The University of the State of New York

The State Education Department
State Review Officer
www.sro.nysed.gov

No. 21-168

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

Appearances:
The Law Offices of H. Jeffrey Marcus, PC, attorneys for petitioners, by Steven L. Goldstein, Esq.

Judy Nathan, Interim Acting General Counsel, attorneys for respondent, by Gail M. Eckstein, 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) offered the student appropriate special education programming and denied their request to be reimbursed for their son's tuition costs at the Bay Ridge Preparatory School (Bay Ridge) for the 2020-21 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

According to a May 2017 psychological update the student was a former English language learner and had passed the New York State English as a Second Language Achievement Test (NYSESLAT) in 2015 (Dist. Ex. 5 at p. 1). At the time of the May 2017 psychological update the student was in the sixth grade at a district public school, was eligible for special education programming as a student with a learning disability and received integrated co-teaching (ICT) services and speech-language therapy (id.).[1] Results of cognitive testing revealed that the student

[1] The student's eligibility for special education and related services as a student with a learning disability is not in dispute (see 8 NYCRR 200.1[zz][6]).

was functioning in the average range on measures of perceptual reasoning and in the low average range on tests of verbal comprehension (id.). Teacher reports indicated that the student's overall academic skills were on a fifth-grade level, that he did well with math computation but required support with word problems and multi-step problems, and that he had good decoding skills but required support with comprehension, inferencing, and written organization (id.). Reportedly, strategies used in the class which had been successful included visuals, note sheets, organizers, and scaffolds (id.).

In June 2017 a neuropsychological evaluation was completed upon the request of the student's family (Parent Ex. O at p. 6; see Dist. Ex. 1 at p. 1).[2] According to a subsequent abbreviated neuropsychological evaluation report, as of June 2017 the student had received diagnoses including fetal alcohol spectrum disorder, language disorder, specific learning disorder, unspecified anxiety disorder, other specified neurodevelopmental disorder, and rule out attention deficit hyperactivity disorder (Parent Ex. O at pp. 2, 6-7).

The student attended the Lowell School during the 2017-18 school year (Parent Ex. V ¶ 7; Dist. Ex. 4 at p. 1).[3] In January 2018 the student was observed in a science class of nine students where he reportedly was engaged in the lesson and attentive to the teacher, able to work independently as well as cooperatively with a peer, and presented no behaviors indicating difficulty with grasping the content of the lesson (Dist. Ex. 4). The student continued to attend the Lowell School during the 2018-19 school year (see Parent Ex. V ¶¶ 9-10).

During the 2019-20 school year (ninth grade) the student attended Bay Ridge (Parent Ex. C at p. 2). The student's Bay Ridge report card from fall 2019 showed the student received grades of "A," "A-" or "A+" in English Literature I (modified), Reading and Writing I, Global History I (modified), Algebra 1-A (modified), Physical Education 9, Biology I (modified), and Introduction to Spanish, and a designation of "Pass" in Academic Mentoring 09, Biology Lab, and Video Game Design (Parent Ex. R).

In December 2019 a CSE convened to conduct the student's annual review and developed an IEP with an implementation date of January 6, 2020 (Dist. Exs. 1 at pp. 1-18; 2; 3 at p. 1; 6 at p. 1; 7 at p. 1). Finding the student eligible for special education and related services as a student with a learning disability the December 2019 CSE recommended a 15:1 special class placement for math, English language arts (ELA), social studies, and sciences and related services of one 30-minute session per week of counseling in a group of three, one 30-minute session per week of individual counseling, and two 30-minute sessions per week of speech-language therapy in a group of three (Dist. Ex. 1 at pp. 1, 10-11, 16).

In a January 2020 letter to the district the parents shared their concerns that the district's recommendations, detailed within the December 2019 IEP and a December 2019 prior written

[2] The June 2017 neuropsychological evaluation report was not entered into evidence (see Parent Exs. A-V; Dist. Exs. 1-7).

