The University of the State of New York

The State Education Department
State Review Officer
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No. 21-108

Application of a STUDENT SUSPECTED OF HAVING A DISABILITY, by his parents, for review of a determination of a hearing officer relating to the provision of educational services by the New York City Department of Education

Appearances:
Spencer Walsh Law, PLLC, attorneys for petitioners, by Tracey Spencer Walsh, Esq.

Judy Nathan, Interim Acting General Counsel, attorneys for respondent, by Cynthia Sheps, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioners (the parents) appeal from the decision of an impartial hearing officer (IHO) which determined that respondent (the district) correctly found that the student was not eligible for special education services and denied the parents' request to be reimbursed for their son's tuition costs at the Sundance Canyon Academy (Sundance) for the 2019-20 school year. 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 student attended both public and private schools as a younger child, at which time the parents reported that he exhibited "behavioral issues" and had difficulty following directions (Parent Exs. F at p. 3; H at p. 13). He received a diagnosis of an attention deficit hyperactivity

disorder (ADHD) at age seven for which he was administered medication beginning at 10 years of age (Parent Ex. H at p. 8).[1]

In spring 2017 (seventh grade), the parent reported that the student's behavioral difficulties "escalated" and that he exhibited behaviors such as having an "explosive tantrum" for approximately two hours, following his mother around the house with a knife, throwing a glass, and banging on doors with a screwdriver (Parent Ex. F at p. 2). Further, on four occasions, the parent reported that the student did not come home from school and she did not know his whereabouts (id.). Additionally, the student sent inappropriate pictures to peers (id. at pp. 2-3). Based on these behaviors, the parent reported that she "no longer [felt] able to have [the student] live under her roof due to safety issues with regards to herself and his siblings" (id. at p. 3). During this time, the student saw a counselor on a weekly basis for individual therapy and on alternate weeks he participated in joint sessions with his mother (id. at p. 3). The parent reported that the student was doing poorly in school because he did not complete his work, had engaged in a fist fight with a peer, had received detentions, and had been suspended (Parent Exs. F at p. 3; H at p. 19). Following a private neuropsychological evaluation in spring 2017, the neuropsychologist concluded that the student continued to meet the criteria for an ADHD diagnosis and also met the criteria for a developmental coordination disorder and an intermittent explosive disorder and was "developing a [c]onduct [d]isorder" (Parent Ex. F at pp. 8, 9).[2]

During summer 2017, the parent reported that the student visited with family out of state, attended summer camp, and went on vacation to another country with family where he "did well" (Parent Ex. H at pp. 7, 17, 19).

From approximately September 2 to September 7, 2017 the student was admitted for an inpatient psychiatric hospitalization after being picked up by police for disrobing in public, reportedly following encouragement by his friends (Parent Exs. G at p. 4; H at pp. 6-7, 17, 32). At that time the parent reported that the student had exhibited "worsening impulsivity and aggression" and engaged in physical fights with his younger sibling, and the parent had concerns about the student's continued aggression toward family members (Parent Ex. H at pp. 6, 7). As such, the parent was considering "a therapeutic educational setting, possibly a residential program" (id. at pp. 7, 17, 19).

During the 2017-18 school year (eighth grade), the student attended a general education parochial middle school (Parent Ex. I at p. 1). Following the student's fall 2017 psychiatric hospitalization discharge, the parents reported that, while there was a period of time that the student "did well," he then began refusing to go to outpatient therapy or to take his ADHD medication (id. at p. 13).

[1] The student has also received a diagnosis of an excoriation disorder, described as skin-picking behavior (Parent Ex. G at p. 3).

[2] The parent described the student's symptoms of an intermittent explosive disorder as the student becoming upset, dysregulated, and unable to control his emotions, at which time he "react[ed] intensely and aggressively for a period of time" (Tr. pp. 157, 159). She continued that "afterwards, [the student] [came] down from that and [was] able to just resume normal functioning" (Tr. p. 159).

During the 2018-19 school year (ninth grade), the student attended the honors program at a private general education parochial high school (Tr. p. 99; Parent Ex. I at pp. 21, 27; Dist. Ex. 1 at pp. 1-2). From approximately January 29 to February 6, 2019, the student was admitted for a second psychiatric hospitalization due to an incident involving aggressive behavior toward his sibling (Parent Exs. I at pp. 6-7, 16; J at pp. 15-16). At that time the parents reported that, over the past several months, the student had been "tantruming when he didn't get his way" and that he was "allowed to just play video games as th[at] [wa]s the only thing that ke[pt] him occupied and quiet" (Parent Ex. I at p. 13). According to the parents, the student was verbally and physically aggressive and had been destructive at home, was noncompliant with medication and outpatient therapy, was very impulsive, and had "little interest in personal hygiene" (Parent Exs. I at p. 13; J at p. 2). Further, the parents reported that the student had been "very oppositional and [did] not respond to consequences at home or at school" (Parent Ex. J at p. 2). The parents also reported that the student was doing increasingly poorly at school, he had received "many detentions," was not working in school, did not complete homework, and was failing some classes (Parent Ex. I at pp. 13, 21). According to hospital records, the family was "concerned for the safety of their son and themselves" and they were looking to "pursue residential placement"; however, a residential treatment program explored at that time did not accept the student (Parent Exs. I at pp. 20, 31; J at pp. 3, 14). During the second psychiatric hospitalization, the student received a diagnosis of an oppositional defiant disorder (ODD) (Parent Ex. J at pp. 2, 15-16).

On February 25, 2019 the parent advised the district of the student's second admission to an inpatient psychiatric facility, noting that he had struggled with behavioral problems for many years and had recently undergone a second neuropsychological evaluation (Parent Ex. D). The parent indicated that she would share the report as soon as it was completed, granted consent for the district to conduct "any additional evaluations" of the student, and requested "an IEP meeting" (id.).

On April 10, 2019, the parent provided the district with consent to evaluate the student to determine whether he had an educational disability and was eligible for special education services and the district conducted a social history (Parent Ex. E; Dist. Ex. 8 at p. 3). On May 28, 2019, a district special education teacher conducted a classroom observation of the student in his high school honors English class (Parent Ex. T; Dist. Ex. 1 at p. 1). According to the parent, the student completed the 2018-19 school year, but was required to go to summer school to pass the two classes that he had failed in order to continue at the high school for the next school year (see Tr. pp. 162-63; Parent Ex. R). The student then sent the dean of the high school inappropriate videos via email, "at which time it became no longer an option [for the student] to even take the summer classes and come back" (Tr. p. 163). In June 2019, the high "school wanted to expel [the student], so [his] parents withdrew him from the school in order to avoid having an expulsion on his record" (Parent Exs. G at p. 6; T; Dist. Ex. 1 at p. 2; see Tr. p. 163).

In a neuropsychological addendum dated July 12, 2019, the neuropsychologist, who had conducted the June 2017 evaluation of the student, reflected parent reports that the student's behavior had "significantly deteriorated whereby he ha[d] been extremely violent towards his sister and at home in general, engaged in numerous anti-social acts in public," sent inappropriate material to others via email and text, and exhibited "increased impulsivity and aggression towards family members to the point that he ha[d] required two psychiatric hospitalizations" (Parent Ex. G at p. 1; see Parent Ex. F at p. 10). The addendum continued that "[s]ince th[ose] hospitalizations, [the

student] ha[d] refused to attend outpatient therapy or take his medications," adding that in the past he had changed schools "a number of times due to behavioral problems and aggression towards peers in school" (Parent Ex. G at p. 1). Additionally, the student reportedly refused to study, attend classes, and stated that he did not want to go to school (id.). Further, the neuropsychologist reported that the student's "grades [had] deteriorated this past year such that he [was] failing and he [was] defiant in school," noting that the student was not permitted to return to his high school for the upcoming school year due to his actions (id.). The neuropsychologist concluded that the student required "immediate placement in a therapeutic school program as his emotional and psychological needs [were] intertwined with his learning and academic needs," adding that "[h]is mental health issues [were] so severe that they significantly impact[ed] his education" (id.). Further, the neuropsychologist indicated that the student had been "unable to progress despite [two] hospitalizations, outpatient therapy, and medication, since he [was] largely non-compliant," and that, as such, "he [could] not make progress emotionally, behaviorally, or academically and [would] continue to regress unless he receive[d] placement in a full-time, year round, therapeutic, residential setting" to address his emotional, behavioral, and educational needs simultaneously (id.).

