents for their son's tuition, maintenance, and costs at Heritage Schools Inc./The Heritage Community (Heritage) for the 2019-20 and 2020-21 school years. The parents cross-appeal from the IHO's determination which denied their request for full tuition, maintenance, and costs at Heritage. The appeal must be sustained. The cross-appeal must be dismissed.

II. Overview—Administrative Procedures

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

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

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

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

III. Facts and Procedural History

The student attended private parochial schools from kindergarten through most of ninth grade (Joint Exs. 3 at p. 2; 21 at p. 3). On March 13, 2018, the parent referred the student to the CSE for an initial evaluation as the student's principal and teachers had "reported escalating behavioral concerns with resulting academic issues," and the parent was concerned that as a result of the student's deteriorating behavior he might require "some type of specialized educational environment or assistance" (Joint Ex. 11). On April 16, 2018, the parents enrolled the student in

Barnstable Academy (Barnstable), an out-of-State nonpublic school (see Joint Exs. 2 at p. 1; 10; 15 at p. 1).

A CSE convened on May 7, 2018 to conduct an initial review and determined that the student was eligible to receive special education as a student with an emotional disturbance (see generally Joint Exs. 1-2).¹ Due to the student's "significant emotional concerns," the May 2018 CSE recommended that the student attend a Board of Cooperative Educational Services (BOCES) 12:1+2 special class and receive related services of one 30-minute session per week of counseling in a small group (3:1) and one 30-minute session per week of individual counseling (Joint Ex. 2 at pp. 1, 5, 7). Further, the May 2018 CSE recommended use of a positive reinforcement plan and refocusing and redirection throughout the school day (id. at p. 8).

The student continued attending Barnstable during tenth grade (2018-19 school year) until April 3, 2019 when the parents withdrew him and placed him at Aspiro Wilderness/Aspiro Vantage Point Program (Aspiro) in Utah "following increasingly oppositional and defiant behavior that involved constant and significant conflict with family members" (see Joint Exs. 15 at p. 1; 16 at p. 1; 21 at p. 2; see also Joint Ex. 26 at pp. 1, 3).

The CSE convened on June 20, 2019 to conduct the student's annual review and develop an IEP for the 2019-20 school year (eleventh grade) (see generally Joint Exs. 15-16).² The June 2019 CSE found the student eligible for special education as a student with autism based upon information obtained from a private psychological evaluation report dated June 7, 2019, in which the student was found to meet the criteria for a diagnosis of autism spectrum disorder (Joint Ex. 16 at p. 1; see Joint Ex. 21 at pp. 22, 25).³ The June 2019 CSE concluded that the student required a "therapeutic program that include[d] intensive daily counseling" for his social/emotional difficulties (Joint Ex. 16 at p. 6). The June 2019 CSE recommended a BOCES 8:1+1 special class located at Riverview High School (BOCES Riverview program) (id. at pp. 1, 8). In addition, the June 2019 CSE recommended two 30-minute sessions per week of individual psychological counseling services and one 60-minute session per month of parent counseling and training (id.). The June 2019 CSE continued to recommend a positive reinforcement plan and refocusing and redirection throughout the school day (id. at pp. 8-9). The meeting information summary indicated that the parents requested a residential placement for the student but that "committee members agreed that [the student's] emotional needs" could be met in a therapeutic setting with intensive daily counseling (id. at p. 1).

In a letter to the district dated June 20, 2019, the parents indicated that they disagreed with the June 2019 CSE's recommendations and notified the district of their intent to unilaterally place

¹ The May 2018 IEP reflects a meeting date of May 17, 2018, however, the prior written notice (Joint Ex. 1) and the district CSE chairperson's notes (Joint Ex. 14) reflect a meeting date of May 7, 2018.

² The IEP reflects a meeting date of June 20, 2018 (Joint Ex. 16); however, it was confirmed through testimony that the correct year was 2019 (Tr. pp. 287-88; see Joint Ex. 15).

³ The student's eligibility for special education and related services as a student with autism is not in dispute (see 8 NYCRR 200.1[zz][1]).

the student at Heritage, "a residential therapeutic school" located in Utah, for the 2019-20 school year and seek reimbursement of the costs thereof from the district (see Joint Ex. 22).⁴

On July 4, 2019, the student was discharged from Aspiro and began attending Heritage (Joint Exs. 26 at p. 1; 29 at p. 1).

In response to the parents' notice of unilateral placement, the district reconvened the CSE on July 11, 2019 to again discuss the student's program and services for the 2019-20 school year (Joint Exs. 23 at p. 1; 24 at p. 1; 25 at p. 1). At the July 2019 CSE meeting, the parents expressed their concern that the therapists and other professionals working with the student felt that he needed a residential placement (Joint Ex. 25 at p. 1). The July 2019 CSE considered the parents' request but determined that a residential placement was "too restrictive" and continued to recommend the 8:1+1 special class in the BOCES Riverview program (id. at pp. 1, 8).

In a due process complaint notice, dated October 24, 2019, the parents alleged that the district failed to offer the student a free appropriate public education for the 2018-19 and 2019-20 school years (see IHO Ex. A).

While the present matter was pending, the CSE convened on June 10, 2020 for an annual review and to develop the student's IEP for the 2020-21 school year (twelfth grade) (see generally Joint Exs. 35-36). Finding that the student remained eligible for special education as a student with autism, the June 2020 CSE again recommended the student attend the 8:1+1 special class in the BOCES Riverview program (compare Joint Ex. 36 at pp. 1-2, 10, with Joint Ex. 25 at pp. 1-2, 8). The June 2020 CSE also recommended that the student receive two 30-minute sessions per week of individual psychological counseling services and one 30-minute session per week of small group (5:1) psychological counseling services and that the parents receive one 30-minute session per month of parent counseling and training (Joint Ex. 36 at pp. 1, 10). Further, the CSE recommended a positive reinforcement plan, refocusing and redirection, special seating arrangements, breaks, modified curriculum, and support for transitions (id. at pp. 10-11). It was also recommended that the student receive services during summer 2020 as follows: 8:1+1 special class in the BOCES Riverview program; one 30-minute session per week of individual psychological counseling services; one 30-minute session per week of small group (5:1) psychological counseling services; and one 60-minute session per month of parent counseling and training (id. at pp. 11-12).

The student continued at Heritage for the 2020-21 school year (see Joint Ex. 42).

A. Due Process Complaint Notice

In an amended due process complaint notice, dated August 4, 2020, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2018-19, 2019-20, and 2020-21 school years (see generally IHO Ex. H).

⁴ The Commissioner of Education has not approved Heritage as a school with which districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d]; 200.7).

In connection with the 2018-19 school year, the parents alleged that the May 2018 CSE failed to offer the student an appropriate placement (IHO Ex. H at p. 9). In addition, the parents alleged that the May 2018 CSE failed to recommend annual goals for the student's social/emotional and behavioral deficits, and failed to identify the profile of students in the special class and the intensity of counseling recommended for the student (id. at pp. 4, 9). The parents further alleged that the May 2018 CSE failed to conduct a functional behavioral assessment (FBA) and develop a behavior intervention plan (BIP) (id. at pp. 4, 9).

For the 2019-20 school year, the parents alleged that the June 2019 CSE failed to offer the student an appropriate placement for 2019-20 school year (IHO Ex. H at p. 9). As with the previous school year, the parents alleged that that the June 2019 CSE failed to recommend annual goals that addressed the student's social/emotional and behavioral deficits, failed to conduct an FBA and develop a BIP, and generally failed to offer appropriate services to the student for 2019-20 school year (id. at pp. 7, 9). In their amended due process complaint notice, the parents generally alleged that the district failed to provide the student a FAPE for 2020-21 school year (id. at p. 9).

As relief, the parents sought a finding that the district denied the student a FAPE for 2018-19, 2019-20, and 2020-21 school years (IHO Ex. H at p. 9). Additionally, the parents sought an award of tuition and costs for Heritage for the 2019-20 and 2020-21 school years (id.). The parents also sought the cost of a private neuropsychological evaluation (id. at p. 10). Finally, the parents sought compensatory education for the district's alleged denial of FAPE for the three school years in question (id. at p. 9).

