



The University of the State of New York

The State Education Department

State Review Officer

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No. 21-080

Application of a STUDENT WITH A DISABILITY, by her parent, for review of a determination of a hearing officer relating to the provision of educational services by the New York City Department of Education

Appearances:

Ratcliff Law, PLLC, attorneys for petitioner, by Jennifer Ratcliff, Esq.

Judy Nathan, Interim Acting General Counsel, attorneys for respondent, by Nathaniel Luken, 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 parent) appeals from the decision of an impartial hearing officer (IHO) which determined that the respondent (the district) did not violate its child find obligations for the 2016-17 or 2017-18 school years and that the educational program and services that the district's Committee on Special Education (CSE) had recommended for the student for the 2018-19 school year were appropriate and, therefore, denied the parent's request to be reimbursed for the costs of her daughter's tutoring expenses, as well as the cost of private evaluations, and her request for compensatory education. The appeal must be dismissed.

II. Overview—Administrative Procedures

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

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

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

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

III. Facts and Procedural History

The detailed facts of this matter and the student's earlier educational history will be discussed below. Briefly, the student attended a nonpublic elementary school through fifth grade, and a district middle school for the 2015-16 school year (sixth grade) where she received accommodations (see Parent Ex. D at pp. 1-2; Dist. Ex. 3 at p. 2). The student continued to attend the district middle school for the 2016-17 school year with accommodations, and during that school year the parent reported that the student's grades "went down" (see Parent Exs. D at p. 2; LL at p. 1; Dist. Ex. 3 at p. 2). In August 2017, the parent requested that the district conduct an

evaluation to determine "whether [the student] require[d] special education services" and convene a meeting to update the student's accommodation plan (Parent Exs. B; AA).

The student attended the district public middle school for the 2017-18 school year (eighth grade) and worked with a private math tutor, a private executive functioning coach, and a private psychotherapist outside of school (see Parent Ex. D at pp. 1, 2, 6). In fall 2017, the district conducted evaluations of the student and a CSE convened for an initial review in December 2017, at which time the CSE determined that the student was not eligible for special education services (see Parent Ex. I; Dist. Exs. 3; 7; 9; 17). Specifically, the December 2017 CSE found that the student was "able to fully access the general education curriculum" and that her areas of weakness did "not appear to significantly impact classroom performance" (Dist. Ex. 9 at p. 6). During the meeting, the parent shared that the private services that the student received factored into the student's ability to meet standards and that "without them [the student] would struggle a lot more in the school setting" (id. at p. 5). The parent expressed her belief that "special education services and supports [we]re warranted" (id.).

In an email to the district dated January 24, 2018, the parent requested that the district re-evaluate the student and set forth questions regarding an agreed upon "new eligibility meeting" for the student (Parent Ex. WW at pp. 1-4). The parent specifically requested that executive functioning testing, visuospatial/visuoperceptual testing, in depth written expression testing, reading comprehension, and a full administration of the Wechsler Individual Achievement Test (WIAT) be conducted (id. at p. 2). Thereafter, the district completed a February 9, 2018 social history update, a March 27, 2018 classroom observation, and a March 2018 psychoeducational evaluation with a report dated April 11, 2018 (Dist. Exs. 12; 16; 18).¹

On April 18, 2018, a CSE convened to conduct a second initial review (Parent Ex. L). Having found the student eligible for special education as a student with an other health-impairment, the CSE developed an IEP with an implementation date of May 2, 2018 (id. at p. 1).² The CSE recommended that the student receive two weekly periods of special education teacher support services (SETSS) for planning, organization, and time management in a group, as well as supports for the management needs (relating to the student's environment, instruction, and independent work and projects, and relating to consultation between teachers and the parent) and testing accommodations (time and a half, small group, movement breaks if requested) (id. at pp. 1, 4-5, 10-11). According to the IEP, the CSE recommended SETSS because the student's executive functioning deficits affected her work and school performance and the parent had "been providing varied supports outside of school for an extended period of time to address these difficulties" (id. at p. 15). The CSE rejected integrated co-teaching (ICT) services or "more restrictive programs" because the student did not need support for skills taught within the curriculum (id.).

¹ In a letter dated March 12, 2018, the student's private tutor identified several of the student's strengths and weaknesses and identified suggestions for academic supports from which the student would benefit (Parent Ex. K).

² The student's eligibility for special education and related services as a student with an other health-impairment is not in dispute (34 CFR 300.8[c][9]; 8 NYCRR 200.1[zz][10]).

The student attended a district magnet high school for the 2018-19 school year (ninth grade) (Dist. Ex. 43; see Parent Ex. MM). By email dated August 30, 2018, the parent requested a CSE meeting to review the student's IEP (Parent Ex. N at p. 3). In a response email dated September 5, 2018, the student's special education teacher indicated that the student's IEP needed to be amended to provide a "minimum of three hours of SETSS per week" in academic subject areas, which the teacher indicated were State requirements (id. at p. 2). A meeting for September 27, 2018 was proposed and the parent agreed (see id. at p. 1). The student's IEP was amended to adjust supports for the student's management needs and changed the student's SETSS to five periods weekly in English language arts (ELA) (compare Parent Ex. O at pp. 7, 13, with Parent Ex. L at pp. 4-5, 10).^{3, 4}

A CSE convened on December 7, 2018 upon parent request (Tr. p. 175; Parent Ex. Q at p. 20); however, it does not appear that a revised IEP was developed at that meeting (see Tr. pp. 175, 177).⁵

On April 12, 2019, a CSE convened to conduct the student's annual review and developed an IEP with an implementation date of April 30, 2019 (see Parent Ex. T). The April 2019 CSE continued the recommendation for five periods per week of SETSS (compare Parent Ex. T at p. 10, with Parent Ex. Q at p. 16). According to the IEP, the parent provided the district with a response dated April 18, 2019, which was incorporated into the April IEP (Parent Ex. T at p. 14).⁶ The parent believed that the April 2019 CSE meeting was flawed as the CSE did not review program or service recommendations or review the student's progress towards her annual goals (id.). The parent also expressed her view that the CSE disregarded the views of the student's private tutors (id.).

In a letter dated June 24, 2019, the parent requested an assistive technology evaluation of the student (Dist. Ex. 29). Thereafter, the district conducted an assistive technology evaluation on July 31, 2019 and an assistive technology trial period plan was developed for the student's use of a tablet computer (Dist. Exs. 35-36). On August 8, 2019, the student underwent audiological and auditory processing evaluations (Dist. Ex. 37-38).⁷

³ The hearing record contains parent and district copies of the student's IEPs, which are similar (compare Parent Exs. O, T, U, and FF, with Dist. Ex. 22, 24, 26, and 33). For purposes of this decision, the parent exhibits are cited except in the instances where the district exhibits appear more complete or set forth a date that might be lacking from the parent's copy.

⁴ The amended IEP does not reflect a revised meeting date (see Parent O at p. 17; Dist. Ex. 22 at p. 13); however, the SETSS teacher testified that district exhibit 22 was the IEP generated at the meeting held in September 2018 (Tr. pp. 159-61). The IEP will hereinafter be referred to as the September 2018 IEP and the district exhibit will be cited.

⁵ The IEP in evidence that is described as the December 2018 IEP was overwritten with information that post-dates it and does not appear to be a document generated at the December 2018 CSE meeting (Parent Ex. Q at pp. 1, 20).

⁶ It appears that the parent's written response was added to the April 2019 IEP.

⁷ The CSE reconvened on September 9, 2019 at the start of tenth grade and recommended that the student attend

A. Due Process Complaint Notice

In a due process complaint notice dated October 1, 2019, the parent alleged that the district failed to offer the student a FAPE for the 2016-17, 2017-18, and 2018-19 school years (Parent Ex. A). The parent also asserted that the district violated section 504 of the Rehabilitation Act of 1973 ("section 504"), 29 U.S.C. § 794(a) (*id.* at p. 2). The parent contended that, during the school years at issue, she, "on numerous occasions, requested special education evaluations and interventions" for the student (*id.* at pp. 2-3). The parent alleged that the district's response was "untimely or non-existent," notwithstanding that the district had "multiple teachers' reports, referrals, clinical recommendations, [and] evaluations" that recommended supports and accommodations for the student due to her disabilities (*id.* at p. 3). According to the parent, she again referred the student for special education in August 2017 but the student "was not provided with an IEP until April 18, 2018" (*id.* at p. 4).

Regarding the student's initial evaluation during the 2017-18 school year and the December 2017 CSE's ineligibility determination, the parent asserted that the evaluations conducted by the district were incomplete and/or inaccurate and that the CSE meeting was untimely (Parent Ex. A at pp. 5-6). The parent alleged that she was denied the opportunity to participate in the meeting, and that the CSE failed to consider the student's needs, did not discuss programming options for the student, and predetermined the outcome of the meeting (*id.* at p. 6). Further, the parent contended that CSE "did not recommend an IEP or any other interventions, supports or services, including Academic Intervention Services (AIS) or even at risk services" and did not provide the parent with prior written notice stating the CSE's rationale for finding the student ineligible for special education (*id.*).

Specific to the April 2018 CSE, which found the student eligible for special education, the parent alleged that the meeting was untimely and that the committee was improperly composed and "refused to discuss a variety of supports" for the student (Parent Ex. A at pp. 7). The parent alleged that the April 2018 IEP "was deficient and not reasonably calculated to meet [the student's] needs," having only recommended SETSS twice weekly along with supports for the student's management needs, accommodations, and modifications (*id.* at pp. 3-4, 7). The parent asserted that the CSE failed to recommend academic support across subjects, related services, or "transitional support," or address the student's social/emotional needs (*id.* at p. 7). The parent also contended that many of the April 2018 IEP supports and services "were not provided, fully implemented nor monitored" and that she had never received annual goal progress reports from the district (*id.* at pp. 3, 4). In particular, she indicated that, although the IEP had an implementation date of May 2, 2018, the student did not receive any of the services, supports, or modifications during the remainder of the 2018-19 school year (*id.* at pp. 7-8).

a general education class with ICT services for math five periods per week and receive one 40-minute session per month of individual counseling services (Parent Ex. FF at p. 15; *see* Parent Ex. Y at p. 2). The CSE also recommended that the student's ELA and science teachers receive support from a special education teacher to implement instructional strategies (Parent Ex. FF at p. 15). In a letter dated September 16, 2019, the parent indicated that she disagreed with the September 2019 CSE's recommendations and notified the district of her intent to obtain one-to-one tutoring support for the student and seek reimbursement for the costs thereof from the district (Parent Ex. Y).

Turning to the 2018-19 school year, the parent asserted that she requested that the CSE reconvene prior to the school year and review the student's IEP (Parent Ex. A at p. 8). The parent alleged no CSE meeting took place but, instead, she met with a special education teacher and that, in an amendment, the student's IEP was changed to adjust the SETSS recommendation to comport with the school's offerings and to include new goals without "explanation or discussion" (id.). She alleged that the goals were not specific or meaningful and that the IEP still did not include transition goals (id.). In addition, the parent indicated that the district did not provide her with prior written notice regarding the amended IEP (id.).

As for the December 2018 CSE meeting, the parent alleged that the committee was not properly comprised, that the CSE did not discuss or provide any teacher reports or vocational assessments to review in developing the IEP, and that the CSE failed to consider the input of the parent or the student's outside specialists and/or discuss any program options "other than SETSS/Resource Room five times per week in an unspecified group," such as ICT services, counseling or related services, or supports for school personnel (Parent Ex. A at pp. 9-10). The parent alleged that the CSE predetermined the recommendations for the student and took issue with the April 30, 2019 implementation date of the resultant IEP (id. at p. 9). The parent indicated that the December 2018 CSE removed the annual goals added to the IEP earlier in the school year without discussion or indication that the student had achieved the goals (id.). As for the goals included on the IEP, the parent asserted that they were not measurable, specific, or appropriate (id.). Overall, the parent asserted that the December 2018 IEP "was not designed to provide any educational benefit or support" (id. at p. 10). The parent also alleged that the district failed to provide her with prior written notice after the meeting (id. at p. 9).