On August 13, 2019, the district conducted a Level 1 vocational interview and an educational evaluation of the student (Dist. Exs. 6; 7).

In a letter dated September 9, 2019, counsel for the parents advised the district that the parents intended to unilaterally place the student at Sundance for the 2019-20 school year and seek public funding of Sundance tuition and costs, including airfare, hotel, and rental car costs (Parent Ex. B). By letter dated September 16, 2019, the district responded to the parents' notice letter, informing the parents that the district had determined the "10 day notice of unilateral placement claim [was] not appropriate for settlement" and indicated if the parents were still interested in pursuing the unilateral placement at district expense, they must file a due process complaint notice (Parent Ex. C).

On September 7 and 9, 2019, the parents signed an enrollment contract for the student's attendance at Sundance for the 2019-20 school year (Parent Ex. N). On September 24, 2019, the student began attending Sundance, described as a residential treatment center for troubled teenage boys (Parent Ex. K at p. 1).[3]

On December 12, 2019, the CSE convened for an initial eligibility meeting (Dist. Exs. 1; 3; 5). After reviewing various assessment results and materials, the CSE determined that the student was not eligible for special education services (Parent Exs. T; U; V; Dist. Exs. 1; 3 at p. 1; 5 at pp. 2-3).

A. Due Process Complaint Notice

In a due process complaint notice dated June 3, 2020, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2019-20 school year (see Parent Ex. A). The parents argued that the district failed to "timely 'find'" the student's

[3] The Commissioner of Education has not approved Sundance as a school with which school districts may contract for the instruction of students with disabilities (see 8 NYCRR 200.1[d], 200.7).

"emotional disturbance or any other disability" (id. at p. 7). With regard to evaluations, the parents asserted that the district failed to timely evaluate the student and provide the parents with evaluation reports, and that the district's evaluations of the student were "inadequate," because the evaluations failed to address all areas of suspected disability or include a vocational evaluation (id. at p. 6). Next, the parents argued that the district failed to convene a CSE meeting in a timely manner, the CSE was not appropriately composed, and the CSE failed to consider, review, or have pertinent documents about the student including his report card, reports from two psychiatric hospitalizations, private evaluations, and recommendations from private professionals (id. at pp. 6-7).

Further, the parents alleged that the CSE failed to classify the student as a student with a disability, develop an IEP, and recommend a "viable educational program that was 'reasonably calculated' to meet [the student's] unique needs" (Parent Ex. A at pp. 5, 7). Specifically, the parents argued that the CSE failed to 1) develop annual goals, 2) consider a residential placement for the student, 3) offer the student an appropriate program and placement, including services on a 12-month basis, or 4) implement recommendations from private evaluation reports (id. at pp. 5-7). Additionally, the parents asserted that the district failed to provide them with a prior written notice or remediate any of its deficiencies even after the parents had provided the district with a "'10-day' letter" (id. at p. 5). As such, the parents alleged that "[w]hile the [d]istrict's failures and omissions may each amount to a denial of a FAPE on their own, certainly the cumulative and combined effect of the [d]istrict's multiple failures add[ed] up to a FAPE deprivation for [the student]" (id.).[4]

As relief, the parents requested tuition reimbursement for the student's placement at Sundance including room and board, as well as transportation to and from Sundance for the student and the parents, together with rental car and hotel costs (Parent Ex. A at p. 8). Additionally, the parents indicated that they would "also seek a compensatory education claim for any and all educational services [the student was] entitled to that the [d]istrict failed to provide, including his pendency entitlements" and that they "reserve[d] the right to further amend" their demand (id.).

B. Impartial Hearing Officer Decision

An impartial hearing convened on November 18, 2020 and concluded on March 8, 2021 after four days of proceedings (Tr. pp. 1-270). In a decision dated April 3, 2021, the IHO first set forth a recitation of the parties' positions, witness testimony, and the legal standard for determining eligibility for special education services as a student with an emotional disturbance (IHO Decision at pp. 4-16). Next, the IHO concluded that the student "did not exhibit an inability to learn" and that, despite the student's various diagnoses, "the record lack[ed] evidence to substantiate that [the student's] emotional difficulties impacted his learning" (id. at pp. 16-17). According to the IHO,

[4] The parents also alleged that the district failed to provide the student with "'equal access' to an appropriate education that was afforded to other children who reside[d] in" the district, and that the CSE "applied blanket policies and considered administrative factors and the availability of resources over [the student's] needs in formulating his IEP" (Parent Ex. A at pp. 6, 7). Further, the parents put forth assertions that the district's "employees intentionally or negligently concealed or otherwise failed to disclose information that it had a duty to disclose to the student and the student's parents which, if timely disclosed, would be the basis for additional claims" and that "the [d]istrict failed to respond to the parents' questions and requests for information and had such information been timely supplied, that information would have been pleaded . . as part of the hearing request" (id. at p. 7).

further analysis of the evidence in the hearing record showed that the student's "declining academics may be more the result of circumstances within the home environment," and did not indicate that the student "engaged in altercations within the school setting" either with teachers or peers (id. at pp. 17, 19). As such, the IHO determined that the record supported "that any socio-emotional issues [the student] may have had were solely directed . . . towards his family members," and witness testimony "strongly suggest[ed] that [the student] required the residential setting not because his behaviors were impacting his academics but because he needed to tend to his behavioral issues while not neglecting his academics" (id. at p. 19).

Therefore, the IHO found "no indication that the CSE determination" that the student did not meet the criteria for eligibility for special education "as a student with a classifiable disability was either improper or predetermined," noting that "[t]he evaluative information available to the CSE provided sufficient information regarding the student to warrant the CSE team conclusion that [the student] did not exhibit a significant delay in one or more functional areas related to cognitive, language and communication, adaptive, socio-emotional or motor development which adversely affected his ability to learn" (IHO Decision at p. 20). She continued that the student also did not exhibit an "inability to build or maintain friendships with peers and teachers," "inappropriate behaviors under normal circumstances," "a generally pervasive mood of unhappiness," or "a tendency to develop physical symptoms or fears associated with personal or school problems to a marked degree over a long period of time and to a marked degree within the school setting" (id.). The IHO found "no procedural deficits that may have existed" in the CSE's review of the student's eligibility "to rise to the level of denying the student a FAPE," and that "[t]here ha[d] been nothing presented in this proceeding to indicate an erroneous determination by the [d]istrict in failing to identify the student with a classifiable disability" (id.). As such, the IHO found that there was "no need to review the appropriateness of the unilaterally-selected placement" or equitable considerations, and she dismissed the parents' due process complaint notice (id. at p. 21).