B. Impartial Hearing Officer Decisions

An impartial hearing convened on October 14, 2020 and concluded on November 5, 2020 after six days of proceedings (Tr. pp. 1-1675).^{5, 6} In a decision dated January 27, 2021, the IHO determined that the district failed to offer the student a FAPE for the 2019-20 and 2020-21 school years, that Heritage was an appropriate unilateral placement, and that equitable considerations weighed in favor of granting a portion of the parents' requested relief (IHO Decision at pp. 29-30, 34, 36). As relief, the IHO ordered the district to reimburse the parents for "not more than fifty-percent of the tuition and maintenance expenses actually incurred by them" at Heritage for the 2019-20 and 2020-21 school years, together with the student's travel expenses to and from Heritage and expenses for up to two trips per school year for the parents' travel (id. at pp. 36-37).

Initially, the IHO held that May 2018 IEP which recommended a therapeutic day treatment program was reasonably calculated to enable student to make progress and offered the student a

⁵ A different IHO was appointed on October 28, 2019 but later recused himself due to health reasons (see generally IHO Exs. B, E). The IHO who presided over the impartial hearing was appointed on or about July 9, 2020 (IHO Ex. F).

⁶ Prior to the issuance of the January 27, 2021 decision, the IHO issued four interim orders with respect to the exchange of exhibits, extensions to the timeline, and post-hearing briefs (see generally IHO Exs. G, J-L).

FAPE in the least restrictive environment (LRE) for the 2018-19 school year (IHO Decision at pp. 20-21, 36).

Next, the IHO held that the "educational components" of the June 2019 IEP were "very appropriate" to meet student's needs, but without a residential setting the student could not access his education (IHO Decision at p. 28). The IHO held that the student required the residential program at Heritage to receive educational benefit for the 2019-20 school year (id.). Therefore, the IHO held that June 2019 IEP failed to offer the student a FAPE for the 2019-20 school year (id. at pp. 28, 36).

Similarly, for the 2020-21 school year, the IHO held that only a residential program with an educational component as contained in the June 2020 IEP would meet the student's needs (IHO Decision at p. 29). The IHO also held that the summer remote learning services offered in the June 2020 IEP would not have allowed the student to transition into the district's program for the 2020-21 school year (id. at p. 30). Again, the IHO held that the "essential components" of the June 2020 IEP were appropriate, but without a residential setting, the June 2020 IEP was inappropriate and denied the student a FAPE for the 2020-21 school year (id. at pp. 30, 36).

Next, the IHO discussed the parents' unilateral placement at Heritage, and held that the student made "little behavioral progress" and that the program was "marginally successful" (IHO Decision at pp. 33-34). In addition, the IHO held that the evidence in the hearing record "suggest[ed] that the Heritage program [wa]s not providing an appropriate program for the [s]tudent" (id. at pp. 31-32). Moreover, the IHO held that a residential setting so far from the student's home [wa]s inappropriate under the LRE standard (id. at p. 33). Next, the IHO held that that equities did not bar the parents' reimbursement claims, except as they related to the placement of the student in a residential setting so far from his home (id. at p. 34). Based on these findings, the IHO awarded the parents partial reimbursement of Heritage tuition and maintenance costs for the 2019-20 and 2020-21 school years (id. at p. 36).

As for other relief sought by the parents, the IHO found that the hearing record did not demonstrate that the parents disagreed with the district's initial evaluation, and therefore, they were not entitled to the cost of the private psychological evaluation (IHO Decision at p. 35). Finally, the IHO denied the parents request for compensatory services as the parents failed to specify the compensatory services sought or offer proof as to their benefit (id. at pp. 35-36).

IV. Appeal for State-Level Review

The main issues presented on appeal by the district are that the IHO erred in finding that the district denied the student a FAPE for the 2019-20 and 2020-21 school years, and the IHO further erred in awarding tuition reimbursement to the parents.

Specifically, the district argues that the IHO properly found that the educational components of the June 2019 IEP were appropriate but erroneously found that the student required a residential program for the 2019-20 school year. The district argues that the hearing record demonstrates that the student did not require residential setting and the June 2019 IEP met the student's needs in the LRE.

Additionally, the district contends that the IHO erred in finding that the district denied the student a FAPE for the 2020-21 school year because the June 2020 IEP failed to contain a residential program. The district argues that it is "incongruous" for the IHO to hold that the student required a residential setting despite finding that the educational components of the June 2020 IEP were appropriate. Further, the district contends that, despite not being raised in the parents' amended due process complaint notice, the IHO improperly held that the program recommended by the district in the June 2020 IEP "would not have been viable for the student" due to possible remote instruction during summer 2020.

Furthermore, the district argues that the IHO was correct in finding that there was "very little evidence" that Heritage was appropriate, and accordingly, the IHO should not have awarded any tuition reimbursement for Heritage. The district notes the IHO's finding that Heritage was too far from the student's home but argues that the IHO incorrectly held that the equitable considerations weighed in favor of awarding the parents partial tuition reimbursement.

In an answer and cross-appeal, the parents argue that the student required a residential setting and the student made progress at Heritage, and that, therefore, the parents are entitled to full tuition and maintenance costs for Heritage for the 2019-20 and 2020-21 school years. The parents also assert that the remote summer program was not appropriate for the student.

In a reply to the parents' answer, the district argues that the parents should not be permitted to submit additional evidence pertaining to Heritage for the 2020-21 school year or present testimony from the student now that the impartial hearing has concluded. In addition, the district submits an answer to the cross-appeal, generally denying those allegations contained in the parents' cross-appeal. The district argues that the information submitted by the parents pertaining to the 2018-19 school year should not be considered as the parents did not appeal the IHO's finding that the district provided the student a FAPE for the 2018-19 school year. The district also argues that the parents' cross-appeal fails to comply with the procedural requirements of the State practice regulations. Finally, the district argues that the parents cannot now assert that the remote learning summer program is inappropriate as it was not raised in their due process complaint notice or amended due process complaint notice.

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

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).⁷

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. Preliminary Matters

1. Scope of Impartial Hearing

Before reaching the merits of the parties' appeals, the first issue to be addressed is whether the IHO erred in determining that remote instruction during summer 2020 would not have allowed the student to transition into the district's recommended program for the 2020-21 school year (IHO Decision at p. 30). The district asserts that the issue pertaining to remote instruction for summer 2020 was not raised in the parents' due process complaint notice or amended due process complaint notice and therefore, such determination by the IHO was "impermissible" and "speculative in nature" (Dist. Mem. of Law at pp. 13-14). On the other hand, the parents contend that for the 2020-21 school year their choice was between remote instruction at home which they describe as "absurd" and Heritage, and therefore, the IHO was correct in determining that the summer 2020 remote learning program was not appropriate (Answer at pp. 9-10).

⁷ The Supreme Court has stated that even if it is unreasonable to expect a student to attend a regular education setting and achieve on grade level, the educational program set forth in the student's IEP "must be appropriately ambitious in light of his [or her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives" (Endrew F., 137 S. Ct. at 1000).

Generally, the party requesting an impartial hearing has the first opportunity to identify the range of issues to be addressed at the hearing (Application of a Student with a Disability, Appeal No. 09-141; Application of the Dep't of Educ., Appeal No. 08-056). Under the IDEA and its implementing regulations, a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.507[d][3][i], 300.511[d]; 8 NYCRR 200.5[j][1][ii]), or the original due process complaint notice is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.507[d][3][ii]; 8 NYCRR 200.5[i][7][b]). Indeed, "[t]he parent must state all of the alleged deficiencies in the IEP in their initial due process complaint in order for the resolution period to function. To permit [the parents] to add a new claim after the resolution period has expired would allow them to sandbag the school district" (R.E., 694 F.3d 167 at 187-88 n.4; see also B.M. v. New York City Dep't of Educ., 569 Fed. App'x 57, 58-59 [2d Cir. June 18, 2014]). Moreover, it is essential that the IHO disclose his or her intention to reach an issue which the parties have not raised as a matter of basic fairness and due process of law (Application of a Child with a Handicapping Condition, Appeal No. 91-40; see John M. v. Bd. of Educ. of Evanston Tp. High Sch. Dist. 202, 502 F.3d 708, 713 [7th Cir. 2007]). Although an IHO has the authority to ask questions of counsel or witnesses for the purposes of clarification or completeness of the hearing record (8 NYCRR 200.5[j][3][vii]), or even inquire as to whether the parties agree that an issue should be addressed, it is impermissible for the IHO to simply expand the scope of the issues raised without the express consent of the parties and then base his or her determination on new issues raised sua sponte (see Dep't of Educ., Hawai'i v. C.B., 2012 WL 220517, at *7-*8 [D. Haw., Jan. 24, 2012] [finding that the administrative hearing officer improperly considered an issue beyond the scope of the parents' due process complaint notice]).