Regarding implementation of the student's IEPs during the 2018-19 school year, the parent alleged that "[n]o special education services, management needs, classroom modifications or accommodations were put into place for [the student] for a substantial period of time" and the district did not provide the parent with any progress reports for the entire school year (Parent Ex. A at pp. 8-9, 10).

The parent asserted that the student struggled during the 2018-19 school year and that, despite her request that "a full committee" convene and review the student's progress, the CSE that convened in April 2019 did not have a vocational assessment or progress reports and did not make any changes to the student's IEP (Parent Ex. A at p. 10). The parent also indicated that the district provided her with a prior written notice with an incorrect meeting date (id.).

Turning to the June 2019 CSE, the parent asserted that, again, no progress reports were discussed and that the CSE indicated it was "not able to provide one-on-one tutoring or teaching support" on the student's IEP even though committee members "agreed that [the student] needed it" (Parent Ex. A at p. 11). The parent also alleged that, although the CSE indicated it would reconsider ICT services for the student, it concluded that such a decision "would have to wait until September 2019" (id.). The parent contended that the June 2019 IEP "continued to have the same annual IEP goals," which were not measurable or accurate (id.).

Finally, the parent alleged that, despite recommendations for assistive technology in a July 2019 evaluation, the district never provided a device or assistive technology services to the student (Parent Ex. A at p. 11).

For relief, the parent requested that the district reimburse her for the costs of expenses paid for "one-one-one teaching support, evaluations, assessments and monitoring" (Parent Ex. A at p. 12). In addition, the parent sought compensatory education consisting of 745 hours of 1:1 tutoring outside of school from a provider of the parent's choosing (id. at pp. 11-12). The parent also requested that the district be required to amend the student's IEP to include ICT services for science, math, and ELA and that the district provide the student with an assistive technology device and support (id. at p. 12). Finally, the parent requested district funding of an independent speech-language evaluation (id.).

B. Impartial Hearing Officer Decision

An impartial hearing convened on November 26, 2019 and concluded on July 22, 2020, after five days of proceedings (see Tr. pp. 1-810). In a decision dated February 8, 2021, the IHO found that the district met its burden to prove that it did not deny the student a FAPE for the 2016-17 and 2017-18 school years in the absence of finding the student eligible for special education services (IHO Decision at p. 20). The IHO credited the testimony of the district regular education teacher that the student did well during seventh and eighth grade years and that the student's 504 plans "met her needs" without special education services (id.).

Regarding the 2018-19 school year, the IHO determined that the parent had the opportunity to participate during CSE meetings, that "appropriate evaluative information was considered in creating the IEPs," annual goals were appropriate, and "there were no substantive or procedural errors" that would support a finding that the district denied the student a FAPE (IHO Decision at p. 22). In particular, the IHO found that the April 2018, September 2018, and April 2019 IEPs provided the student with programming and a placement that was likely to produce progress (id. at pp. 21-22). The IHO noted that, although the student "had a more challenging time in the [ninth] grade," this was not "clearly attributable to lack of services to address her special education needs" (id. at p. 22). Rather, the IHO credited the testimony of the assistant principal that the particular magnet high school that the student attended was "rigorous" (id.).

Given the district's agreement with the parent's request, the IHO ordered the district to fund a speech-language independent educational evaluation (IEE) (IHO Decision at pp. 22, 23). The IHO denied the remainder of the parent's requested relief (id. at p. 22).

IV. Appeal for State-Level Review

The parent appeals and argues that the IHO erred in finding that the district did not deny the student a FAPE for the 2016-17, 2017-18, and 2018-19 school years. Initially, the parent argues that the IHO's decision was not well reasoned and that the IHO erred in crediting and relying on the testimony of the district's witnesses and in failing to weigh conflicting evidence.⁸

Regarding the 2016-17 school year, the parent asserts that the district waived any opportunity to argue that the parent's claims were barred by the IDEA's statute of limitations and that, in any event, the claims were not barred. The parent alleges that the district failed to convene a CSE meeting despite that the parent alerted the district to the student's special education needs

⁸ As I have reviewed the hearing record in its entirety, it is unnecessary to separately discuss the parent's allegations regarding the IHO's credibility determination or the weight afforded the testimony.

and that the district did not provide the parent with notice of her due process rights. As to the merits, the parent argues that the IHO erred by failing to address the parent's specific claims relating to the 2016-17 school year. The parent contends that, despite evidence that the student was struggling and that the parent requested special education services for the student and shared private evaluations with the district, the district "failed to identify, refer, evaluate, or develop an IEP for [the student]." The parent also asserts that, contrary to the IHO's finding, the student did not have a 504 plan in place during the 2016-17 school year.

As for the 2017-18 school year, the parent argues that the student continued to struggle and that the student's October 2017 504 plan was not sufficient to meet her needs. The parent alleges that the IHO erred in relying on the testimony of the district advisory teacher to the contrary. Further, the parent asserts that the December 2017 CSE inappropriately found the student ineligible for special education.

Next, the parent alleges that the recommended program of SETSS "was nothing more than a study hall," whereas the student required "1:1 specialized instruction" in all subjects.

The parent asserts that the student did not make progress during any of the school years at issue and that the IHO erred by finding that the student was doing well based on the district's "self-serving and unsubstantiated" claims to this effect and without taking into account that the student had been receiving private 1:1 tutoring at the parent's expense in order to achieve her grades. The parent argues that the student was "a twice-exceptional student" and that, therefore, passing grades for her would not meet "the FAPE standard."

As to relief, the parent argues that the 1:1 tutoring that the student received during the 2016-17, 2017-18, and 2018-19 school years was appropriate and necessary to allow the student to make progress and that the IHO erred in failing to order the district to reimburse the parent for the costs thereof, as well as the costs of private evaluations obtained by the parent. The parent also argues that the student is entitled to 745 hours of 1:1 tutoring as compensatory education. In addition, the parent asserts that the student's IEP should be amended to include ICT services, as well as assistive technology training.

In an answer, the district responds to the parent's allegations and argues that the IHO's decision should be upheld in its entirety.

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]).⁹

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. Scope of Review

Before addressing the merits, a determination must be made regarding which claims are properly before me on appeal. State regulations governing practice before the Office of State Review require 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]). Further, an IHO's decision is final and binding upon the parties unless appealed to a State Review Officer (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]). Generally, the failure to comply with the practice requirements of Part 279 of the State regulations may result in the rejection of the submitted documents or a determination excluding issues from the scope of review

⁹ 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).

on appeal (8 NYCRR 279.8[a]; see Davis v. Carranza, 2021 WL 964820, at *12 [S.D.N.Y. Mar. 15, 2021] [upholding an SRO's conclusions that several claims had been abandoned by the petitioner]; M.C. v. Mamaroneck Union Free Sch. Dist., 2018 WL 4997516, at *23 [S.D.N.Y. Sept. 28, 2018] [upholding dismissal of allegations set forth in an appeal to an SRO for "failure to identify the precise rulings presented for review and [failure] to cite to the pertinent portions of the record on appeal, as required in order to raise an issue" for review on appeal]).

Here, the parent's request for review sets forth eleven numbered issues for review. The parent includes numbered and lettered paragraphs, with the first numbered paragraph under each bolded heading articulating the issue for review and the lettered subparagraphs thereunder elaborating on that issue. For example under the heading "First Issue for Review," paragraph one states that "The IHO's Decision Should Not Be Afforded Any Deference" and paragraphs "a" through "d" thereunder detail the parent's arguments regarding the quality of the IHO's decision (see Req. for Rev. at p. 1). Thereafter, the second issue involves the parent's argument about the statute of limitations, the third relates to the parent's child find claim for the 2016-17 school year, the fourth relates to the sufficiency of the October 2017 504 plan, the fifth relates to the adequacy of the "'SETSS' program" for the student during the 2018-19 school year, the sixth pertains to the student's progress during all three school years, and the seventh through eleventh pertain to the relief sought by the parent (id. at pp. 2-10).

Review of the numbered issues set forth in the parent's request for review reveals that the parent has not appealed the IHO's determinations that the parent had the opportunity to participate during CSE meetings, that the CSEs had appropriate evaluative information, and that annual goals included in the IEPs were appropriate (IHO Decision at p. 22). As such, the IHO's findings pertaining to the parent's participation, the sufficiency of the evaluative information, and the appropriateness of the annual goals 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]). Further, although the subparagraph "e" under issue six relating to the student's progress during all three school years alludes to the district's failure to "refute the evidence establishing that [the student's] IEPs were not fully implemented," I find that this is not sufficient to raise an issue relating to implementation of the student's IEPs on appeal as it is not separately numbered and does not state that the IHO erred in failing to address the parent's IEP implementation claims (see Request for Rev. at p. 7).¹⁰

As for the fourth numbered issue, the parent argues that the student's October 2017 504 plan was inadequate to meet the student's needs during the 2017-18 school year (see Parent Mem.

¹⁰ In addition to the extent the parent argues more directly in her memorandum of law that the district failed to implement the student's SETSS during the 2018-19 school year (see Parent Mem. of Law at p. 17), a memorandum of law is not a substitute for a pleading (see 8 NYCRR 279.4, 279.6; see also Davis, 2021 WL 964820, at *11; Application of a Student with a Disability, Appeal No. 19-021; Application of the Dep't of Educ., Appeal No. 12-131). State regulations direct that "[n]o pleading other than a request for review, answer, answer with cross-appeal, or answer to a cross-appeal, will be accepted or considered" by an SRO, "except a reply to any claims raised for review by the answer or answer with cross-appeal that were not addressed in the request for review, to any procedural defenses interposed in an answer, answer with cross-appeal or answer to a cross-appeal, or to any additional documentary evidence served with the answer or answer with cross-appeal" (8 NYCRR 279.6[a]). Thus, any arguments included solely within the memorandum of law have not been properly raised and will not be considered or addressed in this decision.

of Law at pp. 15-16). To the extent that the parent's argument attempts to raise the appropriateness or implementation of the 504 plan as an independent issue for review on appeal, rather than as a question of fact underlying her claims under the IDEA for the 2017-18 school year, discussed below, State law does not make provision for review of section 504 claims through the State-level appeals process authorized by the IDEA and the Education Law (see Educ. Law § 4404[2] [providing that SROs review IHO determinations "relating to the determination of the nature of a child's handicapping condition, selection of an appropriate special education program or service and the failure to provide such program"]). Courts have also recognized that the Education Law makes no provision for State-level administrative review of IHO decisions with regard to section 504 (see A.M. v. New York City Dep't of Educ., 840 F. Supp. 2d 660, 672 & n.17 [E.D.N.Y. 2012] [noting that "[u]nder New York State education law, the SRO's jurisdiction is limited to matters arising under the IDEA or its state counterpart"], aff'd, 513 Fed. App'x 95 [2d Cir. 2013]; see also F.C. v. New York City Dep't of Educ., 2016 WL 8716232, at *11 [S.D.N.Y. Aug. 5, 2016]). Therefore, to the extent the parent attempts to raise issues under section 504, I have no jurisdiction to review them, and such claims will not be further addressed.

Finally, although the parent raises the operation of the statute of limitations as the second issue for review, it was the district that was aggrieved by the IHO's failure to address its defense.¹¹ The district has not cross-appealed from the IHO's failure to find that the parent's claims pertaining to the 2016-17 school year were barred by the IDEA's statute of limitations and, therefore, has abandoned the defense on appeal.