IV. Appeal for State-Level Review

The parents appeal from the IHO's denial of their request for tuition reimbursement, transportation to and from Sundance, and "necessary travel expenses." First, the parents assert that the IHO erred by failing to find that the district violated the student's procedural safeguards resulting in a substantive deprivation of a FAPE; specifically, that 1) the district "failed under Child Find" by failing to convene a CSE meeting until 10 months after the parents' initial request, 2) the CSE was not properly composed, 3) the district failed to timely evaluate the student, 4) the CSE knowingly failed to consider school records and psychiatric hospitalization reports, 5) the CSE failed to discuss the student's emotional disturbance and criteria for eligibility for emotional disturbance or any other classification at the CSE meeting, and 6) the CSE failed to consider the continuum of programs. Second, the parents argue that the IHO improperly shifted the burden of proof to the parents when she found that they had "failed to substantiate a correlation of declining grades due to behavior occurring in the school setting." Third, the parents allege that the IHO failed to thoroughly and carefully examine and weigh the evidence and improperly relied on other evidence, otherwise, she would have concluded that the parents prevailed. Next, the parents assert that the IHO should have found that a FAPE was denied, because the CSE did not review or consider the private neuropsychological evaluation report and consequently rejected the recommendation that the student attend a therapeutic residential program. The parents also argue

that the IHO erred in finding that the evidence supported the CSE's decision that the student did not meet the criteria for a "classifiable disability"' and assert that the CSE failed to consider emotional disturbance as a disability classification.

Further, the parents claim that the IHO erred by determining that any social/emotional issues the student may have had were "solely directed towards his family members," and that the CSE had sufficient information to determine that the student did not exhibit a significant delay in adaptive and social/emotional development which adversely affected his ability to learn. Additionally, the parents allege that the IHO failed to cite to controlling caselaw to support her determinations that the student's behaviors outside of school should not have been considered, and that his school refusal did not qualify as interfering with his learning. Further, the parents assert that the IHO erred in finding that the hearing record lacked evidence that the student's emotional difficulties affected his learning.

Lastly, the parents argue that, despite the IHO's failure to rule on these issues, Sundance was an appropriate unilateral placement and equitable considerations weighed in favor of the parents' requested relief, as such, they are entitled to tuition reimbursement and transportation costs. The parents request a determination that the student is eligible for special education services and transportation, that Sundance was appropriate, that equitable considerations weighed in favor of the parents' requested relief. In addition, the parents seek an order that the district reimburse the parents for the student's placement at Sundance for the 2019-20 school year along with transportation, rental car, and hotel costs.

In an answer, the district responds to the parents' allegations in the request for review with a general denial and asserts that the IHO's determination that the student did not require special education services should be affirmed. Specifically, the district first argues that the parents' due process complaint notice did not allege that the district had committed any child find violations. The district concedes that it failed to timely evaluate the student and convene a CSE meeting to make an initial eligibility determination, but argues that the delay did not rise to a procedural violation of the IDEA that affected the student's right to a FAPE, as it did not hinder the parents' ability to execute an enrollment contract with Sundance. Next, the district asserts that the absence of a district special education teacher or regular education teacher at the December 2019 CSE meeting also did not result in a denial of a FAPE, as the director of Sundance participated in the meeting and the CSE had teacher reports about the student from the 2018-19 school year. The district further argues that the parents' claim that the CSE failed to consider appropriate evaluations has no merit, and that, while the CSE considered the recommendations contained therein, it was not required to "wholesale adopt" those same recommendations. Contrary to the parents' contention, the district asserts that the student's social/emotional difficulties did not adversely affect his educational performance, and overall the evidence in the hearing record supports the IHO's determination that the student should not have been found eligible for special education services.

Additionally, although not addressed by the IHO, the district alleges that the parents failed to sustain their burden to show that Sundance was an appropriate unilateral placement and "was individualized to meet the unique needs of [the student]." Lastly, the district argues that equitable considerations do not weigh in the parents' favor as they failed to make the student available for

testing which impeded the district's efforts to timely evaluate the student. As such, the district requests that the parents' appeal be dismissed in its entirety with prejudice.

In a reply, the parents argue that the district made incorrect factual assertions and distinguishes some of the caselaw the district cited in its answer. The parents respond to the district's allegation that the due process complaint notice did not include a child find allegation, referencing an allegation that the district failed to "timely 'find'" the student's "emotional disturbance or any other disability." The parents further allege that Sundance was appropriate for the student and equitable considerations favored the parents' request for relief.

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]).[5]

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

[5] 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).

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. CSE Process

1. Timeliness of the Initial Evaluation and CSE Meeting

While the parents and district argue as to whether the parents raised an allegation related to "child find" in the due process complaint notice, there is no question that the due process complaint notice can be read to include such an allegation in that the parents asserted "[t]he district failed to timely 'find' [the student's] emotional disturbance or any other disability" (Parent Ex. A at p. 7). However, on appeal, the parties seem to be conflating the district's child find responsibilities with the district's obligations after a referral for an initial evaluation is made. For example, the parents link an allegation that the district failed in its child find obligations with the allegation that the district failed "to timely convene an IEP meeting [by] not convening until 10 months after Petitioners' initial request"; the parents contend that despite the parents requesting an evaluation on February 25, 2019, "the [district] failed to meet its statutory obligation under Child Find"; and the parents refer to the district as having "Child Find failures at the IEP meeting" (Req. for Rev. at pp. 1-2; Parent Mem. of Law at pp. 1, 26). Consistent with the parents' allegations on appeal, the primary focus of this portion of the decision is on the impact of the district's failure to comply with its obligations after the parents' referral of the student for an initial evaluation. The district concedes that it did not evaluate the student or hold a CSE meeting within the regulatory time period; however, the district contends that these failures did not affect the student's right to a FAPE.

Upon written request by a student's parent, a district must initiate an individual evaluation of a student (see Educ. Law § 4401-a[1], [3]; 8 NYCRR 200.4[a][1][i]; [a][2][ii]-[iv]; [b]; see also 20 U.S.C. § 1414[a][1][B]; 34 CFR 300.301[b]). Specifically, once a referral is received by the CSE chairperson, the chairperson must immediately provide the parents with prior written notice, including a description of the proposed evaluation or reevaluation and the uses to be made of the information (8 NYCRR 200.4[a][6]; 200.5[a][5]). In addition, the district must, within 10 days of receipt of the referral, request the parent's consent to initiate the evaluation of the student (see 8 NYCRR 200.4[a][2][iv][a]; see also 34 CFR 300.300[a]).[6] After parental consent has been

[6] State regulation also provides that, upon receiving a referral, a building administrator may request a meeting with the parent and the student (if appropriate) to determine whether the student would benefit from additional general education support services as an alternative to special education, including speech-language services, academic intervention services, and any other services designed to address the learning needs of the student (see 8 NYCRR 200.4[a][9]). Any such meeting must be conducted within 10 school days of the building administrator's receipt of the referral and must not impede the CSE from continuing its duties and functions (see 8 NYCRR 200.4[a][9][iii][a]-[b]).

obtained by a district, the "initial evaluation shall be completed within 60 days of receipt of consent" (8 NYCRR 200.4[b]; see also 8 NYCRR 200.4[b][7]). "Within 60 school days of the receipt of consent to evaluate for a student not previously identified as having a disability . . . the board of education shall arrange for appropriate special programs and services" (8 NYCRR 200.4[e][1]).[7]

Here, the evidence in the hearing record shows that by letter dated February 25, 2019, the student's mother requested a CSE meeting, informed the district that the parents were having a second neuropsychological evaluation of the student conducted, and provided consent for the district to conduct "any additional evaluations" (Parent Ex. D). According to the district's SESIS log, the district initially scheduled a social history to be conducted on March 15, 2019, but that appointment was rescheduled twice at the parent's request (see Dist. Ex. 8 at p. 4). On April 10, 2019, the parent formally provided the district with consent to evaluate the student, and a social history was conducted (id.). During spring 2019, the district attempted to schedule a classroom observation, a physical examination, and an independent psychiatric evaluation (see id.). A classroom observation of the student was conducted on May 28, 2019 (Dist. Ex. 1 at p. 1). In late June 2019, the parent informed the district that the student would not be physically in the district until the week of July 28, 2019 (Dist. Ex. 8 at p. 3). On July 29, 2019, the parent informed the district that the student refused to attend the appointment for the psychiatric evaluation scheduled for that day (id. at pp. 2, 3). The district conducted a Level 1 vocational evaluation and an educational evaluation of the student on August 13, 2019 (Dist. Exs. 6 at p. 1; 7 at p. 1). Subsequently, the district received documents pertaining to the student's unilateral placement at Sundance, at which time the matter changed CSE regions (see Tr. p. 39; Parent Ex. B; Dist. Ex. 8 at pp. 1, 2). The CSE convened for the student's initial eligibility meeting on December 12, 2019 (Dist. Ex. 1).