[3] The parent described the Lowell School as "a small special education school for students with language-based learning disabilities" (Parent Ex. C at p. 2).

notice and school location letter, were inappropriate at the time and that moving the student mid-year would not address his significant learning needs (see Parent Ex. C at pp. 2-6).

In February 2020 the parents visited the public school the district assigned the student to attend (Parent Ex. D at p. 1).

The student's final 2019-20 school year report card from Bay Ridge showed the student received grades of "A," "A-" or "A+" in English Literature I (modified), Reading and Writing I, Global History I (modified), Algebra I-A (modified), Physical Education 9, Biology I (modified), and Introduction to Spanish and a designation of "Pass" in Academic Mentoring 09, Biology Lab, Video Game Design, and Digital Photography (Parent Ex. R).

Through a June 2020 email the district provided the parents with copies of a June 2020 prior written notice of the educational program recommended for the student, a June 2020 school location letter in which the district identified the same assigned school the parent had visited in February 2020 and which would implement the student's recommended program, and the student's December 2019 IEP (compare Parent Ex. K at pp. 1-23, with Parent Ex. D at p. 1).

In a July 2020 response to the district, the parents reiterated their concerns (with additional concerns and questions related to remote learning plans) from January 2020 that the district's recommendations detailed within the December 2019 IEP were inappropriate for the student at the time and that moving the student to the assigned school would not address his significant learning needs (see Parent Ex. D at pp. 1-7).

In a 10-day notice letter dated August 17, 2020, the parents stated that they believed that the district failed to offer the student a FAPE for the 2020-21 school year, specifically arguing, among other issues, that the district failed to provide the parents with the opportunity to meaningfully participate in the planning for the student's education, conduct and/or consider all necessary and appropriate assessments and evaluations in planning for the 2020-21 school year, and timely provide an appropriate IEP and school and classroom placement (Parent Ex. E at pp. 1-4). In the absence of an offer of a FAPE by the district, the parents stated that they would place the student at Bay Ridge for the 2020-21 school year and seek tuition reimbursement and/or direct payment from the district (id. at p. 4).

On August 17, 2020, the parents executed an enrollment contract with Bay Ridge for the 2020-21 school year (tenth grade) (Parent Ex. M at pp. 2-4). The student began receiving instruction from Bay Ridge on September 10, 2020 (Parent Exs. L; N).

In October 2020 the parents obtained a private abbreviated neuropsychological evaluation (Parent Ex. O at pp. 1-25).[4] The examiner noted that by October 2020, the student's "[r]elevant [h]istorical [d]iagnoses" included language disorder- mixed expressive-receptive, specific learning disorder, auditory processing disorder, unspecified anxiety disorder, and an other specified neurodevelopmental disorder (Parent Ex. O at p. 17). As a result of the then current evaluation,

[4] While the final report was dated October 4, 2020, the report also indicated that the testing was conducted in July and August of 2020 (Parent Ex. O at p. 2).

the student also received diagnoses of unspecified depressive disorder and rule out post traumatic stress disorder (id.).

A. Due Process Complaint Notice

By due process complaint notice dated October 27, 2020, the parents alleged that the district denied the student a FAPE for the 2020-21 school year and sought reimbursement and/or direct payment of the costs of the student's attendance at Bay Ridge for the 2020-21 school year (see Parent Ex. A).[5] Specifically, the parents argued that the December 2019 CSE was not duly constituted and specifically noted that the district representative and district special education teacher or related service provider who attended the meeting were not properly qualified (id. at pp. 11-12). In addition, the parents argued that the district denied them the opportunity to meaningfully participate in all stages of the IEP development and placement process, including by failing to provide them with an adequate and timely prior written notice and by improperly predetermining its recommendations (id. at pp. 4, 8-9).