In the instant matter, the parents' due process complaint notice and amended due process complaint notice do not include any allegations related to the district's remote learning program for summer 2020 (IHO Exs. A; H). Further, there is no indication in the hearing record that the district agreed to expand the scope of the impartial hearing or that the parents sought permission from the IHO to further amend their due process complaint notice. Therefore, the parents did not raise the question of the appropriateness of remote instruction for the student during summer 2020 as an issue to be addressed during the impartial hearing.

The next inquiry focuses on whether the district through the questioning of its witnesses "open[ed] the door" under the holding of M.H. v. New York City Department of Education (685 F.3d at 250-51; see also B.M. v. New York City Dep't of Educ., 569 Fed. App'x 57, 59 [2d Cir. June 18, 2014]; D.B. v. New York City Dep't of Educ., 966 F. Supp. 2d 315, 327-28 [S.D.N.Y. 2013]; N.K. v. New York City Dep't of Educ., 961 F. Supp. 2d 577, 584-86 [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, *9 [S.D.N.Y. Aug. 5, 2013]).

Here, the issue of the availability of a remote versus in-person program for the student for summer 2020 came up in the parents' cross-examination of the district special education teacher and the district only briefly followed-up with questions to the teacher on the issue in response to the parents' line of questioning (see Tr. pp. 450, 460-69). Accordingly, the hearing record demonstrates that the district did not open the door to the parents' claim that the district's remote learning program for summer 2020 was inappropriate for the student (see A.M., 964 F. Supp. 2d

at 282-84; J.C.S., 2013 WL 3975942, at *9). The remote learning summer 2020 program was an issue that was not properly raised and is outside the scope of the impartial hearing (see B.P. v. New York City Dep't of Educ., 841 F. Supp. 2d 605, 611 [E.D.N.Y. 2012] [explaining that "[t]he scope of the inquiry of the IHO, and therefore the SRO . . . , is limited to matters either raised in the . . . impartial hearing request or agreed to by [the opposing party]]").

2. Scope of Review

Further, regarding the issues before me on appeal, State regulation governing practice before the Office of State Review requires that the parties set forth in their pleadings "a clear and concise statement of the issues presented for review and the grounds for reversal or modification to be advanced, with each issue numbered and set forth separately," and further specify that "any issue not identified in a party's request for review, answer, or answer with cross-appeal shall be deemed abandoned and will not be addressed by a State Review Officer" (8 NYCRR 279.8[c][2], [4]; see 8 NYCRR 279.4[a]). An IHO's decision is final and binding upon the parties unless appealed to a State Review Officer (34 CFR 300.514[a]; 8 NYCRR200.5[j][5][v]).

Here, neither party appealed the IHO's finding that the district offered the student a FAPE for the 2018-19 school year or his determinations denying the parents' requests for compensatory education services and reimbursement for the costs of the private psychological evaluation. As such, those findings have become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]).

B. 2019-20 School Year

Turning to the merits, the crux of the parties' dispute for both school years at issue relates to whether or not the CSEs' recommendations that the student attend therapeutic day treatment programs were appropriate despite the recommendations from outside professionals that the student required a residential placement.

While the student's present levels of performance are not in dispute in this matter, a review of the student's needs as reflected in the evaluative information considered by the June 2019 CSE, and the present levels of performance included in the resultant IEP, provides context for a discussion of the appropriateness of the district's recommended program and placement for the student's 2019-20 school year.

According to the June 2019 IEP, the CSE had before it the following evaluations and reports: a January 19, 2018 physical, a June 2019 private psychological evaluation report, documenting the results of an evaluation conducted in May 2019, a June 6, 2019 teacher progress report, and a June 7, 2019 report card and transcript (Joint Ex. 16 at p. 3; see Joint Exs. 17; 19; 21).

The private psychological evaluation was conducted while the student was attending Aspiro (May 2019) using the Wechsler Intelligence Scale for Children-Fifth Edition (WISC-V), Wide Range Assessment of Memory and Learning-Second Edition (WRAML-2), Woodcock Johnson Test of Achievement - Fourth Edition (WJ-IV), Rey-Osterrieth Complex Figure Test (RCFT), Beery-Buktenica Developmental Test of Visual Motor Integration-Sixth Edition (VMI-

6), Autism Diagnostic Observation Schedule-Second Edition (ADOS-2), Behavior Rating Inventory of Executive Functioning (BRIEF), Social Responsiveness Scale-Second Edition, Social Communication Questionnaire, Minnesota Multiphasic Personality Inventory-Adolescent (MMPI-A), Million Adolescent Clinical Inventory (MACI), Substance Abuse Subtle Screening Inventory-Second Edition (SASSI-2), a sentence completion task, interviews and review of records (Joint Ex. 21 at p. 1). During the evaluation, the student was reportedly "talkative and friendly" but also "somewhat socially immature" (id. at p. 6). The private psychologist noted that the student was "easily distracted" by other activity around him, and impulsive when responding (id. at p. 6).

In terms of background history, the private psychologist reported that the student's family was supportive, but his recent decline affected the relationships with his parents and siblings and "their relationship with each other as the stress in the house increased" (Joint Ex. 21 at p. 4). According to the private psychologist, in the last year, the student's siblings moved out of the house "to avoid the stress and conflict in the home that revolved around [the student] and his dysregulated moods and behavior" (id. at pp. 4-5). Still, the private psychologist concluded that the student's "family relationships [we]re a strong asset for him as he progresse[d] through his treatment" (id. at p. 6). The private psychologist relayed information from the student's counselor at Aspiro, who reported the student "lack[ed] emotional insight and ha[d] difficulty reading social situations" (id. at p. 5). However, she also reported that, during his time at Aspiro, the student had become increasingly aware of his anxiety which was a step toward learning how to cope with the anxiety and "manage his worry" (id. at pp. 5, 22). The Aspiro licensed clinical mental health counselor (counselor) noted that since arriving at the wilderness program the student had exhibited "outbursts" and tantrums when he did not get his way, but he was not aggressive (Tr. pp. 1058-59; Joint Ex. 21 at p. 5; see Tr. p. 865). The private psychologist concluded that the student had made "excellent therapeutic progress" at Aspiro and was "invested" in his treatment (Joint Ex. 21 at p. 22).

As part of his evaluation of the student, the private psychologist administered the WISC-V, the results of which showed the student demonstrated average abilities in visual spatial skills and processing speed, high average abilities in verbal comprehension and working memory, and very high skills in fluid reasoning (Joint Ex. 21 at pp. 7-8). The student's full-scale IQ of 116 was lower than previous IQ scores (2015 & 2018) with no clear reason (id. at p. 8). The student was able to describe how different words were similar and define increasingly complex vocabulary words (id.). The student was able to create figures with blocks to match a picture and select pieces correctly to form a puzzle (id.). The student's processing speed was average, which was a relative weakness for him (id. at p. 9).

A memory assessment revealed average scores in the student's verbal and visual memory (Joint Ex. 21 at p. 10). Specifically, the private psychologist reported that the student was able to retell a story and recall words presented to him in auditory format both immediately and after a delay, demonstrating his ability to remember verbal information (id.). In addition, the student was able to recall and draw details from a picture presented to him after a delay (id. at pp. 10-11). The student's performance on an additional measure of visual memory skills led the private psychologist to report that the student was able to "efficiently" encode and organize visual information in memory (id. at p. 11). In addition, evaluation results indicated that the student showed average attention/concentration, measured by his "working memory and mental control,"

in which he was able to recall a string of numbers and letters, and repeat a pattern of pointing modeled by the examiner (id.).