B. 2016-17 School Year: Child Find

The parent argues that the district failed to identify, refer, or evaluate the student during the 2016-17 school year despite evidence in the hearing record that the student was struggling academically and the parent requested special education services for the student and provided the district with private evaluation reports.¹²

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]; E.T., 2012 WL 5936537, at *11; see 20 U.S.C.

¹¹ During the impartial hearing, the district raised the defense of statute of limitations (see Tr. pp. 71-72).

¹² Contrary to the district's argument that the parent did not raise a claim relating to child find for the 2016-17 school year as an issue for the impartial hearing, a review of the due process complaint notice reveals that the parent sufficiently alleged that the district failed to initiate a referral of the student for special education during the 2016-17 school year despite the parent's requests for evaluations and interventions (Parent Ex. A at pp. 2-3).

§ 1412[a][10][A][ii]; see also 8 NYCRR 200.2[a][1], [7]; New Paltz Cent. Sch. Dist. v. St. Pierre, 307 F. Supp. 2d 394, 400 n.13 [N.D.N.Y. 2004]). The "child find" requirements apply to "children who are suspected of being a child with a disability . . . and in need of special education, even though they are advancing from grade to grade" (34 CFR 300.111[c][1]; see 8 NYCRR 200.2[a][1], [7]; D.K. v. Abington Sch. Dist., 696 F.3d 233, 249 [3d Cir. 2012]; J.S. v. Scarsdale Union Free Sch. Dist., 826 F. Supp. 2d 635, 660 [S.D.N.Y. Nov. 18, 2011]). To satisfy the requirements, a board of education must have procedures in place that will enable it to identify, locate, and evaluate such children (34 CFR 300.111[a][1]; 8 NYCRR 200.2[a][1], [7]).

Because the child find obligation is an affirmative one, the IDEA does not require parents to request that the district evaluate their child (see Reid v. District of Columbia, 401 F.3d 516, 518 [D.C. Cir. 2005] [noting that "[s]chool districts may not ignore disabled students' needs, nor may they await parental demands before providing special instruction"]; see also Application of the Bd. of Educ., Appeal No. 11-153; Application of a Student Suspected of Having a Disability, Appeal Nos. 11-092 & 11-094). A district's child find duty is triggered when there is "reason to suspect a disability and reason to suspect that special education services may be needed to address that disability" (J.S., 826 F. Supp. 2d at 660; New Paltz Cent. Sch. Dist., 307 F. Supp. 2d at 400 n.13, quoting Dep't of Educ., 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]).

To support her contention that the district violated its child find obligations, the parent specifically points to her provision to the district of the March 2015 private psychological evaluation report, her request for a 504 meeting in the beginning of the 2016-17 school year and the district's alleged failure to respond to that request, as well as her provision to the district of the October 2017 neuropsychological evaluation report (Req. for Rev. ¶¶ 3[b]-[c]).

The student attended a nonpublic school from first through fifth grade, where according to the parent the student exhibited "academic issues" including difficulty with math and higher-level thinking skills (see Dist. Ex. 3 at p. 2). In March 2015 during fifth grade, the parent obtained a private psychological evaluation of the student (Dist. Ex. 5). The psychologist indicated that the student had "superior intellectual skills" but exhibited symptoms of anxiety, significant problems maintaining attention at home and school, lower processing speed, and difficulty with math (id. at pp. 12-13). According to the evaluation report, the student met the criteria for diagnoses of a generalized anxiety disorder, a learning disorder (processing speed and executive function vulnerabilities), and a specific learning disorder with impairment in mathematics, as well as a rule out diagnosis of an attention deficit hyperactivity disorder (ADHD) (id. at p. 13). The psychologist

recommended specialized assistance in math and academic accommodations to give the student "the opportunity to achieve a level of academic success that [wa]s consistent with her intellectual ability" (id. at pp. 13-14, 16). The private psychologist did not recommend that the student be found eligible for special education as a student with a disability and nothing in the evaluation, on its own, would have warranted a referral for the same (see generally Dist. Ex. 5).

In an email to the principal of the middle school, dated April 17, 2015, the parent asked to meet to discuss the private evaluation results and seek "guidance on what kinds of support might be available to [the student] in public middle school" (Parent Ex. OOO; see Tr. pp. 635-38). In addition, the parent testified that she shared the private evaluation with the district so that the student's teachers could "understand [the student's] learning profile" and to be sure that teachers did not "misinterpret" the student's behaviors such as "talking too much or talking when she wasn't supposed to" or judge her character based thereon (Tr. pp. 635-38; see Parent Ex. OOO). The parent testified that, as a result of the meeting with the principal, it was determined that the student would be placed in a classroom with "two teachers" (Tr. p. 638). On August 14, 2015, the student's physician completed a form requesting section 504 accommodations for the student, including double time for testing (Parent Ex. W).

The student attended a district public middle school for the 2015-16 school year (sixth grade) as a regular education student in a class where ICT services were provided (see Parent Ex. D at p. 1; Dist. Ex. 3 at p. 2). While a 504 accommodation plan for the 2015-16 school year was not included in the hearing record, other evidence reflects that a 504 plan was put in place (see Parent Ex. D at p. 2; Dist. Ex. 3 at p. 2).¹³

The student attended the district public middle school for the 2016-17 school year (seventh grade) in general education classes (see Parent Ex. D at p. 2; Dist. Ex. 3 at p. 2). The only evidence of a parent communication around the beginning of the 2016-17 school year is the parent's testimony that she requested that the district provide the student with section 504 accommodations (Tr. pp. 645-48). Even assuming that this request was in writing, the parent's request for accommodations for the student pursuant to section 504 would not, on its own, trigger the district's obligation to evaluate the student to determine her eligibility for special education under the IDEA (see Durbrow v. Cobb County Sch. Dist., 887 F.3d 1182, 1193 [11th Cir. 2018] [noting that even if the parents in had sought help or some other form of testing, "such as testing for a § 504 Plan," such requests would not "amount to a parental request for an IDEA evaluation"]).¹⁴ As with the 2015-16 school year, the hearing record does not include an accommodation plan in place for the student during the 2016-17 school year; however, according to other evidence in the hearing

¹³ According to the parent, a 504 plan was put into place for the 2015-16 school year, but no meeting was held, the school did not provide several accommodations that the parent requested, and the plan was unsigned (see Parent Ex. LL at p. 1). Again, the district's compliance with section 504 procedures is beyond the purview of the undersigned's jurisdiction.

¹⁴ 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]). State regulations do not prescribe the form that a referral by a parent must take but do require that it be in writing (8 NYCRR 200.4[a]). It has been held "that general expressions of concern" cannot be deemed to "constitute a 'parental request for evaluation' under the plain terms of the statute" (D.K., 696 F.3d at 247 n. 5 [emphasis in the original], citing 20 U.S.C. § 1415[d][1][A][i]).

record, the student had a 504 plan with classroom and testing accommodations (see Tr. pp. 89-90; Parent Exs. D at p. 2; LL at p.1; Dist. Ex. 3 at p. 2).¹⁵

According to the parent, the student's "grades went down" during the 2016-17 school year (see Parent Ex. D at p. 2; Dist. Ex. 3 at p. 2). The parent testified that during seventh grade, she received several communications from the student's teachers "raising the same kind of concerns about . . . [the student] being off task, not turning in homework, not being able to focus to . . . do the work in class, [and] having side conversations" (Tr. p. 648). The parent also indicated that, academically, the student had "deteriorated" and that the student's English teacher had reached out to her to express concerns about the student's reading comprehension and written expression (Tr. pp. 648-49). The parent also recalled that the student's scores on math and English tests had gone down that year (Tr. p. 649). In contrast, the student's advisory teacher during the 2016-17 school year testified that the student "generally did well during that school year across subject areas" (Tr. pp. 91-99). Further, according to the evidence in the hearing record, the student achieved grades in the "[h]igh threes and fours" and received a score of 2.97 on the New York State Mathematics exam and a 4.06 on the New York State ELA exam in spring 2017 (Tr. p. 93; Dist. Ex. 9 at p. 3).

In a letter to the principal of the student's middle school dated August 4, 2017, the parent stated her concern about the student, including "in the areas of her weaknesses in attention and focus, anxiety, weaknesses in executive functioning, organization, study skills, note-taking, processing speed, math computations and math applications, reading comprehension, and, very importantly, being able to discern themes, main ideas and getting the 'big picture' in all subjects" (Parent Ex. B). The parent requested that the district conduct an evaluation to determine "whether [the student] require[d] special education services" (id.). Specifically, the parent requested completion of an educational assessment form, a formal observation, and a psychological evaluation (id.). The parent further requested that the CSE consider the private evaluation "when determining eligibility for special education services" (id.).^{16, 17}

The student attended the district public middle school for the 2017-18 school year (eighth grade) in a general education class with ICT services as a regular education student (see Parent Ex. D at p. 2). The student worked with a private math tutor, a private executive functioning coach, and a private psychotherapist outside of school (see id. at p. 6).

In a prior written notice dated September 8, 2017, the district proposed an initial evaluation of the student to include a social history, a psychological evaluation, a physical examination, and

¹⁵ As with the 2015-16 school year, the parent indicated that a 504 plan was put into place for the 2016-17 school year but that no meeting was held and the plan was unsigned (see Parent Ex. LL at p. 1).

¹⁶ In an email dated September 8, 2017, a district social worker stated that she was "aware that [the parent] want[ed] an evaluation for [the student] ASAP" but indicated she did not have a letter from the parent requesting the evaluation (Dist. Ex. 2 at p. 1). The parent responded and provided the social worker with the August 4, 2017 letter to the principal (id. at pp. 1-2).

¹⁷ In a second letter to the principal with the same date, the parent requested a meeting "as soon as possible" to update the student's section 504 accommodation plan, noting that an initial meeting had never been held (Parent Ex. AA). The parent requested that all of the student's eighth grade teachers attend the meeting, as well as the educational consultant that the parent had hired (id.). The parent also stated that she believed it would be beneficial for the student to attend a class with ICT services for the upcoming school year (id.).

an observation (Parent Ex. C). The district completed a September 11, 2017 social history update, a September 13, 2017 level one vocational interview with the parent as the informant, an October 30, 2017 psychoeducational evaluation, and an October 30, 2017 classroom observation (see Parent Ex. I; Dist. Exs. 3; 7; 17).

A section 504 accommodation plan was developed for the student at a meeting on October 6, 2017 (Parent Ex. X). Accommodations recommended included double time for tests and classwork, a separate location for tests or work, preferential seating, structures for organization and work (i.e., color coded folders, assignment notebook, graphic organizers, outlines), organization checklists, frequent check-ins, study guides, wait time to process incoming information, movement breaks, provision of teacher notes, specific problem solving strategies in math, and scaffolding (Parent Ex. X at pp. 2-3).¹⁸

The parent obtained a private neuropsychological evaluation of the student, which was conducted on October 27, 2017 (Parent Ex. D). The neuropsychologist noted that the student exhibited "vulnerabilities with attention and executive function" that "contribute[d] to variable performance on tasks and interfere[d] with optimal performance in school" (id. at p. 6). The neuropsychologist found that the student met the criteria for diagnoses of an unspecified anxiety disorder and ADHD, inattentive subtype (id. at p. 7). The neuropsychologist recommended that the student attend a structured class setting with a low student to teacher ratio and opportunities for 1:1 support with executive functioning and math, participate in a study skills class, receive support from a "learning specialist," and receive several accommodations/modifications (id. at pp. 7-10).