The parents argued that the CSE failed to consider the reports and evaluative materials obtained and provided by the parent and contained in the student's special education file and that the December 2019 IEP did not include an adequately updated statement of the student's present levels of performance and/or an adequate statement of how his educational performance and ability to progress in the general education curriculum were impacted by his disability (Parent Ex. A at pp. 5, 8). The parents alleged that they were denied a meaningful role in the formation of the student's annual goals and short-term objectives and that the annual goals included in the December 2019 IEP were broad, vague, and lacked adequate methods of measurement, could not be implemented in the district recommended 15:1 special class, and were insufficient to allow the student to make meaningful progress and to address the student's educational needs including but not limited to language processing, decoding, written expression, pragmatic language, language processing, self-esteem related, sensory integration, speech-language, social/emotional, attentional, executive functioning, organizational, and academic deficits (id. at pp. 6-7). The parents also argued that the district failed to conduct a functional behavioral assessment (FBA) and failed to consider whether it should develop a behavioral intervention plan (BIP) for the student (id. at p. 7). Regarding the placement, the parents alleged that the December 2019 CSE's recommendation for the student to attend a 15:1 special class in a community school would not address the student's educational deficits as the student required "a small school and class environment with minimal sensory distractions," as well as multisensory instruction and "nurturing social support" (id. at pp. 4-5). The parents also argued that the CSE violated the requirement to place the student in the least restrictive environment (LRE) when it recommended that the student attend a 15:1 special class, segregated from nondisabled peers (id. at p. 4). Further, the parents

[5] The parties engaged in correspondence following the October 2020 due process complaint notice. In a November 2020 email, the district requested information regarding the parent's participation in a resolution session scheduled for November 19, 2020 (Parent Ex. F). In a written response dated the same day, the parents waived their right to a resolution meeting (Parent Ex. G at p. 1). In a letter dated November 20, 2020, the parents shared their concerns that the recommendations and plans outlined in an IEP, prior written notice, and school location letter developed as a result of a November 2020 CSE meeting were not appropriate for the student and that moving the student mid-year would not address his significant learning needs (Parent Ex. H at pp. 1-5).

alleged that the district did not provide the parents with adequate information regarding its plans for the student in the event he had to attend school remotely (id. at pp. 12-13).

Regarding the assigned public school site, the parents alleged that "the schools in which . . . programs" such as that recommended on the student's IEP "[we]re housed [we]re generally inappropriate" to meet needs such as the student's and that the specific school to which the student was assigned was inappropriate (Parent Ex. A at pp. 4, 10-11). In addition, the parents asserted that the district failed to provide them with sufficient information regarding the composition of the proposed classroom and that the recommended class placement could not provide an appropriate functional grouping for the student (id. at pp. 9-10).

The parents argued that Bay Ridge was an appropriate unilateral placement and that equitable considerations weighed in favor of the parents' requested relief (Parent Ex. A at pp. 13-14). As relief the parents sought reimbursement or direct payment of the costs of the student's tuition at Bay Ridge for the 2020-21 school year (id. at pp. 15-16). The parents also sought compensatory or additional educational services to be determined by the IHO, authorizations to have the student evaluated, reimbursement of interest and late fees incurred by the parents, and transportation costs for the 2020-21 school year (id. at p. 16).

B. Impartial Hearing Officer Decision

An impartial hearing convened on April 6, 2021 and concluded on June 9, 2021 after four days of proceedings (Tr. pp. 1-117). In a decision dated June 30, 2021, the IHO found that the district offered the student a FAPE for the 2020-21 school year (IHO Decision at pp. 5, 7-8). The IHO determined that the district "provided a cogent and responsive explanation, for the CSE's program and placement recommendations" (id.). The IHO further indicated that the December 2019 IEP was procedurally appropriate, and that if any procedural violations did occur, those violations were de minimis and did not in any way rise to a denial of FAPE (id. at p. 5). More specifically, the IHO found that the CSE "was comprised of the requisite members," considered "input of the Parents and current teachers" and "all necessary evaluations," as well as information about the student's management needs, and made appropriate program and placement recommendations based thereon (id. at p. 7). The IHO also noted that the recommended 15:1 special class was the same class size as the average class at Bay Ridge (id.). While the IHO noted that there was no need to reach the second or third prongs of the Burlington/Carter analysis, she stated that, if it had been determined that the district did not offer FAPE, she would have found that Bay Ridge was an appropriate unilateral placement and that the equitable considerations did "not disfavor" either party (id. at p. 8).