In the area of academics, the private psychologist reported that the student exhibited above grade level skills in reading, math, and writing (Joint Ex. 21 at pp. 11-12). Specifically, he indicated that the student's basic reading skills including decoding, fluency, and comprehension were "well above grade level" which indicated that the student "should not have any trouble accessing grade level reading material" (id.). Further, the student exhibited "well above grade level" and "well developed skills" on most measures of math abilities but showed "far lower" skills on timed math fluency tasks, possibly due to his "lower processing speed" (id.). Finally, the private psychologist reported that the student performed above grade level on all writing tasks (id.). Although his handwriting was occasionally illegible, the student's visual perception and motor coordination scores were in the average range, indicating adequate underlying skills (id. at pp. 12-13).

The private psychologist's evaluation also included an assessment of the student's executive functioning skills, which revealed significantly elevated scores across settings based on ratings completed by the student, his parents, his private psychologist, and a "field guide" from Aspiro (Tr. p. 984; Joint Ex. 21 at pp. 13-14). Specifically, the clinically elevated ratings on the behavior regulation index reflected "extreme impulsivity" common in students with ADHD and weakness with "social awareness" (Joint Ex. 21 at p. 14). In addition, the clinically elevated ratings on the emotional regulation index revealed the student's "very high level of cognitive rigidity" and "extreme difficulty regulating" his emotions (id. at p. 15). The student also displayed "[m]ildly to [c]linically elevated" scores in the area of cognitive regulation, which suggested that the student had difficulty "initiating some tasks and responsibilities independently," in working memory necessary for task completion, and in skills related to planning and organizing to guide his behavior (id.). The student reported weakness related to checking and assessing his own work, he tended to be "somewhat disorganized," and he struggled to keep track of his belongings (id.). Overall, the findings revealed "significant weaknesses in all areas of executive functioning" with the student's weaknesses in behavioral and emotional regulation being more pronounced (id.).

Next, the private psychologist indicated that the student's scores on the ADOS-2 suggested the presence of autism (Joint Ex. 21 at p. 16). He noted that the student had some difficulty reporting on routine events due to distractibility, his train of thought was "fleeting," and he often needed to be redirected (id.). In addition, the student's eye contact was inconsistent, and he did not spontaneously identify emotions in others, likely due to difficulty understanding social situations and relationships (id.). According to the private psychologist, while the student used well developed vocabulary and complex speech throughout the evaluation, he spoke mainly about topics of interest to himself only and lacked reciprocity (id.). The private psychologist concluded that, overall, the student lacked the ability to read his social environment or engage in "back and forth conversation" (id.). A checklist of social behaviors, completed by the student's parents and Aspiro counselor, yielded elevated scores which highlighted the student's difficulty interpreting his social environment (id. at pp. 17-18). The private psychologist concluded that the student met the criteria for autism spectrum disorder (Tr. pp. 987-88; Joint Ex. 21 at p. 18).

In addition to the above, the private psychologist administered measures of personality testing, which yielded a profile of the student that suggested a high level of anxiety impacting his

daily life, elevated social introversion, and a tendency to be withdrawn (Joint Ex. 21 at p. 19). According to the private psychologist, the student's responses suggested mild depression, and the student had a restricted range of interests, and a lack of self-confidence (id.). In addition, the student had difficulty controlling his anger, was easily upset by minor problems, and felt alienated from social connections (id.). Lastly, the student's profiles suggested that he exhibited extreme and unpredictable moods which he was unable to control, was "extremely self-critical," hyperactive, impulsive, and reported that he worried about "everything" (id.).

Based upon his evaluation of the student, the private psychologist offered diagnoses of a level 1 autism spectrum disorder, generalized anxiety disorder, ADHD, and disruptive mood dysregulation disorder (Tr. pp. 987-90; Joint Ex. 21 at p. 22). The private psychologist opined that the student required a residential setting that could provide him with a "high level of structure and predictability" and address his needs holistically (Joint Ex. 21 at p. 22). The private psychologist also recommended individual therapy, mindfulness practices, family therapy, and supervised social and recreational activities, among other things (id. at pp. 23-24).

In addition to the private psychologist's evaluation, the June 2019 CSE considered a teacher progress report (Joint Ex. 17). A June 2019 teacher progress report completed by the head of school at Barnstable reported that the student did not present with weaknesses in reading, writing, or math but struggled following rules and could become frustrated when he did not want to do his work and would refuse to listen to adults (Joint Ex. 17 at pp. 1-2). The head of school indicated that, despite his struggles, the student had "developed many successful relationships" with peers and staff (id. at p. 2). However, according to the report, the student tended to "fall[] behind with his school work when he [wa]s struggling emotionally" (id. at p. 3). The head of school shared that the student benefited from small group instruction (id.).⁸

The district argues that the June and July 2019 IEPs met the student's needs in the LRE as they would have provided the student with a "center-based, therapeutic, day treatment program with wraparound services, curriculum that addressed the [s]tudent's learning needs, a psychologist in the class at all times, and every staff member trained in applied behavior analysis" (Req. for Rev. at p. 5).

The IDEA requires that a student's recommended program must be provided in the LRE (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.107, 300.114[a][2][i], 300.116[a][2], 300.117; 8 NYCRR 200.1[cc], 200.6[a][1]; see T.M., 752 F.3d at 161-67; Newington, 546 F.3d at 111; Gagliardo, 489 F.3d at 105; Walczak, 142 F.3d at 132; Patskin v. Bd. of Educ. of Webster Cent. Sch. Dist., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]). In determining an appropriate placement in the LRE, the IDEA requires that students with disabilities be educated to the maximum extent appropriate with students who are not disabled and that special classes, separate schooling, or other removal of students with disabilities from the general educational environment may occur only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily (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-

⁸ The student's report card from Barnstable for the 2018-19 school year showed that the student achieved grades between 76 and 93 for the first semester with largely positive teacher comments (Joint Ex. 19).

21; Oberti v. Bd. of Educ. of Borough of Clementon Sch. Dist., 995 F.2d 1204, 1215 [3d Cir. 1993]; J.S. v. N. Colonie Cent. Sch. Dist., 586 F. Supp. 2d 74, 82 [N.D.N.Y. 2008]; Patskin, 583 F. Supp. 2d at 430; Watson v. Kingston City Sch. Dist., 325 F. Supp. 2d 141, 144 [N.D.N.Y. 2004]; Mavis v. Sobol, 839 F. Supp. 968, 982 [N.D.N.Y. 1993]). The placement of an individual student in the LRE shall "(1) provide the special education needed by the student; (2) provide for education of the student to the maximum extent appropriate to the needs of the student with other students who do not have disabilities; and (3) be as close as possible to the student's home" (8 NYCRR 200.1[cc]; 8 NYCRR 200.4[d][4][ii][b]; see 34 CFR 300.116). Consideration is also given to any potential harmful effect on students or on the quality of services that they need (34 CFR 300.116[d]; 8 NYCRR 200.4[d][4][ii][c]). Federal and State regulations also require that school districts ensure that a continuum of alternative placements be available to meet the needs of students with disabilities for special education and related services (34 CFR 300.115; 8 NYCRR 200.6). The continuum of alternative placements includes instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions; the continuum also makes provision for supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement (34 CFR 300.115[b]).