As noted above, the district was required to complete the initial evaluation within 60 days from receipt of consent to evaluate and, if the student was found eligible for special education, the district would have been required to arrange for appropriate special programs and services within 60 school days from receipt of consent to evaluate (8 NYCRR 200.4[b], [e][1]; see also 8 NYCRR 200.4[b][7]). The district concedes that it failed to meet these requirements (Answer ¶ 8).

Where a district fails to adhere to the requisite timelines for evaluating a student and creating an educational program post-referral, relief for such a procedural violation of the IDEA is warranted only if the violation affected the student's right to a FAPE (J.D. v. Pawlet Sch. Dist., 224 F.3d 60, 69 [2d Cir. 2000]; see A.H. v. New York City Dep't of Educ., 394 Fed. App'x 718, 720 [2d Cir. Aug. 16, 2010]; Jusino v. New York City Dep't of Educ., 2016 WL 9649880, at *6 [E.D.N.Y. Aug. 8, 2016], aff'd 700 Fed. App'x 25 [2d Cir. July 7, 2017]; A.M. v. New York City Dep't of Educ., 840 F. Supp. 2d 660, 688 [E.D.N.Y. 2012], aff'd, 513 Fed. App'x 95 [2d Cir. Mar. 12, 2013]; Maus v. Wappingers Cent. Sch. Dist., 688 F. Supp. 2d 282, 294, 300 [S.D.N.Y. 2010]; M.M. v. New York City Dept. of Educ. Region 9 (Dist. 2), 583 F. Supp. 2d 498, 501 [S.D.N.Y. 2008]; Warton v. New Fairfield Bd. of Educ., 217 F. Supp. 2d 261, 279 [D. Conn. 2002]). Accordingly, with the district's concession that it failed to timely evaluate the student, the next

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

question is whether the district's failure deprived the student of a FAPE, significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]). As discussed below, the December 2019 CSE's determination that the student was not eligible for special education is supported by the hearing record. Accordingly, although the district did not conduct the initial evaluation of the student within the applicable timelines, the timing of the evaluations cannot be said to have deprived the student of a FAPE or educational benefits (see Burnett v. San Mateo Foster City Sch. Dist., 739 Fed. Appx. 870, 872 [9th Cir. 2018] ["When a student is ineligible for special education there can be no loss of educational opportunities"]). Finally, it is possible for a parent of a student suspected of having a disability to be excluded from the CSE process such that at least one SRO has found that a district denied a FAPE to a student who was not found eligible for special education where the district significantly impeded the parents' opportunity to participate in the decision-making process (see Application of a Student Suspected of Having a Disability, Appeal No. 15-038). However, as discussed below, the parents participated in the December 2019 CSE and there is no indication that the delay in evaluating the student and holding the initial eligibility meeting denied the parents the opportunity to participate in this instance.

2. CSE Composition

I will next turn to the parents' contention that the IHO ignored the parents' allegation that the December 2019 CSE did not include the participation of a special education or regular education teacher.

State regulation requires, in pertinent part, that a CSE must be composed of the following persons: the parents or persons in parental relationship to the student; not less than one regular education teacher of the student whenever the student is or may be participating in the regular education environment; not less than one special education teacher of the student, or, if appropriate, not less than one special education provider of the student; a school psychologist; a district representative who shall serve as the CSE chairperson; an individual who can interpret the instructional implications of evaluation results; a school physician if requested in writing 72 hours prior to the meeting; an additional parent member if requested in writing 72 hours prior to the meeting; other persons having knowledge or special expertise regarding the student, and if appropriate, the student (8 NYCRR 200.3[a][1]; see 20 U.S.C. § 1414[d][1][B]; 34 CFR 300.321[a]; Educ. Law § 4402[1][b][1][a]; see also 8 NYCRR 200.1[pp], [xx], [yy] [defining "regular education teacher," "special education provider," and "special education teacher," respectively, as a individuals qualified who are providing instruction or services to the student or who may serve as a teacher or provider to the student).[8]

Here, participants at the December 2019 CSE meeting included a district school psychologist who also served as the district representative, a district social worker, the director of Sundance, and the student's parents (Parent Ex. T; Dist. Ex. 1 at p. 6). The director of Sundance

[8] The regular education teacher "shall, to the extent appropriate, participate in the development of the IEP of the child, including the determination of appropriate positive behavioral interventions and supports and other strategies and supplementary aids and services, program modifications, and support for school personnel" (20 U.S.C. § 1414[d][3][C]; 34 CFR 300.324[a][3]; 8 NYCRR 200.3[d]).

testified that he has "a degree in communications and education" but that at the time of his testimony he did not "hold any certification or licensure" (Tr. pp. 206-07). Arguably, had the student been found eligible for special education and recommended to receive counseling, the district social worker may have qualified to serve as a special education provider. Even so, the CSE indisputably did not include a regular education teacher of the student as a member. Based on the above, the composition of the CSE constitutes a procedural violation; however, as with the timing of the evaluations, it must be determined if the composition of the CSE significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]).

In this context, one of the factors to consider is what a teacher would have added to the discussion during the December 2019 CSE meeting (see DiRocco v. Bd. of Educ. of Beacon City Sch. Dist., 2013 WL 25959, at *17-*18 [S.D.N.Y. Jan. 2, 2013] [concluding that when parents were allowed to meaningfully participate in the review process, ask questions of and receive answers from CSE members, and express opinions about the appropriateness of the recommended program for the student, the "preponderance of the evidence" did not show that the "failure to include a ninth grade regular education on the CSE was legally inadequate"]; J.F. v. New York City Dep't of Educ., 2012 WL 5984915, at *7 [S.D.N.Y. Nov. 27, 2012] [concluding that, even if a regular education teacher was a required CSE member, the lack of such a teacher did not render an IEP inappropriate when there was no evidence of any concerns during the CSE meeting that the regular education teacher was required to resolve and "no reason to believe" that required the advice of such a teacher]; E.A.M. v. New York City Dep't of Educ., 2012 WL 4571794, at *6-*7 [S.D.N.Y. Sept. 29, 2012]).

The parents contend that the lack of a teacher of the student resulted in the CSE "fail[ing] to robustly discuss 'how' [the student's] mental health challenges interfered with his education" (Parent Mem. of Law at p. 15). Other than this brief assertion, there is no other arguments posed as to how the procedural violation either significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or caused a deprivation of educational benefits (see IHO Ex. I; Req. for Rev. at p. 2; Parent Mem. of Law at p. 15; Reply at pp. 4-5; see also 20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]).[9] Similar to the above discussion regarding the timing of the evaluation, as the CSE's determination to find that the student was not eligible for special education is supported by the hearing record, there is no basis for finding that the lack of a general education or special education teacher at the CSE meeting resulted in a deprivation of educational benefit.

[9] In their memorandum of law in support of their request for review, the parents focus on the lack of a general education teacher and a special education teacher at the CSE meeting (see Parent Mem. of Law at p. 15). In their reply, the parents focus on their argument that the CSE did not have "a representative of the school district who is qualified to provide or supervise special education and who is knowledgeable about the general education curriculum and the availability of resources of the school district" (Reply at p. 4; see 8 NYCRR 200.3[a][1][v]). However, the CSE included a district school psychologist who also served as the district representative, which is permissible under the regulation, and there is no evidence in the hearing record to indicate that the school psychologist was not "knowledgeable about the general education curriculum and the availability of resources of the school district" (8 NYCRR 200.3[a][1][v]; see 20 U.S.C. § 1414[d][1][B][iv]; 34 CFR 300.321[a][4]).