IV. Appeal for State-Level Review

The parents appeal and argue that the IHO erred in finding that the district offered the student a FAPE for the 2020-21 school year. The parents argue that the IHO's decision was "general, conclusory, and had little, if anything, to do with [the student] and his disability-based needs." In addition, the parents argue that the IHO erred and "improperly reversed the burden of persuasion." The parents further argue that the IHO's decision was flawed because the testimony and documents relied on by the district at the impartial hearing were faulty and blatantly incorrect.

More specifically, the parents contend that the IHO erred in failing to analyze and address the district's denial of the parents' right to meaningfully participate in the planning of the student's education as the parents allege that the CSE consistently ignored their concerns, refused to include critical information in the December 2019 IEP, and refused to provide a satisfactory explanation as to why they recommended a placement without enough support for the student without any evaluations or documentation to support the decision. In addition, the parents argue that the IHO erred in failing to determine that the December 2019 CSE's placement decision was improperly predetermined. The parents argue that the hearing record did not support the IHO's conclusion that the district considered the information and recommendations provided by the parent and Bay Ridge providers at the December 2019 CSE meeting and that contrary to the IHO's findings the December 2019 CSE completely ignored the psychological information available at the CSE meeting as well as the information and recommendations provided by the parent and the educational providers from Bay Ridge.

The parents contend that the IHO erred in finding the district provided a cogent and responsive explanation for the CSE's program and placement recommendations. The parents allege that the IHO erred in concluding that the management needs in the December 2019 IEP were sufficient to address the student's many significant learning disabilities (including his need for multisensory instruction). The parents also allege that supports for the student's management needs could not be implemented in the assigned public school site as there was no evidence that multisensory instruction would have been used. The parents argue that the IHO erred in finding the description of Bay Ridge, with an average class size of 15 students, somehow rendered the 15:1 special class recommendation appropriate. Additionally, the parents contend that the IHO erred in failing to consider the absence of statutorily required transitional support services in the December 2019 IEP.

The parents contend that the IHO erred in concluding that the equitable considerations did not weigh in favor of either party and allege that the district behaved inequitably towards the parents throughout the matter, failed to respond to any of the parents' concerns, failed to conduct any evaluations or examinations in anticipation of the CSE meeting, and failed to provide a written response to the parents' hearing request.

As relief the parents seek a reversal of the IHO's decision, a finding that the district deprived the student of a FAPE and impeded the parents' opportunity to participate in the decision-making process causing a deprivation of educational benefits, and tuition reimbursement and direct payments for tuition at Bay Ridge for the 2020-21 school year.

In an answer, the district responds to the parents' allegations with admissions and denials and argues that the IHO properly found that the district offered the student a FAPE for the 220-21 school year.

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 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]).[6]

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E., 694 F.3d at 184-85; T.P., 554 F.3d at 252). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo, 489 F.3d at 111; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

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

VI. Discussion

A. Preliminary Matters -Burden

As an initial matter, the parents argue that the IHO improperly shifted the burden of persuasion to them. Under the IDEA, the burden of persuasion in an administrative hearing challenging an IEP is on the party seeking relief (see Schaffer v. Weast, 546 U.S. 49, 59-62 [2005]

[6] 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).

[finding it improper under the IDEA to assume that every IEP is invalid until the school district demonstrates that it is not]). However, under State law, the burden of proof has been placed 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 Hardison v. Bd. of Educ. of the Oneonta City Sch. Dist., 773 F.3d 372, 386 [2d Cir. 2014]; C.F. v. New York City Dep't of Educ., 746 F.3d 68, 76 [2d Cir. 2014]; R.E., 694 F.3d at 184-85).