With respect to residential placements, the Second Circuit has stated that "[w]hile some children's disabilities may indeed be so acute as to require that they be educated in residential facilities, it is appropriate to proceed cautiously whenever considering such highly restrictive placements. . . . The norm in American public education is for children to be educated in day programs while they reside at home and receive the support of their families" (Walczak, 142 F.3d at 132). A residential placement is not appropriate unless it is required for a student to benefit from his or her educational program (M.H. v. Monroe-Woodbury Cent. Sch. Dist., 296 Fed. App'x 126, 128 [2d Cir. Oct. 7, 2008]; Walczak, 142 F.3d at 122; Mrs. B., 103 F.3d at 1121-22; see Educ. Law § 4402[2][b][2]; 34 CFR 300.104; 8 NYCRR 200.6[j][1][iii][d]). In general, the Second Circuit has required objective evidence that a student cannot obtain educational benefit in a less restrictive setting before finding that a residential placement is required by the IDEA (M.H., 296 Fed. App'x at 128; Walczak, 142 F.3d at 131-32; see MN v. Katonah Lewisboro Sch. Dist., 2020 WL 7496435, at *9 [S.D.N.Y. Dec. 21, 2020]). Additionally, State law requires that in order to properly recommend a residential placement, a district must make the determination that there is no appropriate non-residential school available consistent with the needs of the student (Educ. Law § 4402[2][b][2]).

Initially, at the June 2019 CSE meeting, the CSE agreed to change the student's disability classification from emotional disturbance to autism based upon the private psychologist's diagnosis of autism (compare Joint Ex. 16 at p. 1, with Joint Ex. 2 at p. 1; see Joint Ex. 21 at pp. 18, 22). The June 2019 IEP reflected the student's present levels of performance in accordance with the evaluative information before the June 2019 CSE (compare Joint Ex. 16 at pp. 3-7, with Joint Exs. 17, 19, 21; see Tr. pp. 406-10). Specifically, the June 2019 IEP indicated that the student was performing above grade level in reading, writing, and math, with a relative weakness in timed math tasks (Joint Ex. 16 at p. 5). The June 2019 IEP reflected that the student exhibited "strong" cognitive capacity, with a relative weakness in processing speed (id. at p. 5). With regard to the student's social/emotional development, the June 2019 IEP indicated that the student exhibited "underdeveloped social awareness and social skills," "concrete" and "inflexible" thinking, emotional outbursts, anxiety, lack of emotional insight, difficulty reading social situations, and difficulty with self-regulation, frustration, impulsivity, and inattention (id. at p. 6). The June 2019

CSE identified supports for the student's management needs including a "therapeutic program" with "intensive daily counseling" and development of coping strategies (*id.*). The June 2019 IEP featured two annual goals, which addressed the student's need to improve his social/emotional and behavioral functioning (Tr. pp. 295-96; Joint Ex. 16 at p. 8). The goals focused on the student's ability to identify his negative emotions and employ effective coping strategies such as perspective taking and deep breathing in order to maintain acceptable school behavior, as well as his ability to identify options for responding to a given social situation and the consequences therefrom (Joint Ex. 16 at p. 8). The June 2019 CSE recommended an 8:1+1 special class in the BOCES Riverview program with the support of counseling as a related service (Tr. pp. 107-08; Joint Exs. 15 at p. 1; 16 at pp. 1, 8).

Representatives of Barnstable and Aspiro participated in the June 2019 CSE meeting and, according to district staff, "reported that, although [the student] had great difficulty coping with his frustration, he was not physical or aggressive toward others or property in school" (Tr. pp. 283-84, 426-27, 455-58; Joint Exs. 15 at p. 2; 16 at p. 1). Additionally, the Barnstable and Aspiro representatives reported that the student "had great friends and no social issues" (Joint Ex. 15 at p. 2). Further, the representative from Aspiro stated that, when the student was anxious or frustrated, he would yell, scream, and cry, but was not destructive as the parents reported that he was in the home (Joint Ex. 15 at p. 2; *see* Tr. pp. 441, 456-58). At the meeting, a representative from Barnstable reported that the student had been "experiencing [meltdowns] which . . . affect[ed] his academics causing a deterioration in his academic performance and behavior" (Joint Ex. 15 at p. 1).

With regard to the student's educational performance during the 2018-19 school year, the Barnstable social worker testified that the student never walked out of the school but did walk out of class (Tr. pp. 769, 848-49). Consistent with the June 2019 Barnstable teacher progress report, the social worker reported that the student "was doing well" when he began attending Barnstable (Tr. pp. 768, 822). However, in December 2018, the student reportedly exhibited an increase in negative behaviors at home, and upon returning to school after winter break, he began leaving his classroom more (Tr. pp. 774-75, 1441-46). It was reported to the CSE that the student struggled academically, and "spent more time out of class" (Tr. pp. 426-27, 455). The student had become resistant to doing his schoolwork and his academic performance suffered as a result (Tr. pp. 426-27). The student sometimes "shut down," left the classroom, and refused to complete schoolwork if it did not interest him (Tr. pp. 410, 769). The social worker testified that the school "could no longer educate [the student] emotionally and behaviorally, it was too much to continue to support" (Tr. p. 779). The student did not receive any academic credit for the third quarter as he was not completing assignments and not participating "at all" (Tr. p. 782).

Based upon the recommendations from the student's private psychologist and the Aspiro counselor, the parents requested that the CSE consider placing the student in a residential setting (Joint Exs. 15 at p. 2; 16 at p. 1; 21 at p. 22; 26 at p. 4). Heritage and Barnstable staff testified that the student needed a residential program because it offered "more consistency and predictability" for him, "to build that bridge back home" (Tr. pp. 775-76, 778-79, 1120, 1289-90, 1293-94). The Aspiro counselor stated that, although the recommended BOCES 8:1+1 special class "could be a great program" for the student, he needed a residential program to "transition" from the highly structured wilderness program (Tr. p. 948).

However, the June 2019 CSE felt a residential setting "was too restrictive" and accordingly recommended a therapeutic day program with "intensive daily counseling" (Joint Exs. 15 at pp. 1-2; 16 at p. 1). The CSE chairperson indicated that the student's Barnstable report card showed that he was passing all of his subjects and that he was generally courteous and cooperative in school (Tr. pp. 96-97). She noted that the student "earned full credit" for the 2018-19 school year (Tr. p. 98).⁹ The CSE chairperson acknowledged that the student demonstrated "social, emotional and behavioral issues" but also noted that Barnstable was not a special education school and there was nothing submitted by Barnstable to suggest that the student received in-school counseling or support services at the school (Tr. pp. 99-100, 275-76). Furthermore, the CSE chairperson testified that the CSE did not recommend a residential placement because the "level of aggression" described by the parents in the home was not the same "level of aggression" the student was demonstrating at school (Tr. p. 284). She noted that there were "family" issues in the home and not solely pertaining to the student (Tr. p. 285). The chairperson testified that the CSE needed to look at and consider a residential placement as the parents believed it was appropriate for the student but that the CSE concluded that the student needed to be "with his family and work out whatever issues exist[ed]" (Tr. pp. 315-16). The case manager testified that a residential placement was not appropriate for the student as he was a "bright student" and he was not "aggressive in school" (Tr. pp. 539, 591).¹⁰ The school psychologist testified that if the student was in a special education therapeutic environment, he would have adequate support for his emotional difficulties (Tr. p. 698). The school psychologist testified that the 8:1+1 special class in the BOCES Riverview program was recommended because the student has was "academically and cognitively" intact but had "fairly-significant social and emotional challenges" and to help the parents and student "in terms of that family structure and environment" (Tr. pp. 142-43).

The recommended 8:1+1 special class was part of a "center-based therapeutic program" in which most of the students were on a Regents track, and the "therapeutic piece" was of primary importance (Tr. pp. 278-79). The 8:1+1 special class did a "great deal of project-based learning" and worked independently and in small groups (Tr. p. 281). According to the case manager, the BOCES Riverview program was designed to accommodate "emotionally fragile" students with anxiety and "social issues" that had difficulty regulating their emotions, comparable to the student in this case (Tr. p. 707). The case manager testified that because the student was close to his family, the CSE determined he would benefit from remaining in the home environment, and therefore the BOCES 8:1+1 special class was the appropriate program for him (Tr. pp. 534-35).