In reviewing whether the district satisfied its child find obligations, the child find inquiry "must focus on what the [d]istrict knew and when" (K.B., 2019 WL 5553292, at *8, quoting J.S., 826 F. Supp. 2d at 652). Overall, the evidence in the hearing record prior to the parent's August 2017 referral for special education demonstrates that the district properly responded to information available to it regarding the student and requests made by the parent. Neither the March 2015 psychological evaluation nor the parent's request for 504 accommodations for the student were sufficient to trigger a suspicion that the student needed special education under the IDEA to address her disability. While the parent disputes the adequacy of or the actual development of 504 plans for the student—which, as noted above are questions outside of the undersigned's jurisdiction to review—the district's pursuit of accommodations pursuant to section 504 was an appropriate response to the information before it. Finally, to the extent the parent cites the October 2017 private neuropsychological evaluation as a document that should have triggered the district's child find violation, this report was generated after the parent had already referred the student for special education and the district had initiated its evaluation procedures. Thus, from the beginning of the 2016-17 school year until the parent referred the student for an evaluation for special education in August 2017, there is no evidence that the district overlooked clear signs of disability or was negligent in failing to order testing.

¹⁸ In an October 9, 2017 letter, a private psychiatrist indicated he had examined the student and found that she met the criteria for diagnoses of a generalized anxiety disorder and unspecified ADHD (Dist. Ex. 13). The psychiatrist opined that the student would benefit from the accommodation of extra time on school testing (id.).

As a final point, the parent argues that the district never advised her of the "special education referral process" and that she did not learn of the process until a private consultant explained it to her (see Parent Mem. of Law at p. 13). However, neither IDEA nor the federal or State implementing regulations require school districts to notify all parents of students not eligible for special education regarding special education laws and practices (Letter to Siegel, 72 IDELR 221 [OSEP 2018]; see generally 34 CFR 300.111; 8 NYCRR 200.2). Accordingly, the district did not commit a procedural violation by failing to communicate the special education referral process to the parent prior to her referral of the student in August 2017.

C. 2017-18 School year: December 2017 CSE's Determination of Ineligibility and Child Find

The parent argues that the December 2017 CSE denied the student an IEP solely because of the student's good grades but failed to consider teacher reports, parent concerns, observations, and conclusions of private provider(s) and evaluator(s) that the student exhibited deficits that required special education, including "1:1 remediation." The parent contends that the fact that the April 2018 CSE found the student eligible for special education just four months later demonstrated that the December 2017 CSE's determination was flawed.

The IDEA defines a "child with a disability" as a child with specific physical, mental, or emotional conditions, including a learning disability, "who, by reason thereof, needs special education and related services" (20 U.S.C. § 1401[3][A]; Educ. Law § 4401[1]; see 34 CFR 300.308[a][1]; 8 NYCRR 200.1[zz]).

Under State and federal regulation, other health-impairment is defined as "having limited strength, vitality, or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment, that . . . [i]s due to chronic or acute health problems such as . . . attention deficit hyperactivity disorder [ADHD]" (34 CFR 300.8[c][9]; 8 NYCRR 200.1[zz][10]). The other health-impairment category also requires an examination of whether the student's condition or deficits adversely affected her educational performance (see 34 CFR 300.8[c][9][ii]; 8 NYCRR 200.1[zz][10]). Whether a student's condition adversely affects his or her educational performance such that the student needs special education within the meaning of the IDEA, is an issue that has been left for each state to resolve (J.D. v. Pawlet Sch. Dist., 224 F.3d 60, 66 [2d Cir. 2000]). Although some states elect to establish further, more explicit definitions for these terms, often through regulation or special education policy (see, e.g., Mr. I. v. Maine Sch. Admin. Dist. No. 55, 480 F.3d 1, 11 [1st Cir. 2007]; J.D., 224 F.3d at 66-67; Johnson v. Metro Davidson County Sch. Sys., 108 F. Supp. 2d 906, 918 [M.D. Tenn. 2000]), others do not and instead resolve the issue on a "case-by-case" basis (R.B. v. Napa Valley Unified Sch. Dist., 496 F.3d 932, 944 [9th Cir. 2007]; see, e.g., Yankton Sch. Dist. v. Schramm, 93 F.3d 1369, 1375-76 [8th Cir. 1996]; Greenland Sch. Dist. v. Amy N., 2003 WL 1343023, at *8 [D.N.H. Mar. 19, 2003]). Cases addressing this issue in New York appear to have followed the latter approach (Corchado v. Bd. of Educ. Rochester City Sch. Dist., 86 F. Supp. 2d 168, 176 [W.D.N.Y. 2000] [holding that each child is different and the effect of each child's particular impairment on his or her educational performance is different]; see Maus v. Wappingers Cent. Sch. Dist., 688 F. Supp. 2d 282, 294, 297-98 [S.D.N.Y. 2010] [emphasizing that educational performance is focused on academic performance rather than social development or integration]; see also C.B. v. Dep't of Educ. of City of New York, 322 Fed. App'x 20, 21-22 [2d Cir. Apr. 7, 2009]; Muller v. E. Islip Union Free Sch. Dist., 145 F.3d 95, 103-04 [2d Cir. 1998]; W.G. v. New

York City Dep't of Educ., 801 F. Supp. 2d 142, 170-75 [S.D.N.Y. 2011] [finding insufficient evidence that the student's "academic problems—which manifested chiefly as truancy, defiance and refusal to learn—were the product of depression or any similar emotional condition"]; A.J. v. Bd. of Educ., E. Islip Union Free Sch. Dist., 679 F. Supp. 2d 299, 308-11 [E.D.N.Y. 2010] [noting the difficulty of interpreting the phrase "educational performance" and indicating that it must be "assessed by reference to academic performance which appears to be the principal, if not only, guiding factor"]; Eschenasy v. New York City Dep't of Educ., 604 F. Supp. 2d 639, 649-50 [S.D.N.Y. 2009]; N.C. v. Bedford Cent. Sch. Dist., 473 F. Supp. 2d 532, 543 [S.D.N.Y. 2007], aff'd, 300 Fed. App'x 11 [2d Cir. Nov. 12, 2008]; New Paltz Cent. Sch. Dist., 307 F. Supp. 2d at 399).

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

According to a district December 4, 2017 notice of ineligibility, a CSE convened on December 4, 2017 to determine the student's eligibility for special education services (Dist. Ex. 9 at p. 1). As part of the initial evaluation process the CSE conducted an October 2017 social history, an October 2017 psychoeducational evaluation, and an October 2017 classroom observation (Dist. Exs. 9 at pp. 1-3; 10 at p. 1). The notice of ineligibility included the student's present levels of educational performance the CSE prepared for the meeting, which indicated that the CSE also considered a December 2017 teacher report and the student's grades in ELA (3.6), mathematics (3.3), social studies (3.5), and science (3.8), as well as a privately obtained October 2017 neuropsychological evaluation report and a March 2015 psychological evaluation report (Dist. Ex. 9 at pp. 1-3; 10 at p. 1).

The December 2017 notice of ineligibility present levels of performance reflected results from the October 2017 neuropsychological evaluation report, which indicated that the student's vulnerabilities with attention and executive function contributed to her variable performance on tasks and interfered with optimal performance in school, specifically due to her significant weakness in sustained attention as well as difficulties in broader executive functions such as planning, organization, and self-monitoring (Dist. Ex. 9 at p. 5). From the October 2017 neuropsychological evaluation report, the present levels of performance indicated that the student's

impairments were consistent with her diagnosis of ADHD, inattentive sub-type, and that, although the student presented with excellent verbal and problem-solving skills, her executive function difficulties significantly interfered with organized and efficient learning (*id.*). The impact of her vulnerability with executive functioning on academic work was reportedly seen in her difficulty with mathematics which relies on the ability to plan, self-monitor, and think flexibly while problem solving (*id.*). Executive function difficulties were also noted to affect the student's reading/writing due to her difficulty seeing the big picture, synthesizing information and identifying main ideas (*id.*).

According to the notice of ineligibility, October 2017 psychoeducational evaluation results indicated that the student's overall profile was in the very high range with an "overall" IQ of 128 with relative strengths in verbal comprehension, working memory and visual spatial tasks, on which she performed "solidly in the high average to extremely high range" (Dist. Ex. 9 at p. 4). The notice also indicated that the student's performance on tasks of fluid reasoning and processing speed were areas of relative weakness when compared to the rest of her profile, nonetheless the student's scores in these areas were in the high average range and better than almost 79 percent of her same age peers (*id.*).

With respect to academic achievement testing, October 2017 psychoeducational evaluation results included in the ineligibility notice present levels of performance indicated that the student's scores were in the average to very high range in the areas of reading, writing and mathematics (Dist. Ex. 9 at p. 4). Reading was reportedly a strength and the student's mathematics performance suggested abilities solidly in the average range showing a "well-developed ability to perform grade level work" (*id.*). The present levels of performance noted that, although the student's performance on mathematical fluency tasks was average, it was considered a relative weakness when compared to the student's overall profile (*id.*). Regarding written expression, the present levels of performance indicated the student performed in the very high range on spelling tasks and her skills were in the average range with respect to the essay composition task (*id.*). The notice indicated that the student was hardworking, motivated, and possessed a strong desire to achieve academically, noting that the student's "scores throughout both cognitive and academic measures suggest[ed] [that] her ability to perform grade level work [was] good," and she was "almost always performing better than same age peers" (*id.*).

The December 2017 present levels of performance contained in the ineligibility notice indicated that, according to teacher report, in mathematics the student received a 3.0 out of 4.0 on a measure of her ability to understand functions, linear relationships, and slope, which indicated the student was meeting grade level standards and that, although the student did not always "get" a topic when it was first introduced, this "[wa]s normal for many kids" and that the student persisted and quickly learned the information with the support of her peers (Dist. Ex. 9 at p. 3).¹⁹ According to the notice, in ELA the student received a 3.6 out of 4.0 which indicated she was exceeding grade level standards on a task measuring her ability to understand "various economic societies," although she struggled with evaluating arguments presented in in various economic texts (*id.* at p. 4). The present levels of performance also indicated that the student's organizational needs were supported in the ELA class but also pointed out that the student advocated for herself

¹⁹ The present levels of performance also noted the student achieved a 2.97 on the New York State Mathematics exam and a 4.06 on the New York State ELA exam in the spring 2017 (Dist. Ex. 9 at p. 3).

when she needed help, worked independently toward task completion, and was functional and effective during small groups and whole group instruction (*id.*). The student reportedly received an overall grade of 3.5 out of 4.0 on an assessment of her understanding of the Industrial Revolution in social studies, which indicated she was exceeding grade level standards although she demonstrated difficulty regarding the skills needed to create an evidence-based argument related to the curriculum topic (*id.*). Reportedly, the student was supported with graphic organizers, leveled readings, small group instruction, frequent check-ins, and clarifying instructions during her social studies class (*id.*). In science the teacher indicated that the student achieved a 3.8 out of 4.0 on a task measuring humans' impact on the environment, which was considered to be exceeding grade level standards, but noted that she struggled with investigating to produce data to serve as a basis for evidence (*id.*). The student was supported in science by way of graphic organizers, hands-on activities, and leveled reading (*id.*).

With respect to the student's social/emotional development, the December 2017 present levels of performance reflected information from the October 2017 psychoeducational evaluation report, which indicated the student presented with good eye contact, established rapport easily and was compliant, appropriate, motivated, and on task during the evaluation (Dist. Ex. 9 at p. 5). The student reportedly persisted on most tasks that were difficult and, according to the October psychoeducational evaluation report, conveyed that staying up late to do homework was stressful but that generally she was not stressed about school (*id.*). However, the student reportedly expressed feeling a sense of pressure to do well (*id.*). The present levels of performance conveyed that, according to the October 2017 classroom observation report, the student appeared diligent and conscientious, presented with age-appropriate behaviors, listened to and followed directions, and worked well in a group (*id.*). The observer also found that the student understood the concepts presented, was on task during class, appropriately sought the teacher's attention, and effectively communicated her wants and needs (*id.* at pp. 5-6). The observer also indicated that the student presented with adequate attention span and ability to transition between tasks, with no observable difficulty with respect to reading, writing, and/or thinking (*id.* at p. 6). By teacher interviews conducted in October 2017, the present levels of performance indicated that the student was socially well adjusted, followed school rules and routines, and maintained appropriate behavior throughout the school and community environment (*id.*). Further, the teacher interview report indicated that the student established and sustained friendships with peers and adults and occasionally struggled to maintain attention due to socializing with peers but was very responsive to redirection and prompting (*id.*). The teacher interview report also noted the student worked well independently or in small groups, solicited teacher attention when necessary, and, overall, "appear[ed] to be a hardworking and conscientious student who want[ed] to perform well in school" (*id.*). The December 2017 present levels of performance indicated that the student did not present with any social/emotional impairments when in the classroom or in the school environment (*id.*). Regarding physical development, the December 2017 present levels of performance indicated that the student was healthy with no gross or fine motor difficulties and noted the student's diagnoses of generalized anxiety disorder and ADHD, inattentive subtype (*id.*).