Accordingly, the inquiry focuses on whether the procedural violation significantly impeded the parents' opportunity to participate in the decision-making process.

Although the CSE did not include the participation of a teacher of the student, as discussed in more detail below, the CSE did have information regarding how the student was functioning in the classroom. The CSE had a classroom observation report from May 28, 2019, ninth grade high school teacher reports from June 4, 2019, and the director of Sundance where the student was currently attending participated in the meeting (Dist. Ex. 1 at pp. 1-3). Additionally, review of the recordings of the December 2019 CSE meeting shows that the parents participated in the discussion (Parent Exs. T-V). Under these circumstances, the hearing record supports finding that, although the December 2019 CSE lacked the participation of a required member(s), the failure to include such member(s) did not significantly impede the parents' opportunity to participate, such that there would be a denial of FAPE for a student who is not otherwise eligible for special education.

3. Sufficiency and Consideration of Evaluative Information

The parents assert on appeal that the IHO erred in determining that the CSE had sufficient information to determine that the student did not exhibit an emotional disturbance because it lacked the student's high school "report cards reporting failed classes" and the "detailed psychiatric hospitalization records." Further, the parents allege the IHO erred insofar as she should have found that the CSE failed to review and consider the private neuropsychological evaluation.

An initial evaluation of a student must include a physical examination, a psychological evaluation, a social history, a classroom observation of the student, and any other "appropriate assessments or evaluations" as necessary to determine factors contributing to the student's disability (8 NYCRR 200.4[b][1]). A CSE may direct that additional evaluations or assessments be conducted in order to appropriately assess the student in all areas related to the suspected disabilities (8 NYCRR 200.4[b][3]). Any evaluation of a student with a disability must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parent, that may assist in determining, among other things the content of the student's IEP (20 U.S.C. § 1414[b][2][A], [B]; 34 CFR 300.304[b][1][ii]; see Letter to Clarke, 48 IDELR 77 [OSEP 2007]). In particular, a district must rely on technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors (20 U.S.C. § 1414[b][2][C]; 34 CFR 300.304[b][3]; 8 NYCRR 200.4[b][6][x]). Whether it is an initial evaluation or a reevaluation of a student, a district must ensure that a student is appropriately assessed in all areas related to the suspected disability, including, where appropriate, social and emotional status (20 U.S.C. § 1414[b][3][B]; 34 CFR 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]). An evaluation of a student must be sufficiently comprehensive to identify all of the student's special education and related services needs, whether or not commonly linked to the disability category in which the student has been classified (34 CFR 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]; see Application of the Dep't of Educ., Appeal No. 07-018).

In developing the recommendations for a student's IEP, the CSE must consider the results of the initial or most recent evaluation; the student's strengths; the concerns of the parents for enhancing the education of their child; the academic, developmental, and functional needs of the

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

The hearing record contains multiple sources of evidence regarding the information and documents the December 2019 CSE had available and considered (see Parent Exs. T; U; Dist. Exs. 1 at pp. 1-3; 3 at p. 1; 5 at pp. 2-3). An audio recording of a portion of the December 2019 CSE meeting reflected that the school psychologist listed aloud the information the CSE had for consideration, including: the April 2019 social history, the August 2019 educational evaluation report, the August 2019 vocational interview, the 2017 neuropsychological evaluation report, the 2019 neuropsychological addendum, the June 2019 teacher progress reports, the May 2019 classroom observation, and the "summaries" from the student's two psychiatric hospitalizations (Parent Ex. T; see Parent Ex. U; Dist. Ex. 5).[10, 11] One of the audio recordings and the minutes from the December 2019 CSE meeting indicated that "[p]rior to the start of the meeting the title of each evaluation that [the CSE] had was reviewed with [the parent]; she was asked if there were any additional[] evaluations that she had that could be utilized for this review and she indicated that there were not" (Parent Ex. T; Dist. Ex. 5 at p. 2). According to the audio recordings of different portions of the meeting, the school psychologist specifically reviewed information from the April 2019 social history, the June 2019 teacher progress reports, the May 2019 classroom observation, results of the 2017 neuropsychological evaluation, the August 2019 educational evaluation, and the 2019 neuropsychological addendum, and at various points inquired whether the parents had any questions or additional information to share (Parent Exs. T; U).

During the December 2019 CSE meeting the parents expressed concern that the CSE had not received the student's high school report card or the complete packet of documentation regarding the student's psychiatric hospitalizations that the parent had sent to the district (Parent Exs. U; V).[12] The school psychologist acknowledged that the CSE had not received those documents and, while she indicated the CSE needed to make a determination about the student's eligibility at that time, she also stated that the CSE could reconvene to consider the documents once they were received (Parent Exs. U; V). Although the CSE may not have had those specific documents, the evidence in the hearing record reflects, contrary to the parents' assertion, that the CSE had available and reviewed information about the student's school experience during the 2018-19 school year and the July 2019 neuropsychological addendum, which included information about his educational experiences, grades during the 2018-19 school year, and two psychiatric hospitalizations (see Parent Ex. G at pp. 2-5; Dist. Exs. 1 at pp. 1-3; 3 at p. 1; 5).

[10] Three audio recordings were admitted as evidence into the hearing record (Parent Exs. T; U; V). The parent testified that the December 2019 CSE meeting lasted "roughly, about an hour" (Tr. p. 172). The total time of the audio recordings in evidence is approximately 35 minutes (Parent Exs. T; U; V).

[11] The hearing record does not include copies of the social history, classroom observation, or the teacher report (see Parent Exs. A-X; Dist. Exs. 1-8; IHO Ex. I).

[12] The student's report card for the 2018-19 school year was not offered as evidence to be admitted into the hearing record (see Tr. pp. 1-270; Parent Exs. A-X; Dist. Ex. 1-8; IHO Ex. I).

Specifically, regarding the student's school experience during the 2018-19 school year, the CSE meeting minutes indicated that the student was "progressively getting worse at school," and that the CSE reviewed the June 2019 "teacher report" (Dist. Ex. 5 at p. 2; see Dist. Ex. 1 at pp. 1-3). According to the June 2019 teacher report reflected in the CSE ineligibility document, in English language arts the student was estimated to be performing at a ninth to tenth grade level for decoding, reading comprehension, fluency, and listening comprehension, he was a strong reader, and demonstrated good critical thinking skills when talking about the literature in class (Dist. Ex. 1 at p. 2). By report, the student was estimated to be performing at a tenth grade level in spelling, grammar, punctuation, and written organization, showing strong foundational skills, good organization of essays, and use of age-appropriate vocabulary (id.). In math, the teacher report indicated that the student's math computation and problem-solving skills were estimated to be on grade level and he had a strong working number sense, which he applied in class and on assignments (id.). The student also exhibited perseverance when solving problems, worked well in small groups and effectively in various contexts (i.e. equations, tables, graphs and visuals), and had the ability to assess his own work and reflect on its accuracy (id.).

Socially, the June 2019 teacher report included in the December 2019 ineligibility document indicated that the student was well liked by peers and teachers and could be "chatty during class time" but made "wonderful contributions in class" (Dist. Ex. 1 at p. 3). Additionally, the teacher described the student as a pleasure to have in class and indicated he was highly cooperative and responded to gentle reminders about appropriate behavior, he was friendly, social, kind and intelligent with a keen sense of humor, and he was observed to have had many close friends with whom he could be seen interacting with on a regular basis (id.). The teacher also reported that the student had difficulty staying focused and on task and was easily distracted, and that he required repeated redirections to engage in class discussions and stay on task in small groups (id.). The parents reported that while attending the high school the student had friends (id.).