The recommended 8:1+1 special class in the BOCES program was a therapeutic placement in that it included a Board Certified Behavior Analyst (BCBA), training for all staff to work with students with emotional needs, daily counseling and a psychologist in the classroom every day, dialectical behavior therapy, and an FBA built into the program (Tr. pp. 279-80, 317, 323, 414;

⁹ The Barnstable director reported that the student did not receive any academic credit for the third quarter as he was not completing assignments and not participating "at all" (Tr. p. 782) and the student left the school at the end of the third quarter (Tr. p. 1455). In summer 2020 the student made up credits he was missing from tenth grade (Tr. pp. 1542-43).

¹⁰ The case manager was a school psychologist who also served as the CSE chairperson for the case management team (Tr. p. 491).

Joint Ex. 16 at p. 7).¹¹ The CSE chairperson opined that Riverview staff were reportedly able to anticipate problem behaviors before they escalated (Tr. p. 280). The program included social workers and a psychologist available at all times to de-escalate a student and work on skills whenever problem behaviors occurred (Tr. pp. 600-01). For example, if a student wanted to leave the building, the support staff would accompany him for a therapeutic walk or a visit to the gym (Tr. p. 601). In addition, the BOCES Riverview program offered wrap-around "services and supports" for the family, including a clinical social worker who helped families access community services designed to support families (Tr. pp. 115-16, 289-90, 414-15, 524-25, 1492). The wrap-around services were intended "to help bridge the gap between school and home" and to give the student the "necessary support that he would need to be successful in school" (Tr. pp. 289-90, 415). The district also worked with agencies within the county to provide the parents supports in the home (Tr. p. 525).

On June 20, 2019, the same date as the June 2019 CSE meeting, the parents sent a 10-day notice to the district, stating their intent to unilaterally place the student at Heritage for the 2019-20 school year (see Joint Ex. 22).¹² In response, the CSE reconvened a meeting on July 11, 2019 (see Joint Exs. 23-25). At the time of the July 2019 CSE meeting the student was already attending Heritage (Joint Exs. 24 at p. 1; 25 at p. 1).¹³ The parents informed the CSE that they visited the BOCES Riverview program and thought it was "a great program" but they, together with the student's therapists and other professionals, believed the student needed a residential setting (Joint Exs. 24 at p. 1; 25 at p. 1). The July 2019 CSE considered the parents' request for a residential placement, but ultimately maintained the recommendation that the student attend an 8:1+1 special class in the BOCES Riverview program (Joint Exs. 24 at p. 1; 25 at p. 1).

The IHO found that the "chief argument" to support a residential program was the testimony from Heritage's clinical director "that a residential program offers more consistency and predictability for its participants such as the student" (IHO Decision at p. 28). However, there is no indication in the hearing record that the program recommended in the IEP would not offer consistency and predictability for the student. The IHO further relied on the testimony of the Barnstable social worker that, as of March 2019, the student's clinical needs "had become the priority"; the IHO held that this statement supported the conclusion that, at the time of the June 2019 CSE meeting, the student "would not likely make academic progress outside of a residential

¹¹ The June 2019 IEP reflected that the student required an FBA and a BIP, which were "built into the recommended therapeutic program" (Joint Ex. 16 at p. 7). The CSE chairperson testified that the FBA and BIP were a "standard" part of the BOCES Riverview program, "created for every single child" and were "data-based" with "data-recorded every single day for every single child" (Tr. pp. 294-95).

¹² The student was admitted to Heritage on July 4, 2019 for "[d]eteriorating academics and chaotic home life" (Joint Ex. 29 at p. 1; see Tr. p. 1503).

¹³ The Heritage clinical director described the school as a "long-term [r]esidential [t]reatment [c]enter" and "subacute psychiatric facility" that served approximately 60 students approximately one-half of whom were "formally diagnosed on the spectrum" (Tr. pp. 1093, 1095, 1097, 1126). The clinical director described the school as being similar to a boarding school as the students "receive specialized educational services" together with "individual, family and group therapy" and "24-hour supervision and coaching and care for the children" (Tr. pp. 1093-94, 1126). The student was enrolled in the Spark Academy of Heritage, which the Heritage clinical director testified was a treatment program specializing in "[n]eurodiverse [s]tudents" (Tr. pp. 1124-25).

program" (*id.* at p. 28). However, as described above, the recommended BOCES Riverview program was a therapeutic program designed to address the needs of student's with anxiety and social/emotional deficits (*see, e.g.*, Tr. p. 707). There is no indication that the student's "clinical needs" could not be met in the day program. Finally, the IHO held that "[h]owever appropriate the IEP's Riverview day-treatment program was, and I find that its educational components were very appropriate to meet the [s]tudent's needs, I conclude that without a residential setting, the [s]tudent would not be able to access his education" (IHO Decision at p. 28). Contrary to the IHO's determinations, there is not enough information in the hearing record to show that the residential program was necessary to enable the student to receive an educational benefit for the 2019-20 school year (*see M.H.*, 296 Fed Appx at 128).

Here, while the student no doubt demonstrated struggles in the home and school environments during the 2018-19 school year, the hearing record does not include objective evidence that the student could not obtain educational benefit in a less restrictive setting than residential given appropriate therapeutic supports (*see M.H.*, 296 Fed. App'x at 128). Further, the student's behaviors in previous settings, as described above, were not of such a severe nature in the school environment to warrant the need for a residential placement (Tr. pp. 266, 378-79, 388, 425-28, 436-38, 454-59; *see* Joint Exs. 21 at p. 5; 28). The CSE properly concluded that the student's needs could be met in an appropriate non-residential school and, therefore, the CSE could not recommend a residential placement for the student (*see* Educ. Law § 4402[2][b][2]). While I sympathize with the parents' concern about the student's social/emotional and behavioral needs and their desire to follow the recommendations of private evaluators and providers, particularly given reports of the student's more difficult behaviors in the home, the CSE was bound to proceed cautiously in considering a residential option (*see Walczak*, 142 F.3d at 132). Taking into account all of the information and opinions available to the June and July 2019 CSEs, the evidence in the hearing record supports a finding that the recommended 8:1+1 special class in the BOCES Riverview program with counseling services was appropriately designed to enable the student to make progress in the LRE. Therefore, the IHO erred in finding that the district failed to offer the student a FAPE for the 2019-20 school year.

C. 2020-21 School Year

On June 10, 2020 the CSE convened to develop an IEP for the 2020-21 school year (*see* Joint Exs. 35-36). The June 2020 IEP lists the following documents as having been before the CSE: an October 28, 2019 psychological report addendum; Heritage treatment plans dated July 7 and July 31, 2019; Heritage quarterly academic summaries dated October 28, 2019, January 27, 2020, April 22, 2020, and May 27, 2020; a Heritage May 11, 2020 transcript; and a Heritage May 11, 2020 progress report (Joint Ex. 36 at p. 3; *see* Joint Exs. 21A; 29 at pp. 1-7; 32-34).¹⁴ In

¹⁴ The evidence in the hearing record includes different types of documentation generated by Heritage during the 2019-20 school year (*see* Joint Exs. 29-30, 32-34); however, the dates listed in the IEP do not always match the dates on the documents in the hearing record. For example, the IEP lists treatment plans dated July 7 and July 31, 2019, whereas the hearing record includes one exhibit that includes an initial treatment plan dated July 7, 2019, and monthly reviews thereof through February 2020 (*compare* Joint Ex. 36 at p. 3, *with* Joint Ex. 29); while the June 2020 IEP does not list the treatment plan reviews for August 2019 through February 2020 (*see* Joint Ex. 29 at pp. 8-32), the district case manager testified that all of the monthly treatment plan reports were considered (*see* Tr. pp. 575-85). In addition, although the IEP lists Heritage quarterly academic summaries dated October 28, 2019, January 27, 2020, April 22, 2020, and May 27, 2020, it appears that the IEP is referencing quarterly

addition, the June 2020 IEP listed evaluative information conducted by the district when the student was initially evaluated for special education in 2018, as well as the documentation that had been before the June and July 2019 CSEs (Joint Ex. 36 at p. 3; see Joint Exs. 3; 4; 5; 17; 21; compare Joint Ex. 36 at p. 3, with Joint Ex. 16 at p. 3). The June 2020 meeting information summary stated that cognitively and academically the student was strong but that his "behavior and management needs ha[d] kept him from accessing his education" (Joint Ex. 36 at p. 1).