The December 2017 present levels of performance also included the parent's concerns regarding the student's needs in relation to her academic success (Dist. Ex. 9 at pp. 5-6). Specifically, the parent shared at the CSE meeting that the student's "academic performance [was] being negatively and severely impacted by impaired executive functioning abilities," and that the family provided independent service providers which were a factor in the student's ability to meet

grade level standards, opining that without such services the student would "struggle a lot more in the school setting" (id. at p. 5). The parent noted that the student took "an inordinate amount of time" to complete homework assignments because she did not "know how to start" and could become dispirited when she struggled (id.). According to the December 2017 present levels of performance, the parent also conveyed that the student had expressed anxiety about school and performing well on homework, that she had received calls from the school that the student had been too talkative in class, and that she would like the student to need less redirection in class and be able to initiate her work independently (id.). Further, the parent strongly contended that the special education services were warranted, asserting that the student's sensory development impairments (i.e. attention difficulties) were detrimentally affecting the student's functioning (id. at pp. 5, 6).

The student's advisory teacher testified that she reported to the December 2017 CSE that the student was high achieving, with incredible academic capabilities who needed to work on some of her work habits, but who was incredibly capable of accessing all the information (Tr. pp. 82, 98).²⁰ She also testified that, at the time of the October 2017 CSE meeting, the school psychologist stated that the student "was showing grade level behaviors that were appropriate for that age group, that she was academically incredibly competent and confident, that she was reaching mastery and above mastery to the highest echelon in all her subject areas, and that any sort of work habit related behaviors were very typical for the age group, and not needing special education services" (Tr. pp. 101-02).

The December 2017 CSE concluded that "[b]ased on results obtained from teacher reports, standardized tests, psychological assessment results, and school grades, [the student] does not appear to exhibit any significant academic or functional needs in the school setting," noting that her "struggles with attention, fluency and sustaining focus" were "areas of relative weakness" that did not "appear to be impacting the work she complete[d] in class" (Dist. Ex. 9 at p. 5). In consideration of the information presented at the December 2017 CSE meeting, the committee determined that the student could "participate and progress in the general education curriculum without specialized education services" (id. at pp. 1, 6, 7).

In an email to the district dated December 11, 2017, the parent set forth concerns relating to "the lack of implementation of [the student's] 504 Plan" as well as regarding the December 2017 CSE meeting (Parent Ex. LL). Specifically, the parent stated concerns with the district evaluation of the student, with the scheduling of and composition of the December 2017 CSE, and with the discussion at the CSE meeting (id. at p. 2). The parent stated it was "blatantly obvious" at the CSE meeting "that the decision to deny [the student's] eligibility was a foregone conclusion" (id.). The parent indicated that, while "all agreed" that the student met the criteria for an other health-impairment, the CSE did not acknowledge the student's specific learning disability (id.). The parent also stated that the district school psychologist who attended the CSE meeting discounted

²⁰ The teacher testified that she was the student's advisory and social studies teacher for sixth and seventh grade, and was the student's advisory teacher during eighth grade (2017-18 school year) (Tr. pp. 82, 91-92, 94). The advisory teacher stated that students were graded academically based on their content and skill mastery and that separately from that, students were graded on their work habits such as accountability, organization, integrity, and community (Tr. p. 99). She testified that in seventh and eighth grade the student demonstrated average grade level work habit growth (id.). She stated that the student's work habits did not affect her academically, as they were not taken into consideration when assigning academic grades (Tr. p. 100).

the student's struggles with homework and disregarded the idea that the student was not meeting her potential as 'subjective' despite objective evidence of a discrepancy between the student's cognitive capacity and performance on academic achievement testing and standardized tests (id. at pp. 2-3). According to the parent, the district school psychologist "disregarded all evidence and factors except for school performance that demonstrate[d] that [the student] [wa]s not making effective progress and essentially took the position that she [wa]s not struggling enough" (id. at p. 3). The parent also indicated that the CSE dismissed the parent's position that the student's progress was attributable to the private services the parent had arranged (id.). In conclusion, the parent requested advice on how to proceed to obtain agreed upon accommodations for the student and/or to appeal the CSE's finding that the student was not eligible for special education (id.).

A prior written notice letter was sent to the parent on December 14, 2017, reiterating the CSE's determination that the student was not eligible for special education services (Dist. Ex. 10 at p. 1). The prior written notice also indicated that the CSE had considered SETSS and ICT services, but both were rejected because, based on the reports and assessment results, the student was "at or above grade level standards in all core academic subjects," and "currently able to access the general educational curriculum without special education services" (id.). According to the prior written notice, the parent had participated in the December 2017 CSE meeting and disagreed with the determination not to classify the student because the parent and her private learning specialist believed that the student required special education services to ameliorate her deficits in executive functioning (id. at p. 2).

Review of the evaluative and teacher information available to the December 2017 CSE supports the IHO's finding that the district met its burden to show that, despite the student's difficulties with attention and focus, the student was doing well at the time of the CSE meeting with the supports and services provided at that time, such that she was not eligible for special education as a student with a disability (see IHO Decision at p. 20). While the parent's position that the student needed more support to help her achieve her potential is understandable, the information before the CSE did not demonstrate that her disability adversely affected her educational performance or that she needed special education. Further, contrary to the parent's argument, the district cannot be expected to parse what the student's educational performance hypothetically would have been but for the private tutoring the student received prior to the December 2017 CSE meeting.

Finally, to support her contention that the December 2017 CSE inappropriately found the student ineligible for special education, the parent points to the April 2018 CSE's determination just four months later that the student was eligible. However, events subsequent to the December 2017 CSE's finding of ineligibility may not be relied upon to evaluate the appropriateness of that determination (see C.L.K. v. Arlington Sch. Dist., 2013 WL 6818376, at *13 [S.D.N.Y. Dec. 23, 2013] [finding that "a substantively appropriate IEP may not be rendered inadequate through testimony and exhibits that were not before the CSE about subsequent events . . . that seek to alter the information available to the CSE"]; J.M. v New York City Dep't of Educ., 2013 WL 5951436, at *18-*19 [S.D.N.Y. Nov. 7, 2013] [holding that a progress report created subsequent to the CSE meeting may not be used to challenge the appropriateness of the IEP]; F.O. v New York City Dep't of Educ., 976 F. Supp. 2d 499, 513 [S.D.N.Y. 2013] [refusing to consider a subsequent school year IEP as additional evidence because it was not in existence at the time the IEP in question was developed]; J.R. v. Bd. of Educ. of City of Rye Sch. Dist., 345 F. Supp. 2d 386, 395 [S.D.N.Y. 2004] [explaining that the placement determination is "necessarily prospective in nature; we

therefore must not engage in Monday-morning quarterbacking guided by our knowledge of [the student's] subsequent progress]).²¹

D. 2018-19 School Year: Special Education Teacher Support Services

The parent asserts that the CSEs' recommendations for SETSS for the student were not appropriate and, therefore, the district failed to offer the student a FAPE for the 2018-19 school year. In this instance, given that the April 2018, September 2018, and April 2019 IEPs were operative for some portion of the 2018-19 school year they are all at issue and will be addressed in turn below (see McCallion v. Mamaroneck Union Free Sch. Dist., 2013 WL 237846, at *8 [S.D.N.Y. Jan. 22, 2013] [finding the later developed IEP to be "the operative IEP"]; see also Application of the Dep't of Educ., Appeal No. 12-215).²²

1. April 2018 IEP

The first IEP to be considered is the April 2018 IEP. On January 24, 2018, the parent emailed a district staff member and indicated that after consulting with her attorney and her education consultant she wished to "resolve the serious procedural and substantive deficiencies of the December eligibility meeting before taking the matter to a formal hearing" and, therefore, "agree[d] to proceed with a new eligibility meeting" (Parent Ex. WW at pp. 1-2). The parent set forth her understanding of the terms they had agreed upon for the eligibility meeting and asked for clarification on several remaining matters (id. at pp. 2-3). The district staff member replied to the parent in emails dated January 25 and 26, 2018, responding to the issues raised by the parent, indicating that the parent would need to formally request an evaluation to consider special education services, and explaining that her remaining questions would be addressed at that time (id. at p. 1).

A CSE reconvened on April 18, 2018, to determine the student's eligibility for special education services (Parent Ex. L at p. 14). The April 2018 IEP indicated that the student was

²¹ The student's teachers had a different view by the time the April 2018 CSE convened. The April 2018 CSE identified that the student's executive functioning challenges impacted her ability to plan, organize her thoughts in written form, break down longer term multistep tasks, time management skills, and ability to prioritize tasks (see Parent Ex. L at pp. 2-5). The April 2018 IEP also included the student's concerns regarding her executive functioning vulnerabilities; at that time she expressed a high level of difficulty with attention, and weaknesses in executive functioning that impacted her sense of worth and confidence (see id. at pp. 2-3). The April 2018 IEP also reflected the parent's concerns that the student's elevated stress impacted productivity and stamina, noted the student's reliance on others for task initiation, difficulty with sustained motivation, rigidity and inflexibility in her approach and uncomfortableness with/resistance to in-class assistance (id. at p. 3).

²² As noted above, despite that the CSE convened on December 7, 2018 upon parent request (Tr. p. 175; Parent Ex. Q at p. 20), it does not appear that an IEP was developed at that meeting. According to the SETSS teacher, there was some confusion regarding what the parent was asking for at that time (Tr. pp. 175, 177). The SETSS teacher thought that the parent wanted an IEP meeting, but he was informed by the parent's advocate that it was premature to hold an annual review (Tr. pp. 175, 177). Therefore, it appears that the meeting was abandoned. The IEP in evidence that is described as the December 2018 IEP was overwritten with information that post-dates it and does not appear to be a document generated at the December 2018 CSE meeting (Parent Ex. Q at pp. 1, 20). While the circumstances surrounding the December 2018 CSE are unclear, ultimately, on appeal the parent does not pursue any claim relating to the procedures underlying the December 2018 CSE and there is no indication in the hearing record that a change to the student's program and placement was agreed upon at that meeting.

referred for a special education evaluation due to concerns relating to her executive functioning and the impact of an ADHD-inattentive type on the student's ability to progress in the curriculum (*id.* at p. 2). According to the April 20, 2018 prior written notice, the April 2018 CSE considered a February 27, 2018 social history, an April 11, 2018 psychoeducational evaluation report, a March 28, 2018 classroom observation, and a February 9, 2018 vocational assessment (Parent Ex. M at p. 1).

The April 2018 IEP indicated that the student was "exceptionally bright and ha[d] strong academic skills in many areas," but also that, in contrast to the December 2017 evaluative information which indicated that the student's attention and fluency weaknesses did not impact the work she completed in class, at the time of the April 2018 CSE meeting her "executive functioning difficulties impact[ed] her planning, organization of thought in written form, breaking down longer term and multistep tasks, time management and prioritizing tasks" (*compare* Parent Ex. L at p. 2, *with* Dist. Ex. 9 at pp. 5, 6). Additionally, although the April 2018 IEP described the student's strong cognitive, academic, and classroom learning skills, the present levels of performance indicated that, according to her teacher, the student was approaching but not meeting standards in preparing for an assignment (Parent Ex. L at p. 2).