According to the June 2019 teacher report reflected in the December 2019 ineligibility document, the student often did not hand in assignments (Dist. Ex. 1 at p. 2). He did very well in in-class assignments and his quiz/exam scores were always significantly higher than his homework grade because he did not hand in the work, reducing his overall grade (id.). Even when the student was given class time to begin his homework, he did not hand it in when it was due; his teachers would have liked to see him complete all of his homework assignments and develop strategies to avoid distractions in class (id. at pp. 2-3). The CSE also discussed the classroom observation conducted at the high school, in which he was an active participant in the honors English class and did not display disruptive behavior (Parent Ex. U; Dist. Ex. 5 at p. 2; see Dist. Ex. 1 at p. 1).

The December 2019 CSE had the July 2019 neuropsychological addendum that provided information about the student's school experiences (Parent Exs. G; U). In the addendum, the neuropsychologist relayed that the student exhibited behavioral difficulties throughout elementary and middle school, including that in sixth grade he "was suspended multiple times for aggressive behavior in school" and was failing classes (Parent Ex. G at p. 5). According to the report, in seventh and eighth grades the student "continued to struggle with behavioral problems and impulsivity," received several detentions, and had poor grades (id.). It was also reported that the student had "to change schools a number of times due to behavioral problems and aggression

towards peers in school," continuing that "he refuse[d] to study, attend classes, and state[d] that he d[id] not want to go to school" (id. at p. 1).

The July 2019 neuropsychological addendum also provided information specific to the student's performance during the 2018-19 school year (Parent Ex. G at pp. 5-6). According to the addendum, the student was defiant in school, had "failed several classes and had at least 20 detentions this past year" and the addendum also reflected reports that the student did not study, refused to do homework, did not turn in assignments, disliked school, and did not want to do the work (id. at pp. 1, 5). The addendum detailed the student's January 2019 and second semester 2018-19 school year report cards, which included teacher comments such as the student was missing assignments which hurt his performance, he needed to prepare more thoroughly for tests and quizzes, although he participated in class discussions his performance was inconsistent which had hindered his achievement, he was easily distracted in class, and his test scores were low (id. at pp. 5-6). Additionally, the addendum provided the student's second semester grades which were as follows: introduction to scripture: God's Word (66), honors English (70), honors global studies (82), Spanish I (85), honors algebra (90), honors biology (72), physical education (A), military science (F), art I (83); with an overall second semester average of 78.3 (id. at pp. 5-6).[13]

During the December 2019 meeting the CSE discussed the parents' concern that the CSE did not have the student's report card and the ineligibility finding did not take into account that the student "failed his Freshman year" at the high school, at which time the CSE explained that it did not have documentation to that effect (Parent Ex. U; Dist. Ex. 5 at p. 3). Rather, the CSE reflected reports from the parents that the student had failed two classes, his overall grades were low because he did not complete his class and homework, and that he "did not complete ninth grade," as they withdrew him from the school in order to avoid having an expulsion on his record after he sent an inappropriate email to the high school dean (Dist. Ex. 1 at p. 2). As indicated above, the student's ninth grade report card was not offered as evidence, but the information provided in the neuropsychological addendum about his performance shows that while he may have struggled behaviorally, his reported grades do not support that he had "failed" for the year (Parent Ex. G at pp. 5-6).[14] Therefore, the evidence in the hearing record shows that the CSE had sufficient information about the student's school performance, including the 2018-19 school year despite the lack of the student's report card, in order to make a determination regarding his eligibility for special education services.

[13] According to the addendum, the student's first semester overall average was 79.6 (Parent Ex. G at p. 6). Additionally, other evidence in the hearing record shows that the student's final grade for military science was a "C" not an "F" (compare Parent Ex. G at p. 6, with Parent Ex. R).

[14] The document admitted into the hearing record specifically reflecting the student's grades during the 2018-19 school year was not from the high school he had attended, rather, the student's grades were compiled into a transcript prepared by the agency Sundance contracted with to "provide our academic work" (Tr. p. 213; Parent Ex. R). The transcript shows—generally consistent with the neuropsychological addendum—that the student received credit for and the following grades during the 2018-19 school year: honors English (C), honors global studies (B-), honors algebra (B-), honors biology (C-), art I (B-), physical education (A), Spanish (B), and military science (C) (compare Parent Ex. G at pp. 5-6, with Parent Ex. R at p. 1). Although the transcript showed that the student failed a religion course and a coding level 1 course, the reason for the student's failure was not indicated (see Parent Ex. R).

Turning next to the parents' claim that the December 2019 CSE did not have information about the student's psychiatric hospitalizations, at the beginning of the CSE meeting the school psychologist indicated that she had "summaries" of the student's psychiatric hospitalizations (Parent Ex. T).[15] Review of the December 2019 ineligibility document reflects information about each hospital admission (Dist. Ex. 1 at p. 3). According to the document, the hospitalizations were initiated by the parents resulting from the incident when the student disrobed and due to concern about the student engaging in physically violent acts toward his younger siblings (id.). The student denied depressed mood, problems with sleep or appetite, suicidal ideation, auditory hallucinations, psychotic symptoms, or substance abuse (id.).

The July 2019 neuropsychological addendum provided detailed information to the district about both of the student's psychiatric hospitalizations (Parent Ex. G at pp. 1, 2, 3-5). Specifically, regarding the first hospitalization in September 2019, the addendum indicated that the parents took the student to the "ER" on September 1, 2019, and he was admitted to the psychiatric hospital "for acute psychiatric treatment as an inpatient" on September 2, 2019 (Parent Ex. G at p. 3). According to the neuropsychological addendum, while hospitalized the student "reported that [the] behavior occurred because he was 'just doing something stupid' and 'doing something impulsive'" (Parent Ex. G at p. 3). The addendum noted, at that time, the student had no past psychiatric hospitalization, no history of drug or alcohol abuse, no known physical or sexual abuse, and he denied depressed mood, problems with sleep or appetite, suicidal ideation, or auditory hallucinations (id.). The student did admit to being impulsive and reported watching inappropriate videos and sending inappropriate images to peers (id.). The addendum reflected reports that the student was assessed for suicidal ideation and considered to be "not at risk," and that he had not shown "aggressive behaviors on the unit, and thus he was considered stable for discharge" (id. at pp. 3, 4). He was discharged from the facility to his mother's house on September 7, 2017, and his discharge plan included receiving treatment from his prior outpatient providers (id. at p. 4).

Regarding the second psychiatric hospitalization in January 2019, the neuropsychological addendum indicated that, on January 27, 2019, the student engaged in a verbal and physician altercation with his sister (Parent Ex. G at p. 4). As a result of this incident the mother and stepfather brought the student to the "ER" that day and he was admitted to the psychiatric facility of that hospital on January 28, 2019 (id.). The parent reported that the student was doing poorly in school, refused to complete homework, was defiant, and physically aggressive at home; additionally, the student had little interest in personal hygiene, and was noncompliant with medications and outpatient therapy (id. at p. 5). During his stay, although he initially minimized the recent events that had occurred at home, the student was able to show some insight and remorse, and agreed to go to outpatient therapy upon discharge (id. at pp. 4-5). As an inpatient, the student denied any psychotic symptoms, suicidality, or substance abuse, and continued to receive diagnoses of ODD and ADHD (id. at p. 5). Due to the student's "increasing and severe physical abuse towards family members, parents explored therapeutic residential treatment

[15] The summaries the school psychologist referred to were not included in the hearing record (see Parent Exs. A-X; Dist. Exs 1-8; IHO Ex. I).

programs while [the student] was in the hospital"; however, he was denied admittance to a temporary residential center due to his aggressive behavior (id.).[16]

The parents' evidence admitted into the hearing record regarding the student's psychiatric hospitalizations included hospital records from both admissions (Parent Exs. H; I; J). While the parents may have submitted those records and possibly more information about the hospitalizations to the district that did not appear to be available to the December 2019 CSE, after reviewing the parents' evidence, it is unclear what additional documentation about the student's hospitalizations the parents believed the CSE required beyond the information it had available in the neuropsychological addendum and from the parents themselves at the time of the meeting (see Parent Exs. G at pp. 1, 2, 3-5; Y; U; V). I note that during the CSE meeting the parents were asked if they had any questions or if there was any other data anyone wanted to highlight, to which the parents responded they did not (Parent Ex. U). As described in detail above, the evidence in the hearing record shows that the district had sufficient information about the student's hospitalizations in order to make a determination regarding his eligibility for special education services (see Tr. pp. 130, 133-34; Parent Exs. T; U; V).