In an October 28, 2019 addendum to the May 2019 private psychological evaluation, the private psychologist indicated that she conducted adaptive testing to "gain a current picture" of the student's "adaptive functioning in the treatment setting" (Joint Ex. 21A at p. 1). She explained that her evaluation was conducted using the Adaptive Behavior Assessment Scale-Third Edition (ABAS-3) which consisted of rating forms completed by three staff members at Heritage (id.). According to the private psychologist, overall, the student's ratings ranged from "[e]xtremely [l]ow to [b]elow [a]verage" which indicated "variable skills" and "a need for support" in all settings (id. at p. 2). Specifically, the student's "ability to communicate for functional and social purposes," access resources, manage time, read for information, and initiate and complete tasks fell "well below average" (id.). The private psychologist reported that staff ratings indicated the student's skills in the leisure and social domain such as meaningfully using free time, engaging with peers, participating in group activities, developing awareness of others' emotions, and responding appropriately to social situations were areas of strength for him, although some of his skills in this domain were still below average (id.). In the practical domain staff ratings of the student fell from "very low" to "below average," reflecting underdeveloped skills in his ability to navigate his community and school safely, transition between activities, use community resources, and ask for help when needed if sick or hurt (id.).

At Heritage, staff developed a master treatment plan for the student and reported monthly on his progress with regard to academics and within his residence (Joint Ex. 29).¹⁵ For July 2019, the Heritage residential report noted that the student was demonstrating poor hygiene and was struggling to regulate his emotions (id. at pp. 5, 7). The monthly report noted that the student performed well academically in classes that he was interested in but frequently walked out of other classes (id. at p. 5). Still, the report reflected class grades of 100 and a GPA of 4 (id.).¹⁶ In terms of the student's behavior, the monthly report indicated that, since enrollment, the student "AWOL'd on a nearly daily basis" especially when he was given an instruction or limit that he did not agree

summaries included in the hearing record dated October 2019, January 2020, April 2020, and June 2020 (compare Joint Ex. 36 at p. 3, with Joint Ex. 32). The district case manager testified that, in preparation for the June 2020 CSE meeting, Heritage sent the district the student's progress reports, discipline reports, and report cards (Tr. pp. 560-61).

¹⁵ The student's Heritage academic advisor testified that he advocated for the students, monitored IEP goals, mentored students, and worked with the treatment team to coordinate their efforts (Tr. p. 1177). The Heritage academic advisor testified that the "[t]reatment [t]eam [was] comprise[d] of [him]self and [the student's] Therapist . . . and his Home Director and Home Leads" (Tr. p. 1178). He testified that they worked as a team to give "insight" on the student's performance in all three milieus in order to collaboratively solve problems (id.).

¹⁶ Grades were not reported for all classes (Parent Ex. 29 at p 5).

with (*id.* at p. 6).¹⁷ The monthly report for August 2019 indicated that the student continued to struggle with peer relations and poor hygiene (*id.* at p. 9). In addition, the report noted that the students continued to go AWOL but at a decreased rate (*id.* at p. 10).

The September 2019 treatment plan review reported that the student had poor hygiene, left supervision without permission, and demonstrated physical aggression towards a coach (Joint Ex. 29 at p. 12). His GPA from July 2019 to September 2019 went from a 4.0 to 1.79 (*id.* at pp. 5, 12). According to the September 2019 monthly report, the student continued to go AWOL almost daily (*id.* at p. 13). The October 2019 monthly report stated that the student continued to struggle in his residence as he was continued to go AWOL (at least three times per week), became explosive and "engag[ed] in interpersonal struggles" (*id.* at pp. 16-17). The student demonstrated aggressive behaviors with students: he hit one student with a hat and threw his backpack at another student (*id.* at p. 17). The October 2019 monthly report indicated that the student was starting to bring up his grades, but he required "a lot of support to maintain passing grades and engagement in his classes" (*id.* at p. 16).

The Heritage monthly treatment plan review notes showed that, by November 2019, the student was showing slight improvement in his "distress tolerance" (Joint Ex. 29 at p. 20). As for academics it was noted that he was "doing well" except for English class (*id.*). It was noted that there was a decrease in the frequency and duration of AWOL's (*id.* at p. 21). In December 2019 the student struggled to follow rules, expectations, and program standards (*id.* at p. 23). The student was shoving and pushing past his coaches and yelling and cursing at them when he did not get what he wanted (*id.*). The student was also struggling with "basic life skills" of personal hygiene and grooming (*id.*). The December 2019 report also stated that with regard to academics the student was functioning far below his ability (*id.*). The student's AWOL or "hot footing" was improving but it still occurred weekly (*id.* at p. 24). The January 2020 report noted that the student began the month "doing well" staying within supervision, advocating for his needs, and improving his hygiene (*id.* at p. 27). However, when the student did not earn a specific reward (video games) he resorted to his previous behaviors of leaving supervision, not following student expectations, and low cooperation in the residential setting (*id.*). Further, the student "required physical intervention after several safety-related incidents" which included trying to break into a director's office (*id.*). It was reported that the student was doing well academically except for U.S. History (*id.*). As of February 2020, the student continued to struggle "with becoming dysregulated quickly" (*id.* at p. 31). It was noted that the student "continue[d] to be highly impulsive in the school setting" and which was a "major roadblock to his academic success" (*id.*). After February 2020 there were no other monthly treatment plan updates for the 2019-20 school year.

The June 2020 CSE further considered the reports of numerous behavioral incidents that occurred at Heritage during the 2019-20 school year (Joint Ex. 35 at pp. 2-3; *see* Joint Ex. 30). In each of the reported incidents the student was "placed in a passive physical restraint (PPR)" or safety hold on at least one if not more occasions (Joint Ex. 30 at pp. 1-15).¹⁸ From September 9,

¹⁷ The Heritage clinical director testified that AWOLs "are when a student leaves the – the designated room or area they are supposed to be at . . . without staff permission, they – they walk off from the area where they're supposed to be at" (Tr. p. 1147).

¹⁸ The Heritage clinical director described a passive physical restraint as "anytime we place our hands on a child

2019 and continuing through to May 28, 2020 the student's behaviors included screaming (id. at p. 1); being aggressive to staff by kicking, hitting, pushing and headbutting them (id. at pp. 1, 3-8, 10-13, 15); walking out of the residence without supervision (id. at pp. 1-2, 5, 10, 14-15); and kicking and punching walls, doors, and windows (id. at pp. 1, 7-8, 10).¹⁹

According to the 2019-20 Heritage quarterly academic reviews, the student's GPA was 2.25 in September 2019, 2.92 in January 2020, 3.46 in April 2020, and 3.25 in June 2020 (Joint Exs. 32 at pp. 2, 4, 6, 8; see Joint Exs. 33-34). The student failed health and journalism in the first quarter, but otherwise passed all his classes during the 2019-20 school year (Joint Ex. 32 at pp. 2, 4, 6, 8).²⁰ According to the June 10, 2020 prior written notice, Heritage "changed its structure for [the student] on April 20, 2020 to provide him with "co-curricular project[-]based learning program" which helped the student to participate to a greater extent in school (Joint Ex. 35 at pp. 1-2). However, the Heritage academic advisor testified that the "project-based learning" was implemented in response to the COVID-19 pandemic and not in response to the student's individual needs (Tr. p. 1232). The June 2020 prior written notice stated that the student "was not successful [at] Heritage until remote learning and project[-]based learning took place" (Joint Ex. 35 at p. 2).