Additionally, the April 2018 IEP reflected the student's report that she had high levels of problems with attention and isolated weaknesses with executive functioning that impacted her overall sense of worth and confidence (Parent Ex. L at p. 3). The IEP indicated that the student's executive functioning difficulties caused her elevated stress which impacted her productivity and stamina (*id.*). According to the IEP, the student was heavily reliant on others to initiate independent assignments completed outside of school, noting that the student found it difficult to sustain her motivation due to difficulty choosing and flexibly modifying strategies which contributed to procrastination (*id.*). The IEP reflected the parent's report that the student could be rigid and inflexible in her approach and uncomfortable with/resistant to in-class assistance (*id.*). The IEP noted that that the student's executive functioning and attention-related deficits slowed her completion of work resulting in late night efforts and insufficient sleep (*id.*).²³

Further, the April 2018 IEP described the parent's concerns including that the student had difficulty taking notes, searching for evidence for a claim because she got sidetracked by non-essential textual resources, forming a thesis statement, disentangling ideas, and developing an essay as she may repeat or fixate on certain ideas and veer off topic (Parent Ex. L at p. 2). The parent also identified the student's difficulty with applying executive organizational structure to material and planning across and within tasks, including difficulty self-monitoring resulting in the student focusing on isolated points or detail in written responses to the neglect of the larger task

²³ The April 2018 IEP made specific mention of the student's performance with respect to letter versus category fluency on the Delis-Kaplan Executive Function assessment, which was in the fifth percentile and her Rey-Osterrieth Complex Figure test performance in the 16th percentile suggesting that vulnerabilities relating to planning and organization impacted her encoding and mental organization of information (Parent Ex. L at p. 1). The IEP also noted that the student's self-report score on the Behavior Assessment System for Children-Third Edition was in the 96th percentile for attention problems and the 78th percentile relative to ADHD (*id.*). On the Behavior Rating Inventory of Executive Function ratings from two of the student's teachers regarding the student's planning and organizing skills were in the 74th percentile; those two teachers' ratings of the student's organization of materials skills were in the 79th percentile (*id.*). The April 2018 IEP reflected the student's performance on the October 2017 administration of the WIAT-II was in the average to above average in all academic areas (*id.*).

or thesis (id.). The parent presented concerns that the student exhibited a tendency toward impulsive responding and blurting out answers while also experiencing indecision when attempting to get started on a task and when making decisions about what she should write about (id.).

The April 2018 CSE determined that the student's difficulty filtering extraneous information contributed to her diverting energy to nonessential aspects of a task, failing to respond directly to questions or tasks, and needing for increased time on task to correct, and that the experience of learning-related stress impacted the student's involvement and progress in the general education curriculum (Parent Ex. L at p. 5). Further, the CSE found that the student's executive functioning problems impacted the quality of her work and school performance (Parent Ex. M at p. 2).

Based on the foregoing, the April 2018 CSE determined that the student was eligible for special education and related services as a student with an other health-impairment (Parent Ex. L at p. 1). The April 2018 CSE recommended numerous management strategies similar to those detailed in the student's October 2017 504 accommodation plan and developed six annual goals to address the student's needs (compare Parent Ex. L at pp. 3-5, 8-9, with Parent Ex. X at p. 3). The April 2018 CSE also recommended the student receive two periods per week of direct SETSS in a group for planning, organization, and time management (Parent Ex. L at p. 10). The CSE rejected ICT services or "more restrictive programs" because the student did not need support for skills taught within the curriculum (id. at p. 15).

The parent testified that she disagreed with the April 2018 CSE's recommendations because she felt that the student would benefit from ICT services and indicated that she "requested one-on-one support as . . . the two neuropsychologists recommended" (Tr. pp. 689-90, 693). The parent signed initial consent for special education services on May 22, 2018 and, with her signed consent form, attached a document entitled "Parent Addendum" to the April 2018 IEP (Tr. p. 694; Dist. Exs. 20 at p. 8; 21). In the addendum, the parent requested that the CSE reconvene when the student started high school for the 2018-19 school year and requested "additional frequency of services . . . outside of the general education setting" as well as "participation in the ICT/co-taught model" (Dist. Ex. 21 at p. 1). In addition, the parent requested that the April 2018 IEP be amended to specify that "[s]ome members" of the committee rejected ICT services and that the student "ha[d] been learning very effectively in co-taught classes" as a general education student (id. at p. 2). The parent opined that the student "tend[ed] to require subtle assistance" in the classroom and was "learning to accept support by [the special education teacher] within the inclusionary setting" (id.).

SETSS are not identified in State regulation describing the continuum of special education (see generally 8 NYCRR 200.6; see, e.g., Application of a Student with a Disability, Appeal No. 16-056). The advisory teacher testified that the SETSS recommended at the April 2018 CSE meeting were intended to provide the student "with one-on-one services to help with things like organization, work habits, making sure she underst[ood] her assignments, and [wa] following steps properly" (Tr. p. 104); however, the teacher's characterization of the service as "one-to-one" is at odds with the IEP which indicated the service would be delivered in a group (compare Tr. p. 104, with Parent Ex. L at p. 10). Nevertheless, the information before the CSE supported the recommendation for two weekly periods of SETSS in a group in the areas of planning, organization, and time management. Although the March 2015 private psychological evaluation

indicated that the student would benefit from individualized tutoring and the October 2017 private neuropsychological evaluation recommended a class with a low student-to-teacher ratio and opportunities for 1:1 support (Parent Ex. D at p. 8; Dist. Ex. 5 at p. 13), the April 2018 CSE was 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 recommendations for individual/1:1 instruction tended toward maximization of services which is not required under the IDEA, and there was no need to remove the student from the regular education environment in order to put her in a small, special class which would almost certainly have been overly restrictive for the student (Grim, 346 F.3d at 379 [quoting Rowley and noting that a school district need "not ... furnish every special service necessary to maximize each handicapped child's potential"]; see Rowley, 458 U.S. at 199).²⁴ Here, there is no indication in the information available to the CSE that the student could not benefit from the support delivered in a small group as recommended on the IEP (see Parent Ex. L at p. 10). Further, given the student's needs in the realm of executive functioning, the CSE's determination that the student would benefit from a service that supplemented the student's regular instruction and focused on planning, organization, and time management was appropriate (see "Continuum of Special Education Services for School-Age Students with Disabilities," at pp. 10-11, 14-15, Office of Special Educ. [Nov. 2013] [making a distinction between services that supplement regular instruction and services delivered contemporaneously with or in replacement of regular instruction], available at <http://www.p12.nysed.gov/specialed/publications/policy/documents/continuum-schoolage-revNov13.pdf>).²⁵ Finally, as the student was initially found eligible at the time of the April 2018 CSE meeting and generally demonstrated success in her general education classes, albeit with support arranged by the parent such as private tutoring, the evidence does not show that the two weekly periods of SETSS was so inadequate a frequency or level of services that she was unlikely to receive educational benefits and thereby be denied a FAPE.

²⁴ To the extent that evaluator was recommending a regular education class with a small student-to-teacher ratio for the student, public school districts cannot be required to downsize their regular education classes in order to satisfy the needs of a particular student with a disability, which would be a fundamental change to the character of the regular classes. Indeed, smaller classes may be preferred by many parents of students, disabled or otherwise. Instead, for public schools to meet the IDEA's LRE requirement, they must "[m]ake 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][2]; see 8 NYCRR 200.1[bbb]). As noted above in this case, the small group SETSS appears to be such a supplementary service to support the student's placement in a regular class and there is no argument that the student should have been otherwise removed from the regular education in order to be placed in a special class setting.

²⁵ Although SETSS are not defined in State regulation, the SETSS contemplated by the April 2018 IEP appear to be similar to a resource room service (compare 8 NYCRR 200.6[f], with Parent Ex. L at p. 10). State guidance describes examples of supplementary instruction that might be provided in a resource room, such as "organization skills, reading, the use of an assistive technology device, the use of Braille or the use of a compensatory strategy" ("Continuum of Special Education Services for School-Age Students with Disabilities," at pp. 10-11).

2. September 2018 IEP

The parent argues that the SETSS at the magnet high school only provided the student with help with study skills and homework, not specialized instruction. The parent asserts that the student required 1:1 academic support and that she needed that support in all subjects, not just ELA.

While the parent testified that the student did not receive the services on the April 2018 IEP at the end the 2017-18 school year (eighth grade) (see Tr. pp. 689, 690), according to the advisory teacher, the student receive two periods per week of individual SETSS for planning, organization, and time management notwithstanding the recommendation for group SETSS in the April 2018 IEP (Tr. pp. 102-05; Parent Ex. L at p. 10).²⁶ When the student transitioned to the district high school for ninth grade (2018-19 school year), she was scheduled to receive five periods per week of SETSS, which resulted in "over-providing" the mandated services leading up to the September 2018 CSE meeting (Tr. p. 158).

The student's SETSS teacher testified that the September 2018 CSE meeting was necessary to amend the previous IEP because it was his understanding that SETSS was required to be "tied to academic subjects" for a minimum of three hours per week, noting that the student's April 2018 IEP did not conform to either requirement (Tr. pp. 151, 154, 157-160). As noted above, SETSS is not defined in State regulation, so there is no regulation mandating a minimum number of hours or that the service be tied to particular subject areas. State regulation does set forth these types of requirements for some services defined on the continuum. For example, State regulation requires that resource room services or a combination of resource room and consultant teacher services be recommended for a minimum of three hours per week (8 NYCRR 200.6[d][2]; [f]). In addition, State regulation requires that an IEP that includes a recommendation for consultant teacher services must specify the regular education classes in which the student will receive such services (8 NYCRR 200.6[d]); however, unlike the SETSS mandated in the present case, this requirement is related to the expectation that consultant teacher services will be delivered in the general education classroom while the student is receiving direct instruction (see "Continuum of Special Education Services for School-Age Students with Disabilities," at p. 7).

A CSE convened on September 27, 2018, to amend the April 2018 IEP (Tr. pp. 157-161; Dist. Ex. 22 at p. 16). The September 2018 IEP reflected several parent-reported items regarding the student's 504 accommodation, school placement, private service, and eligibility history, and at parent request included the statement that the student "has low frustration tolerance and ability to persist and follow through" (Dist. Ex. 22 at pp. 3, 4). The September 2018 CSE maintained the student's extensive management strategies apart from the omission of study guides for tests and quizzes and the addition of refocusing cues and multisensory approach in which connections between concepts/prior knowledge are explicitly stated, especially in math and reading comprehension (compare Parent Ex. L at pp. 3-5, with Dist. Ex. 22 at p. 5). The September 2018 IEP put forth 10 annual goals to address the student's needs with respect to task completion, organization and planning, writing, reading comprehension, and ELA skills (Dist. Ex. 22 at pp. 7-10). To address the student's needs, the September 2018 CSE recommended for the student five

²⁶ As noted above, on appeal, the parent has abandoned any claims relating to the implementation of the student's IEPs.

periods per week of direct SETSS in ELA in a group, which was an increase from the two periods per week of SETSS provided in the April 2018 IEP (compare Dist. Ex. 22 at p. 11, with Parent Ex. L at p. 10).

The student's SETSS teacher indicated that at the time of the September 2018 CSE meeting, although the student seemed distracted, she was "doing fine so far" and that the CSE did not want to disrupt the program that was currently in place, five periods of SETSS per week, but rather wanted to align the SETSS with an academic area (Tr. pp. 162-63). Further, he testified that the CSE decided to align the recommended SETSS with English because it found that "English is a good vessel through which to address executive functioning and processing needs" and the recommendation for five periods per week matched the program that was already in place for her (Tr. p. 163).