Additionally, the December 2019 CSE reviewed the August 2019 educational evaluation report (Parent Ex. U; Dist. Ex. 7). The report provided the student's cognitive assessment results from 2017, at which time his full scale IQ, verbal comprehension, and fluid reasoning skills were all in the high average range, and his visual spatial, working memory, and processing speed scores were in the average range (Dist. Ex. 7 at p. 2). Administration of the Wechsler Individual Achievement Test, Third Edition to the student yielded the following subtest standard scores (qualitative description): reading comprehension (109, average), math problem solving (128, above average), word reading (120, above average), essay composition (135, superior), pseudoword decoding (131, superior), numerical operations (132, superior), oral reading fluency (116, above average), math fluency-addition (120, above average), math fluency-subtraction (125, above average), math fluency-multiplication (125, above average) (id.).

During the August 2019 educational evaluation, the school psychologist assessed the student's social/emotional functioning via "background information and direct observation" (Dist. Ex. 7 at p. 4). At the time of the evaluation, the student "presented as a mature and polite student," rapport was easily established, and the student "openly discussed his school-based and outside interests" (id.). The student reported that he wanted to attend college, and that he had friends from school and camp with whom he maintained friendships (id. at pp. 2, 4; see Dist. Ex. 6 at p. 1). The school psychologist reported that the student demonstrated "an appropriate amount of effort and perseverance on challenging tasks," appeared to independently sustain attention, and did not ask for nor did he need any items repeated (Dist. Ex. 7 at pp. 2, 4). She further reported that her impression was consistent with the description of the student from the 2017 neuropsychological evaluation report, also noting that the student did not display disruptive behavior during the May 2019 classroom observation (id. at p. 4; see Parent Ex. F at pp. 3-4). Therefore, the evidence in the hearing record shows that the December 2019 CSE had multiple sources of evaluative information regarding the student's cognitive, academic achievement and school performance, and

[16] The student appears to have been discharged from the second psychiatric hospitalization on or about February 6, 2019 (see Parent Ex. J at pp. 15-16).

social/emotional performance at home and school upon which to make a determination regarding his eligibility for special education.

Finally, regarding the parents claim that the IHO erred insofar as she should have found that the CSE failed to review and consider the private neuropsychological evaluation, although a CSE is required to consider reports from privately retained experts, it is not required to adopt their recommendations (see, e.g., Mr. P. v. W. Hartford Bd. of Educ., 885 F.3d 735, 753 [2d Cir. 2018]; G.W. v. Rye City Sch. Dist., 2013 WL 1286154, at *19 [S.D.N.Y. Mar. 29, 2013]; C.H. v. Goshen Cent. Sch. Dist., 2013 WL 1285387, at *15 [S.D.N.Y. Mar. 28, 2013]; T.B. v. Haverstraw-Stony Point Cent. Sch. Dist., 933 F. Supp. 2d 554, 571 [S.D.N.Y. 2013]; Watson v. Kingston City Sch. Dist., 325 F. Supp. 2d 141, 145 [N.D.N.Y. 2004] [noting that even if a district relies on a privately obtained evaluation to determine a student's levels of functional performance, it need not adopt wholesale the ultimate recommendations made by the private evaluator], aff'd, 142 Fed. App'x 9 [2d Cir. July 25, 2005]). In this instance, the evidence in the hearing record shows that the CSE reviewed and considered the private neuropsychological evaluation report and addendum, determined that the student was not eligible for special education, and therefore came to a different conclusion regarding the student's placement recommendation than the private neuropsychologist (Parent Exs. F at p. 10; G at pp. 1, 7-8; U; V). This disagreement does not equate to the CSE failing to consider the private neuropsychological evaluative information.

B. Eligibility for Special Education as a Student with an Emotional Disturbance

On appeal the parents allege that during the meeting the CSE failed to discuss the student's emotional disturbance and "never went through the criteria for eligibility" as a student with an emotional disturbance. The parents additionally set forth numerous arguments regarding the IHO's determination that the CSE appropriately determined that the student was not eligible for special education and related services as a student with an emotional disturbance.[17]

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]).

Under the IDEA, in order to be found eligible for special education as a student with an emotional disturbance, the student must meet one or more of the following five characteristics:

> (A) An inability to learn that cannot be explained by intellectual, sensory, or health factors.

[17] In the parents' memorandum of law they assert that the student "fit the criteria for both an emotional disturbance and other health-impairment classification" (see, e.g., Parent Mem. of Law at pp. 1, 22, 25-26). Review of both the due process complaint notice and the request for review shows that the parents have not previously asserted that the student was eligible for special education as a student with an other health-impairment, and as this issue was not properly raised, I decline to address it for the first time on appeal (see Parent Ex. A; Req. for Rev.). Additionally, even if I were to consider this disability category, similar to the emotional disturbance classification, classification of a student with an other health-impairment requires a finding that the student has a disability "which adversely affects [the] student's educational performance" (see 8 NYCRR 200.1[zz][10]).

(B) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers.

(C) Inappropriate types of behavior or feelings under normal circumstances.

(D) A general pervasive mood of unhappiness or depression.

(E) A tendency to develop physical symptoms or fears associated with personal or school problems.

(34 CFR 300.8[c][4]; see 8 NYCRR 200.1[zz][4]). Additionally, the student must exhibit one or more of the five characteristics over a long period of time and to a marked degree that adversely affects the student's educational performance (34 CFR 300.8[c][4]; see 8 NYCRR 200.1[zz][4]). While emotional disturbance includes schizophrenia, the term does not apply to students who are socially maladjusted, unless it is determined that they otherwise meet the criteria above ((34 CFR 300.8[c][4]; see 8 NYCRR 200.1[zz][4]; New Paltz Cent. Sch. Dist. v. St. Pierre, 307 F. Supp. 2d 394, 398 [N.D.N.Y. 2004]).

During the CSE meeting, the school psychologist reviewed the evaluative information with the parents and at various intervals asked if they had any questions or additional information to highlight (Parent Exs. T; U). At the conclusion of the review of the available information, the school psychologist confirmed with the parent that the parent was "very familiar with the 13 disability classifications" and reviewed the eligibility standard, which was that the CSE needed to decide whether or not the student met the criteria for any of those classifications and, if so, whether he needed special education services (Parent Ex. U). The school psychologist continued that the student's disability must be such that it "adversely affect[ed] the student's educational performance" (id.). She concluded that the student's behaviors occurred outside of school, and the CSE did not have the data to support that those behaviors were adversely affecting his educational performance, therefore, he did not meet the criteria as a student with an educational disability at that time (id.).