The case manager testified that, based upon the reports presented by Heritage representatives, the student had "significantly" deteriorated since starting at the school: he had to be physically restrained in "16 instances," refused to attend class, refused to do schoolwork, and left the residential home, all of which "carried over into the academic component" (Tr. pp. 571-74). The case manager testified that the student's leaving the residence and walking out of the classroom indicated that Heritage was "not addressing his needs" and they were unable to "de-escalate him" and "provide him with the right coping mechanisms" prior to going AWOL (Tr. pp. 577, 585). She testified that Heritage was "not a safe environment" for the student if he needed to be "restrained in that particular program on 16 occasions" (Tr. pp. 603, 683-84). The case manager testified that the behaviors he exhibited at Heritage over the 2019-20 school year showed regression (Tr. pp. 597). At Heritage, the student struggled to stay in class and "had 46 class refusals and took 94 breaks" (Joint Exs. 35 at p. 1).²¹ The representatives from Heritage also reported that the student became "dysregulated and disruptive due to conflicts with peers, bullying other students, being hyperactive or being asked to do or complete non-preferred tasks" (id.).

According to the June 10, 2020 prior written notice, the June 2020 CSE discussed several options on the continuum for the student but believed that the "Riverview BOCES offered a therapeutic setting with a lot of center[-]based learning" (Joint Ex. 35 at p. 2). The June 2020 CSE discussed other residential options, but determined that "a residential program would be too restrictive for the student based upon all the information and documents provided by the current

... for the purpose of redirection ... or physical control" (Tr. p. 1097).

¹⁹ The student's academic advisor was unaware of the specific number of times that passive restraint was used with the student from September 2019 to May 2020 (Tr. pp. 1250-51).

²⁰ The student was "on academic probation 30% of the third term" (Joint Ex. 35 at p. 1).

²¹ A class refusal is considered leaving class for more than 20 minutes (Joint Ex. 35 at p. 3).

and previous placements" (*id.*). Further the June 2020 CSE indicated that the student had "never attended a comprehensive therapeutic program to help meet his needs in a less restrictive setting" (*id.*).

The June 2020 CSE recommended the 8:1+1 special class in the Riverview Program for the 2020-21 school year (Joint Exs. 35 at p. 1; 36 at pp. 1, 10). Additionally, the June 2020 CSE recommended two 30-minute sessions per week of individual psychological counseling services, one 30-minute session per week of small group (5:1) psychological counseling services, and one 30-minute session per month of parent counseling and training, (Joint Ex. 36 at pp. 1, 10). Further, the June 2020 CSE recommended supplementary aids and services of positive reinforcement plan, refocusing, redirection, special seating, breaks, modified curriculum, and support for transitions (*id.* at pp. 10-11). In addition, the student was recommended for 12-month services to help the student transition to the Riverview program for the 2020-21 school year (Tr. pp. 430, 450, 598; Joint Exs. 35 at p. 3; 36 at pp. 11-12). The prior written notice reflected the CSE's determination that, since the student was entering twelfth grade, it was the time for him to start to transition with the CSE's recommended supports, "family wrap around services," and a therapeutic day treatment program (Joint Ex. 35 at p. 3).

The IHO found that the CSE viewed information about the student's progress at Heritage as demonstrating that Heritage "was not enabling the Student to be successful" (IHO Decision at p. 30). However, the IHO opined that the evidence demonstrated "that Heritage [wa]s not the right residential program for the Student rather than . . . that a residential setting was not needed to address the Student's rigid thinking patterns, emotional dysregulation and tendency to 'get stuck in his own ways of understanding or perceiving situations'" (*id.*). Applying this same logic, however, the student's experiences in Heritage are not supportive of a finding that the student would benefit from a residential placement. While the June 2020 CSE may have had objective evidence that the student had demonstrated regression in a particular out-of-State residential placement separated from his family, this does not equate to objective evidence tending to support a finding that the student could not obtain educational benefit in a less restrictive setting than residential given appropriate therapeutic supports (*see M.H.*, 296 Fed. App'x at 128).

As a final point, the parents argue that the private evaluators and providers knew the student better than district staff and that, therefore, their recommendations that the student attend a residential placement should be given more weight (*see* Parent Mem. of Law at pp. 9-12, 14). Initially, although a CSE is required to consider reports from privately retained experts, it is not required to adopt their recommendations (*see, e.g., Mr. P. v. W. Hartford Bd. of Educ.*, 885 F.3d 735, 753 [2d Cir. 2018]; *G.W. v. Rye City Sch. Dist.*, 2013 WL 1286154, at *19 [S.D.N.Y. Mar. 29, 2013]; *C.H. v. Goshen Cent. Sch. Dist.*, 2013 WL 1285387, at *15 [S.D.N.Y. Mar. 28, 2013]; *T.B. v. Haverstraw-Stony Point Cent. Sch. Dist.*, 933 F. Supp. 2d 554, 571 [S.D.N.Y. 2013]; *Watson v. Kingston City Sch. Dist.*, 325 F. Supp. 2d 141, 145 [N.D.N.Y. 2004] [noting that even if a district relies on a privately obtained evaluation to determine a student's levels of functional performance, it need not adopt wholesale the ultimate recommendations made by the private evaluator], *aff'd*, 142 Fed. App'x 9 [2d Cir. July 25, 2005]). The district cannot be faulted for spending fewer hours with the student than the private providers given the parents' choice to place the student privately and, generally, judgments of district staff may be afforded some amount of deference (*see Lessard v. Wilton-Lyndeborough Coop. Sch. Dist.*, 592 F.3d 267, 270 [1st Cir. 2010] [noting that "the underlying judgment" of those having primary responsibility for

formulating a student's IEP "is given considerable weight"]; J.E. & C.E. v. Chappaqua Cent. Sch. Dist., 2016 WL 3636677, at *16 [S.D.N.Y. June 28, 2016], aff'd, 2017 WL 2569701 [2d Cir. June 14, 2017], citing E.S. v. Katonah-Lewisboro Sch. Dist., 742 F. Supp. 2d 417, 436 [S.D.N.Y. 2010] ["The mere fact that a separately hired expert has recommended different programming does nothing to change [the] deference to the district and its trained educators"], aff'd, 487 Fed. App'x 619 [2d Cir. July 6, 2012]; Z.D. v. Niskayuna Cent. Sch. Dist., 2009 WL 1748794, at *6 [N.D.N.Y. June 19, 2009] [explaining that deference is frequently given to the school district over the opinion of outside experts]). Therefore, while the parents' position is understandable, for the reasons set forth above, the June 2020 CSE's recommendation for a therapeutic day program was appropriate even though it was not a residential placement as recommended by the outside professionals (see MN, 2020 WL 7496435, at *14 [upholding a finding that a therapeutic day program was appropriate for a student, despite "multiple private experts who recommended a residential placement"]).

Based on the foregoing, the evidence in the hearing record does not support the IHO's finding that a residential placement was necessary to address the areas of need that he identified. Rather, taking into account LRE considerations, the information available to the committee supported the June 2020 CSE's decision to continue the recommendation that the student attend the 8:1+1 special class in the BOCES Riverview program with counseling services and other supports. Accordingly, as with the 2019-20 school year, the evidence in the hearing record does not support the IHO's determination that the district failed to offer the student a FAPE in the LRE for the 2020-21 school year.

VII. Conclusion

Having determined that the evidence in the hearing record does not support the IHO's determination that the district failed to offer the student a FAPE for the 2019-20 and 2020-21 school years, the necessary inquiry is at an end and there is no need to reach the issue of whether Heritage was an appropriate unilateral placement for the student or whether equitable considerations support the parents' request for relief (Burlington, 471 U.S. at 370).

I have considered the remaining contentions and find it is unnecessary to address them in light of my determinations above.²²

THE APPEAL IS SUSTAINED.

THE CROSS-APPEAL IS DISMISSED.

IT IS ORDERED that the IHO's decision dated January 27, 2021, is modified by reversing that portion which found that the district failed to offer the student a FAPE for the 2019-20 and

²² In particular, having determined that the district offered the student a FAPE for the 2019-20 and 2020-21 school years, it is unnecessary to address the parents' cross-appeal or their request that additional evidence be considered or heard related thereto. It is also unnecessary to address the district's argument that the parent's cross-appeal should be rejected for failure to comply with the practice regulations.

2020-21 school years and ordered the district to fund a portion of the costs of the student's tuition, costs and transportation expenses at Heritage for the 2019-20 and 2020-21 school years.

Dated: **Albany, New York**
 April 19, 2021

SARAH L. HARRINGTON
STATE REVIEW OFFICER