Here, the information available to the September 2018 IEP supported the CSE's continued recommendation of SETSS to address the student's needs. The increase in frequency was in conformance with the parent's preference that the student receive more than the two periods recommended in April 2018. While the specification of ELA as the specific subject area for the SETSS was perhaps unnecessary and, ultimately, less descriptive of the student's main area of need than the April 2018 IEP's designation of the service in the areas of planning, organization, and time management (compare Dist. Ex. 22 at p. 11, with Parent Ex. L at p. 10), as the IEP was overall reasonably calculated to enable the student to make progress appropriate in light of the child's circumstances, the specification of ELA for the SETSS, on its own, does not support a finding that the September 2018 IEP denied the student a FAPE.

3. April 2019 IEP

The parent contends that the description of the student in the April 2019 IEP showed that the student's program was not meeting her needs and that, therefore, the IHO erred in finding that the student was doing well despite evidence that she was not making progress.

The student's progress with SETSS during the 2018-19 school year is a relevant consideration for purposes of examining whether the April 2019 IEP was properly developed (see H.C. v. Katonah-Lewisboro Union Free Sch. Dist., 528 Fed. App'x 64, 66-67 [2d Cir. 2013]; Adrienne D. v. Lakeland Cent. Sch. Dist., 686 F.Supp.2d 361, 368 [S.D.N.Y. 2010]; M.C. v. Rye Neck Union Free Sch. Dist., 2008 WL 4449338, *14-*16 [S.D.N.Y. Sept. 29, 2008]; see also "Guide to Quality Individualized Education Program (IEP) Development and Implementation," at p. 18, Office of Special Educ. Mem. [Dec. 2010], available at <http://www.p12.nysed.gov/specialed/publications/iepguidance/IEPguideDec2010.pdf>). The fact that a student has not made progress under a particular IEP does not automatically render that IEP inappropriate, nor does the fact that an IEP offered in a subsequent school year which is the same or similar to a prior IEP render it inappropriate, provided it is based upon consideration of the student's current needs at the time the IEP is formulated (see Thompson R2-J Sch. Dist. v. Luke P., 540 F.3d 1143, 1153-54 [10th Cir.2008]; Carlisle Area Sch. Dist. v. Scott P., 62 F.3d 520, 530 [3d Cir. 1995]; S.H. v. Eastchester Union Free Sch. Dist., 2011 WL 6108523, at *10 [S.D.N.Y. Dec. 8, 2011]; D. D-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at *12 [E.D.N.Y. Sept. 2, 2011], aff'd, 506 Fed. App'x 80 [2d Cir. 2012]; J.G. v. Kiryas Joel Union Free Sch. Dist., 777 F. Supp. 2d 606, 650 [S.D.N.Y. 2011]). Conversely, "if a student had failed to make any progress under an IEP in one year," at least one court has been "hard pressed" to understand how

the subsequent year's IEP could be appropriate if it was simply a copy of the IEP which failed to produce any gains in a prior year (Carlisle Area Sch. Dist., 62 F.3d at 534 [noting, however, that the two IEPs at issue in the case were not identical]). As the parent argues, the student showed variable performance during the 2018-19 school year leading up to the April 2019 CSE meeting; however, as set forth below, the CSE took into account the inconsistent progress among other factors related to the student's needs and circumstances in making recommendations for the student going forward.²⁷

The student's teacher testified that SETSS at the high school were provided in a group of eight students and were scheduled as a separate class during a certain period of the day and provided in the "SETSS room" (Tr. pp. 163, 199).²⁸ The SETSS teacher stated that by the middle of the 2018-19 school year the student was cheerful, very kind, and a pleasure to have in the class but that she required a lot of redirection (Tr. p. 164). According to the SETSS teacher, during the first 5 to 10 minutes of the class the whole group went through an executive functioning curriculum where he supported the students with respect to their IEP goals in addition to "general high school success skills" (*id.*). The executive functioning portion of the class included prioritizing tasks and talking about initiating assignments, which he stated was important for the student as she sometimes struggled with getting started on a task (Tr. pp. 164-65). The SETSS teacher reported that the student would "eagerly engage" in that activity, but opined that she struggled with the rest of the SETSS period as it was not a one-to-one situation and she struggled to stay on task while he worked with other students (*see* Tr. p. 165). He also testified that the student's struggles at home distracted her from her work and that she was struggling to focus and concentrate on the schoolwork due to outside factors that were having an impact on her performance (Tr. pp. 165-66).

With respect to executive functioning skills, the SETSS teacher testified that he worked with the student building flashcards as a study method, he worked with her around planning—hour by hour what an evening would look like, what weekends would look like, and especially as it got closer to tests, what studying would look like—and he realized he really needed to keep working with her regarding study strategies (Tr. pp. 171-172). He indicated that the student struggled with various teachers using different websites for homework and assignments and he created a Google document for her with links to help with that issue (Tr. pp. 172-73). Additionally, the SETSS

²⁷ The parent alleges that the student's lack of progress was demonstrated, in part, by comparing the student's standardized test results reported in the October 2017 private neuropsychological evaluation to the results reported in the February 2020 neuropsychological evaluation (Parent Mem. of Law at p. 25; *see* Parent Exs. D; NNN). However, as the February 2020 private neuropsychological evaluation was not before any of the CSEs at issue in this matter, it cannot be relied upon to assess the adequacy of the student's programming during the 2018-19 school year (*see* C.L.K., 2013 WL 6818376, at *13).

²⁸ The parent argues that the SETSS class at the magnet high school was only "a group study skills/homework help period" and "not individualized special instruction" (Parent Mem. of Law at p. 17). To support this, the parent points to the student's schedule, which listed the SETSS period as a "study skills" class and her own testimony that she was informed that the only way that the magnet high school offered SETSS was "for a student to be in their group study skills class, which was essentially a homework room and that was it" (Tr. p. 717; Parent Ex. ZZ). However, the evidence in the hearing record shows that, rather than functioning as a homework help period as the parent described it, the SETSS teacher worked on annual goals and strategies with the student to address her executive functioning and other needs. Further, so long as the service was implemented in a manner consistent with the student's IEP, any denomination on a class schedule is not determinative of this matter.

teacher testified that he worked with the student regarding note taking and initiating tasks (Tr. p. 173). Further, the SETSS teacher also testified that he addressed the student's goals by, for example, going through notebooks and talking about strategies, monitoring the use of a consistent style for notes, using self-editing checklists, creating checklists to track progress, and working on proofreading strategies (Tr. pp. 180-82).

Regarding the student's academic performance, the SETSS teacher stated that he spoke with the student's mathematics and English teachers almost daily trying to determine the source of her struggles, particularly in mathematics, as the student was having more difficulty in mathematics than in English (Tr. pp. 166-67). He also testified that the purpose of his communication with the student's teachers was to keep up with the content and to "find out early" if there were issues to be concerned about (Tr. p. 167).

With respect to the student's ELA performance, the SETSS teacher indicated that in the English honors class the student occasionally forgot to hand things in, had difficulty with attention, and needed reminders, but he recalled that the student was average or above average in meeting the standards of the course and neither he nor the English teacher were concerned about the student's capacity to meet the standards (Tr. pp. 168-69). He indicated that the student's English teacher reported that the student was doing "fine" and that if her grade went down, it was because the student forgot to do an assignment or forgot to hand it in (Tr. p. 167).

The SETSS teacher testified that he was aware of the student's difficulties with mathematics and indicated he tried to support her with that subject, but he felt it was more of an executive functioning issue than a mathematics skill issue (Tr. p. 166). In mathematics, the teacher commented about the student struggling to pay attention, forgetting to hand things in, and difficulty studying for tests, therefore, studying and planning for studying became something the SETSS teacher worked on during SETSS sessions (Tr. p. 169). Additionally, the SETSS teacher indicated that he would walk through mathematic problems with the student to assess where things were breaking down for her and she would demonstrate the ability to solve those problems when working one-on-one, but she struggled during testing or when asked to show a math skill a week later (Tr. pp. 169-170). The SETSS teacher's communication with the student's chemistry teacher indicated that the student was distracted and needed reminders to hand things in (Tr. p. 170).

A CSE convened on April 12, 2019, for the student's annual review and to develop the student's IEP for the remainder of the 2018-19 school year as well as the 2019-20 school year through the beginning of April 2020 (Parent Ex. T at pp. 10, 16).²⁹ New information reflected in the April 2019 IEP included the student's most recent progress report grades from March 2019, results of an April 2019 Gallup Strengths Explorer Assessment and an April 2019 Human eSources Learning Style Inventory, class assessment results, and State exam scores (compare Parent Ex. T at pp. 1-4, with Dist. Ex. 22 at pp. 1-3). The student achieved grades in her core academic classes of a 71 in global, 70 in geometry, 79 in chemistry, and 95 in English, and scores on the January 2018 Regents exams of 83 (Algebra I), 83 (Living Environments), and 79 (US History) (Parent Ex. T at p. 1). The student's class assessment results included in the IEP were as follows: English

²⁹ The hearing record indicates that the CSE reconvened on December 7, 2018 upon parent request; however, as noted above, no changes were made to the student's SETSS mandate at that time (Tr. pp. 175-77; compare Parent Ex. Q at pp. 16, 20, with Dist. Ex. 22 at p. 11).

82/100, 97/100, and 22/30; geometry 44/100, 48/100, 58/100, 46/100; chemistry 73/100, 64/100; and global history 83/100, 96/100, 92/100 and 93/100 (*id.*). The April 2019 IEP included information from the February 2018 neuropsychological evaluation, that found the student's vulnerabilities with attention and executive function contributed to variable performance on tasks and interfered with optimal school performance, specifically noting her challenges with sustained attention and broader executive functions such as planning, organization, and self-monitoring (*id.* at p. 5).

The April 2019 IEP provided insights from the student's teachers who indicated that the student benefited from individualized support during writing tasks, did well with vocabulary, and demonstrated strength summarizing text with clear and appropriate writing in English class (Parent Ex. T at p. 4). In social studies, the IEP reflected reports of the student being distracted during tests resulting in decreasing grades and struggling with writing standards related to using test and analysis, but that she demonstrated strengths in recalling questions, reading texts, and determining main ideas (*id.*). According to the social studies teacher, the student would benefit from analyzing task prompts and rubrics to ensure quality completion of tasks (*id.*). The IEP indicated that in chemistry the student struggled with multi-step mathematical problems but did better with fact-based questions, and her math teacher reported that the student participated when she knew the material or had gone over the material with her tutor and felt comfortable with it, but multi-step problems that required conceptual understanding with high-level computational fluency were challenging (*id.*).

With respect to adaptive behavior, the April 2019 IEP described the student as sometimes needing preferential seating and prompts to initiate tasks and sustain writing assignments (Parent Ex. T at p. 4). The IEP also noted the student's limited self-initiated participation, distractibility, and off-task behavior, and that she benefitted from check-ins, repeated instructions, and flexibility with homework deadlines (*id.*). According to the IEP, improved participation and engagement would support improved academic achievement (*id.*). The IEP indicated that the parent had gathered data from the student's outside consultants who indicated the student had difficulty finding internal motivation and discipline to get engaged and stay engaged requiring support with engagement in less interesting tasks (*id.* at p. 5). Further, it was suggested that the student needed support with organizing and planning, initiating tasks, organizing assignments, and chunking assignments into smaller pieces (*id.*).