1. Five Characteristics

As discussed above, the evidence in the hearing record shows that, while the student had some difficulties in these areas, his needs overall did not meet the following four criteria: inability to learn (Parent Exs. F at p. 5; R; Dist. Exs. 1 at pp. 1-2; 7 at pp. 2-4); inability to build or maintain satisfactory interpersonal relationships (compare Parent Ex. G at p. 2, with Parent Exs. F at p. 2; J at p. 13; Dist. Exs. 1 at p. 3; 7 at pp. 1, 3); general pervasive mood of unhappiness or depression (compare Parent Exs. F at p. 7; G at p. 7, with Parent Exs. H at pp. 9, 15, 16, 20, 26, 27, 29-30; I at pp. 10, 15, 22, 27, 33; J at pp. 3, 6, 14; Dist. Exs. 1 at p. 3; 7 at p. 4); or physical symptoms or fears associated with personal or school problems (see Dist. Ex. 1 at pp. 1, 3).

However, the evidence in the hearing record does show that the student exhibited inappropriate types of behavior or feelings under normal circumstances.

The United States Department of Education's Office of Special Education Programs has described the third characteristic as follows:

> The third characteristic, "inappropriate behaviors under normal circumstances" as operationally defined by a number of States may include those behaviors which are psychotic or bizarre in nature or are atypical behaviors for which no observable reason exists. For example:
>
> > Running away from a stressful situation, whether at home or at school, is not characteristic of the type of behavior this definition contemplates. Nor is the taking of alcohol or drugs, however harmful, such an inappropriate act under normal conditions as to come within this definition. This definition might include behavior such as assaulting teachers or students for no apparent reason. (emphasis in original).
>
> * * *
>
> The essential element appears to be the student's inability to control his/her behavior (Doe v. Maher, 793 F.2d 1470, 1480 footnote 8, [9th Cir. 1986]) and conform his/her conduct to socially acceptable norms (Honig v. Doe, 108 S.Ct. 592, 595 [1988]).

(Letter to Anonymous, 213 IDELR 247 [OSEP 1989]).

The student in this matter demonstrated aggression towards others, "anti-social acts in public" including disrobing on one occasion, sending inappropriate material to others via email and text, skin-picking, and impulsive, defiant and non-compliant behaviors (see, e.g., Tr. pp. 160-61; Parent Exs. F at pp. 2-3, 6-7; G; H; I; J; T). Additionally, although the exact extent is not defined in the regulation, the evidence in the hearing record suggests that the student exhibited these behaviors "over a long period of time and to a marked degree" (see Parent Exs. F at pp. 2-3, 6-7; G; H; I; J). As such, at the time of the December 2019 CSE meeting, the student met one of the five characteristics required for a determination of eligibility for special education as a student with an emotional disturbance.

2. Adverse Affect

The next portion of the emotional disturbance definition is a determination of whether the characteristic was exhibited over a long period of time and to a marked degree and in a way that adversely affected the student's educational performance (34 CFR 300.8[c][4]; see 8 NYCRR 200.1[zz][4]). The meaning of adversely affecting educational performance is an issue that has been left for each state to resolve (J.D., 224 F.3d at 66). 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, 688 F. Supp. 2d at 294, 297-98 [emphasizing that educational performance is focused on academic performance rather than social development or integration]; Application of the Dep't of Educ., Appeal No. 11-152; Application of a Student Suspected of Having a Disability, Appeal No. 11-021; Application of the Bd. of Educ., Appeal No. 09-087; Application of the Dep't of Educ., Appeal No. 08-042; Application of a Student Suspected of Having a Disability, Appeal No. 08-023; Application of a Child Suspected of Having a Disability, Appeal No. 07-086; Application of a Child Suspected of Having a Disability, Appeal No. 07-042; see also C.B. v. Dep't of Educ. of City of New York, 322 Fed. App'x 20, 21-22 [2d Cir. April 7, 2009]; Muller v. E. Islip Union Free Sch. Dist., 145 F.3d 95, 103-04 [2d Cir. 1998]; A.J. v. Bd. of Educ., East Islip Union Free Sch. Dist., 679 F. Supp. 2d 299, 308-11 [E.D.N.Y. 2010] [noting the difficulty of interpretation of the phrase "educational performance" and that it must be "assessed by reference to academic performance which appears to be the principal, if not only, guiding factor"]; 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 assessing whether a student's disability affects the student's educational performance, courts have taken a slightly broader approach, taking into account academic considerations beyond grades (such as considerations related to the student's attendance, homework, and organization)—but not so broad as to encompass social/emotional needs that have not necessarily translated to academics (see, e.g., M.N. v. Katonah-Lewisboro Sch. Dist., 2016 WL 4939559, at *11-*13 [S.D.N.Y. Sept. 14, 2016]; M.M., 26 F. Supp. 3d at 255-57; cf. W.A. v. Hendrick Hudson Cent. Sch. Dist., 927 F.3d 126, 145 [2d Cir 2019] [in the child find context, acknowledging that "academic success" may appropriately be construed more broadly to include feedback from teachers and standardized test scores in addition to grades], cert. denied, 140 S Ct. 934 [2020]). Thus in the absence of defined terms, the state of the law at this juncture remains somewhat imprecise in that that educational performance appears to lean toward academic performance while being mindful of social and behavior deficits that are affecting the student's academic performance, but the term also stops short of encompassing social and behavioral matters that relate more to matters outside the school environment (Maus, 688 F. Supp. 2d at 294 [noting that courts in this Circuit applying New York's IDEA-related regulations have uniformly interpreted this clause to require proof of an adverse impact on academic performance, as opposed to social development or integration]; A.J., 679 F. Supp. 2d at 308-11; see, e.g., Q.W. v. Bd. of Educ. of Fayette Cty., Ky., 630 Fed. App'x 580, 583 [6th Cir. Nov. 17, 2015]).

While the student exhibited one of the five characteristics, the evidence tends to show that it did not adversely affect his academic performance. Specifically, the information from the 2017 neuropsychological evaluation and the July 2019 addendum, the June 2019 teacher reports, the August 2019 educational evaluation, and the student's grades from the 2018-19 school year show that the student was achieving academically, albeit possibly not up to his potential based on his cognitive and academic achievement skills according to test results (Parent Exs. F at pp. 8-9; G at pp. 4-5; Dist. Exs. 1 at pp. 1-2; 7; see Tr. pp. 58-59; see also A.J., 679 F. Supp. 2d at 310 ["Plaintiffs' arguments that [the student's] 'educational performance' has been hampered by his emotional and behavioral problems such that he is unable to reach his maximum academic potential . . . has been rejected by the Supreme Court"], citing Rowley, 458 U.S. at 186).

Therefore, the greater weight of the testimonial and documentary evidence contained in the hearing record leads to the conclusion that the student's impulsive, defiant, and aggressive behaviors, and inappropriate communications with others, although certainly cause for concern, did not cause him to suffer academically and therefore did not adversely affect his educational performance (C.B., 322 Fed. App'x at 22; N.C. v. Bedford Cent. Sch. Dist., 300 Fed. App'x 11, 13 [2d Cir. Nov. 12, 2008]; Maus, 688 F. Supp. 2d at 297-98; A.J., 679 F. Supp. 2d at 308-11). Accordingly, the hearing record supports the IHO's determination that the student does not meet the criteria for special education eligibility as a student with an emotional disturbance.[18]

VII. Conclusion

Having found that the evidence in the hearing record supports the IHO's determination that the district properly determined that the student was not eligible for special education services for the 2019-20 school year, the necessary inquiry is at an end and there is no need to reach the issues of whether Sundance was an appropriate unilateral placement or whether equitable considerations weighed in favor of the parents' request for relief.

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

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
July 16, 2021

SARAH L. HARRINGTON
STATE REVIEW OFFICER

[18] The parents also argue on appeal that the IHO erred by failing to find that the student's emotional difficulties and "school refusal" did not "qualify as interfering with his learning." The parents assert that the student was engaging in school avoidance, being asked not to return to school, and "constantly" being in detention (Req. for Rev. at p. 9). As discussed, the evidence in the hearing record overall does not support a finding that such instances of missing school or classes were to the degree that they caused the student to suffer academically to the extent that there was an adverse impact on his educational performance.