In her decision, the IHO properly stated the burden of proof (IHO Decision at p. 4). In addition, the IHO concluded that the district had "met its burden of proof in this proceeding" (id. at p. 7). The IHO then indicated that, therefore, the parents had "not met the first of the three Burlington/Carter criteria for tuition reimbursement" (id.). Thus, the IHO's decision indicates that the IHO properly placed the "burden of proof" on the district and, having made that determination, concluded that the parents could not obtain tuition reimbursement.

Moreover, even assuming the IHO misallocated the burden of proof to the parent, the error would not require reversal in this case insofar as the hearing record does not support a finding that this was one of those "very few cases" in which the evidence was in equipoise (Schaffer, 546 U.S. at 58; M.H., 685 F.3d at 225 n.3). Furthermore, I have conducted an impartial and independent review of the entire hearing record and, as discussed below, I reach the same determination as the IHO with regard to the parents' challenge to the district's offer of a FAPE to the student for the 2020-21 school year (34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]).

B. FAPE 2020-2021 School Year

1. Parent Participation and Predetermination

The parents argue that the IHO failed to address their claim that the district denied them a right to meaningfully participate in educational planning for the student. The parents further allege that the IHO erred in failing to find that the December 2019 CSE's placement decision was improperly predetermined.

The IDEA sets forth procedural safeguards that include providing parents an opportunity "to participate in meetings with respect to the identification, evaluation, and educational placement of the child" (20 U.S.C. § 1415[b][1]). Federal and State regulations governing parental participation require that school districts take steps to ensure that parents are present at their child's IEP meetings or are afforded the opportunity to participate (34 CFR 300.322; 8 NYCRR 200.5[d]). Although school districts must provide an opportunity for parents to participate in the development of their child's IEP, mere parental disagreement with a school district's proposed IEP and placement recommendation does not amount to a denial of meaningful participation (see T.F. v. New York City Dep't of Educ., 2015 WL 5610769, at *5 [S.D.N.Y. Sept. 23, 2015]; A.P. v. New York City Dep't of Educ., 2015 WL 4597545, at *8, *10 [S.D.N.Y. July 30, 2015]; E.F. v. New York City Dep't of Educ., 2013 WL 4495676 at *17 [E.D.N.Y. Aug. 19, 2013] [stating that "as long as the parents are listened to," the right to participate in the development of the IEP is not impeded, "even if the [district] ultimately decides not to follow the parents' suggestions"]; P.K. v. Bedford Cent. Sch. Dist., 569 F. Supp. 2d 371, 383 [S.D.N.Y. 2008] [noting that "[a] professional disagreement is not an IDEA violation"]; Sch. for Language & Commc'n Dev. v. New York State

Dep't of Educ., 2006 WL 2792754, at *7 [E.D.N.Y. Sept. 26, 2006] [finding that "[m]eaningful participation does not require deferral to parent choice"]). When determining whether a district complied with the IDEA's procedural requirements, the inquiry focuses on whether the parents "had an adequate opportunity to participate in the development" of their child's IEP (Cerra, 427 F.3d at 192). Moreover, "the IDEA only requires that the parents have an opportunity to participate in the drafting process'" (D.D-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at *11 [E.D.N.Y. Sept. 2, 2011], aff'd, 506 Fed. App'x 80 [2d Cir. Dec. 26, 2012], quoting A.E. v. Westport Bd. of Educ., 463 F. Supp. 2d 208, 216 [D. Conn. 2006]; see T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 420 [2d Cir. 2009] [noting that the IDEA gives parents the right to participate in the development of their child's IEP, not a veto power over those aspects of the IEP with which they do not agree]).