The April 2019 IEP reflected results of a learning style inventory assessment completed in April 2019, which indicated that the student was a "low visual learner" and did not learn best when observing and seeing things (Parent Ex. T at p. 5). Rather, she preferred to learn by listening and did well learning from lectures, listening to audio materials, and through discussions with a strong preference for learning with peers; she learned better in informally designed environments and with less structure approaching tasks (*id.*). The student expressed a preference for choosing her own methods of organizing and controlling task completion, but the IEP noted that it was important that she not overlook required details of assignments (*id.*). Specifically, the parent and private tutor recommended that the student needed support for task initiation (routine, procrastination, planning/prioritizing), time management (sense of time, task timing, taking breaks), organization (using a planner, online system, checking assignments, binder/folder ordering system), and persistence (task follow through, individual learning style) (*id.* at p. 6).

Socially, the April 2019 IEP described the student as having a rich social life but who was sometimes distracted by her social connections (Parent Ex. T at p. 6). Reportedly, the student found school challenging, but she enjoyed school and even her more difficult classes (*id.*). The IEP reflected the student's report that she sometimes had interpersonal stress that could distract her from her work, although she generally presented with a positive demeanor and attitude (*id.*). According to the IEP, the parent's concerns revolved around the student's motivation levels and that she needed support in developing ways to be motivated to complete work for subjects that did not interest her (*id.*). The parent also expressed concern that the student's executive functioning challenges resulted in her staying up late to complete tasks resulting in inadequate sleep and reduced mental functioning (*id.* at p. 7).

The April 2019 CSE develop six annual goals, four of which targeted her executive functioning needs, and for the remainder of the 2018-19 school year and a portion of the 2019-20 school year, recommended that the student continue to receive five periods per week of direct SETSS in a group for ELA (Parent Ex. T at pp. 8-10). The SETSS teacher testified that, although there had been a great focus on supporting the student in mathematics and science throughout the year, SETSS was specified on the IEP for ELA only because the student needed assistance with writing and analysis and the parent did not want her grades in these areas "to fall by the wayside" (Tr. pp. 280-81). Additionally, the April 2019 CSE maintained the extensive recommendations for management strategies that addressed the student's environmental concerns, instructional needs, and organizational supports to allow her to access the general education curriculum (*compare* Parent Ex. T at p. 7, *with* Dist. Ex. 22 at p. 5). The April 2019 IEP also included testing accommodations of extended time, testing in a separate location, and breaks (Parent Ex. T at p. 11).

The April 2019 IEP indicates that the CSE considered general education, SETSS, and ICT service options (Parent Ex. T at pp. 14-15). The CSE concluded that the general education environment alone would not provide the student with enough support for her academic and executive function needs (*id.* at p. 15). The April 2019 IEP indicated that the CSE discussed the student benefiting from an ICT "setting, where she would have reminders from teachers and support in the context of academic learning and organizing, as opposed to the outside-of-the-classroom support of SETSS" (*id.* at p. 5).

However, the student expressed that she found multiple teachers to be distracting and it was her preference to remain in the general education classes with the support of SETSS (Parent Ex. T at p. 5.; *see* Tr. pp. 179-80, 278-79, 290-91). The SETSS teacher testified that, while the idea of an ICT setting was discussed, the CSE ultimately recommended SETSS, which he opined was appropriate because it gave the student a home base at school and someone to advocate for her, it provided a "brain break" during the day and a place where the student could "stand back and look at how things were going and be meta cognitive" that was helpful and useful for her (Tr. pp. 188-90).

Considering the interventions provided to the student during the course of the 2018-19 school year, the SETSS teacher indicated the student showed some improvement, albeit not as much as he would have liked, noting his difficulty determining what may be "intervention fatigue" due to the number of interventions and tutors the student was receiving versus what was an actual skill deficit (Tr. pp. 173-74). He also indicated that the magnet school was challenging; the day was long (8 a.m. to 4:10 p.m.), it was a rigorous academic curriculum, and the student was taking

"the most challenging program a freshman c[ould] take" (Tr. p. 174). He based his view that the interventions were successful on the student "mostly me[eting] expectations" in her classes, passing all the courses, doing well, and "handing things in" (*id.*). Furthermore, the SETSS teacher testified that the student knew more about studying and organizational techniques than at the beginning of year, noting that although she benefited from continued support to use the organizational strategies, her overall success was evidence that those strategies were successful (Tr. pp. 174-75).

With respect to progress, the student's SETSS teacher testified that although the student had not mastered the ELA annual goals, which represented the standards of the ELA course, she was on track to do so (see Tr. pp. 180-84; Dist. Ex. 22 at pp. 7-10). Specifically, the SETSS teacher stated that the student struggled with the planning and sequencing needed to complete tasks, but that she had mastered the goal to distinguish between primary and secondary themes in text and was consistently using a self-edit checklist (Tr. pp. 183-84).

Upon independent review, the evidence in the hearing record supports the IHO's determination that during the 2018-19 school year the district provided the student with programming and a placement that was likely to produce progress (see IHO Decision at pp. 21-22). The hearing record points to the student's challenges with focus and attention, planning and organization, task initiation, time management, and self-monitoring as the primary hinderances to her academic performance (see, e.g., Tr. pp. 162-73; Dist. Exs. 9, 18). However, throughout the 2018-19 school year the student received daily services provided by a special education teacher that specifically focused on remediating her executive functioning deficits and associated academic weaknesses, as well as the supports afforded by numerous management strategies (see Tr. pp. 162-73, 180-82; Parent Ex. T at pp. 7, 10; Dist. Ex. 22 at pp. 5, 11). Although the parent may have preferred that the student receive 1:1 specialized instruction in all areas, the evidence in the hearing record does not show that the student required that level of special education services in order to receive educational benefit (see Parent Ex. D at p. 7). As such, the evidence in the hearing record does not provide a basis to depart from the IHO's determination that the district offered the student a FAPE during the 2018-19 school year (IHO Decision at p. 23).

E. Reimbursement for Private Evaluations

The parent asserts that the district failed to conduct evaluations of the student, notwithstanding that she requested them. The parent argues that the 2015, 2017, and 2020 private evaluations funded by the parent were necessary and that, therefore, the district should reimburse the parent for the costs of the evaluations. The parent's argument in this regard is unclear with respect to whether she is seeking reimbursement for private evaluation's as a remedy for a denial of a FAPE or as a publicly funded IEE under the IDEA's procedures. As to the former, the evidence in the hearing record supports a finding that the district did not violate its child find obligations, appropriately found the student ineligible for special education at the time of the December 2017 CSE meeting, and thereafter offered the student a FAPE during the 2018-19 school year and, therefore, no relief is warranted relating thereto. As to the latter, the evidence in the hearing record also does not demonstrate that the parent is entitled to reimbursement of the private evaluations as IEEs.

The IDEA and State and federal regulations guarantee parents the right to obtain an IEE (see 20 U.S.C. § 1415[b][1]; 34 CFR 300.502; 8 NYCRR 200.5[g]), which is defined by State

regulation as "an individual evaluation of a student with a disability or a student thought to have a disability, conducted by a qualified examiner who is not employed by the public agency responsible for the education of the student" (8 NYCRR 200.1[z]; see 34 CFR 300.502[a][3][i]). Parents have the right to have an IEE conducted at public expense if the parent expresses disagreement with an evaluation conducted by the district and requests that an IEE be conducted at public expense (34 CFR 300.502[b]; 8 NYCRR 200.5[g][1]; see K.B. v Pearl Riv. Union Free Sch. Dist., 2012 WL 234392, at *5 [S.D.N.Y. Jan. 13, 2012] [noting that "a prerequisite for an IEE is a disagreement with a specific evaluation conducted by the district"]; R.L. v. Plainville Bd. of Educ., 363 F. Supp. 2d. 222, 234-35 [D. Conn. 2005] [finding parental failure to disagree with an evaluation obtained by a public agency defeated a parent's claim for an IEE at public expense]). Guidance from the United States Department of Education's Office of Special Education Programs (OSEP) indicates that if a parent disagrees with an evaluation because a child was not assessed in a particular area, "the parent has the right to request an IEE to assess the child in that area to determine whether the child has a disability and the nature and extent of the special education and related services that child needs" (Letter to Baus, 65 IDELR 81 [OSEP 2015]; see Letter to Carroll, 68 IDELR 279 [OSEP 2016]). If a parent requests an IEE at public expense, the school district must, without unnecessary delay, either (1) ensure that an IEE is provided at public expense; or (2) initiate an impartial hearing to establish that its evaluation is appropriate or that the evaluation obtained by the parent does not meet the school district criteria (34 CFR 300.502[b][2][i]-[ii]; 8 NYCRR 200.5[g][1][iv]). If a school district's evaluation is determined to be appropriate by an IHO, the parent may still obtain an IEE, although not at public expense (34 CFR 300.502[b][3]; 8 NYCRR 200.5[g][1][v]). Additionally, both federal and State regulations provide that "[a] parent is entitled to only one [IEE] at public expense each time the public agency conducts an evaluation with which the parent disagrees" (34 CFR 300.502[b][5]; 8 NYCRR 200.5[g][1]).

With respect to the March 2015 private psychological evaluation (Dist. Ex. 5), there is no evidence in the hearing record to suggest that the parent requested that the district assess the student prior to that evaluation, nor is there any evidence of a district evaluation in place at that time with which the parent disagreed and, therefore, the parent cannot seek district funding of the March 2015 evaluation as an IEE.

In response to the parent's August 2017 request to evaluate the student to determine eligibility for special education services (Dist. Ex. 2 at p. 2), the district conducted a psychoeducational evaluation of the student that was completed on October 30, 2017 (Parent Ex. I at p. 1; Dist. Ex. 10 at p. 1). At relatively the same time, the parent obtained a private neuropsychological evaluation on October 27, 2017 (Parent Ex. D). After the December 2017 CSE found the student ineligible for special education (Dist. Ex. 10 at p. 1), the parent disagreed with this outcome but agreed that the district should re-evaluate the student (Parent Ex. WW at p. 2). The February 2018 social history report indicated that the parent expressed that she was "unhappy with the previous evaluation" and on February 9, 2018, she signed the consent for the district to evaluate the student again in hopes of the CSE finding the student eligible for special education services (Dist. Ex. 12 at p. 1). Thus, while the parent communicated disagreement with the district's evaluations of the student leading up to the December 2017 CSE meeting, she did not, at that time, request that the district fund an IEE. The Second Circuit Court of Appeals has recently found that, if a district and a parent agree that a student should be evaluated before the required triennial evaluation "the parent must disagree with any given evaluation before the child's next regularly scheduled evaluation occurs" or "[o]therwise, the parent's disagreement will be rendered

irrelevant by the subsequent evaluation" (D.S. v. Trumbull Bd. of Educ., 975 F.3d 152, 170 [2d Cir. 2020]). Therefore, the parent's failure to request reimbursement for the October 27, 2017 private neuropsychological evaluation defeats the parent's claim for reimbursement. The parent has not expressed any disagreement with the evaluations conducted by the district between February and April 2018 (see Dist. Exs. 12; 16; 18).

According to the parent's testimony, during the 2019-20 school year, she requested additional evaluations for the student that the district did not conduct (Tr. p. 741). However, the parent cannot base her request for district funding of the February 2020 neuropsychological evaluation on this purported request as the parent's due process complaint notice in this matter does not include any allegations relating to the district's failure to evaluate the student in all areas of suspected disability during the 2019-20 school year (see generally Parent Ex. A).

In light of the above, the parent is not entitled to reimbursement for the 2015, 2017, or 2020 privately obtained neuropsychological evaluations.

VII. Conclusion

Based on the aforementioned determination that the district met its child find obligation, appropriately found the student ineligible for special education at the December 2017 CSE meeting and thereafter provided the student a FAPE for the 2018-19 school year, the necessary inquiry is at an end.

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

THE APPEAL IS DISMISSED.

**Dated: Albany, New York
May 10, 2021**

**JUSTYN P. BATES
STATE REVIEW OFFICER**