As to predetermination, the consideration of possible recommendations for a student prior to a CSE meeting is not prohibited as long as the CSE understands that changes may occur at the CSE meeting (T.P., 554 F.3d at 253; A.P., 2015 WL 4597545, at *8-*9; see 34 CFR 300.501[b][1], [3]; 8 NYCRR 200.5[d][1], [2]). The key factor with regard to predetermination is whether the district has "an open mind as to the content of [the student's] IEP" (T.P., 554 F.3d at 253; see D.D-S., 2011 WL 3919040, at *10-*11; R.R. v. Scarsdale Union Free Sch. Dist., 615 F. Supp. 2d 283, 294 [E.D.N.Y. 2009], aff'd, 366 Fed. App'x 239 [2d Cir. Feb. 18, 2010]). Districts may "'prepare reports and come with pre[-]formed opinions regarding the best course of action for the child as long as they are willing to listen to the parents and parents have the opportunity to make objections and suggestions'" (DiRocco v. Bd. of Educ. of Beacon City Sch. Dist., 2013 WL 25959, at *18 [S.D.N.Y. Jan. 2, 2013] [alternation in the original], quoting M.M. v. New York City Dept. of Educ. Region 9 (Dist. 2), 583 F. Supp. 2d 498, 506; [S.D.N.Y. 2008]; see B.K. v. New York City Dept. Of Educ., 12 F. Supp. 3d 343, 358-59 [E.D.N.Y. 2014] [holding that "active and meaningful" parent participation undermines a claim of predetermination]).

Here, the evidence in the hearing record shows that attendees at the December 2019 CSE meeting included a school psychologist, who also served as the district representative, a special education teacher/related service provider, the parents, and representatives from Bay Ridge including a school psychologist, a speech-language pathologist, and an ELA teacher (Tr. p. 42; Dist. Exs. 1 at pp. 1-2; 2; 3 at p. 1). With respect to parent participation, the school psychologist testified that, to facilitate parent involvement in the development of the IEP, she began meetings by asking parents for their concerns and any "viable information" which would be required or needed (Tr. pp. 50-51). The school psychologist further explained that "based on all those parts," including in this matter the input of the parents and Bay Ridge staff, the CSE would provide a recommendation and that her "typical question at the end" would be whether there were any issues, questions, or concerns regarding what was discussed at the CSE meeting which, she explained, provided the parents and the school the opportunity to share additional information to be included in the IEP (Tr. p. 51).

According to the CSE meeting minutes, the CSE reviewed the parents' rights (Dist. Ex. 3 at p. 1). The parents shared with the CSE that they were "interested in a public school placement" for the student and they were invited by district members of the committee to visit the district's office of student enrollment (see Dist. Exs. 1 at pp. 2, 17; 3 at p. 1). According to the IEP, the parents shared their concerns with the CSE regarding the student's anxiety, auditory processing skills, reading comprehension, time management, organization, community awareness, financial

management, self-advocacy, health/first aid, consumer skills, interpersonal skills, safety, and problem-solving skills (Dist. Ex. 1 at pp. 2-3). The IEP and the CSE meeting minutes also reflect the parents' stated concerns with the student's distractibility and ability to stay on task and reports that the student was better able to focus in a smaller group (Dist. Exs. 1 at p. 2; 3 at p. 2). The parents expressed that a class with 12 students seemed too large (Dist. Ex. 3 at p. 2). According to the IEP and the minutes, staff from Bay Ridge echoed the parents' concerns, emphasizing that the student needed a lot of information broken down in order to learn higher order concepts (Dist. Exs. 1 at p. 2; 3 at p. 2). In addition, the school psychologist testified that the December 2019 CSE relied on information provided by Bay Ridge and that since Bay Ridge did not provide any progress reports, the CSE was "literally" writing what was being said in order to generate the student's IEP (Tr. pp. 43-44).

To support their position that they were denied an opportunity to meaningfully participate in the CSE process, the parents cite to the affidavit testimony of the director of Bay Ridge and the student's mother (see Parent Mem. of Law at pp. 9-10).[7] According to the Bay Ridge director and the student's mother, the parents and the Bay Ridge staff shared information with the CSE regarding the student's needs and their view that the student would benefit from attending a class with fewer than 15 students in "a school like [Bay Ridge]" and from receiving instruction using a multisensory methodology (Parent Exs. U at ¶¶ 83-84, 88-91, 97; V at ¶¶ 45-47). The director and the student's mother testified that the district committee members "stated that they were not required to and would not include a specific way of teaching, like Orton-Gillingham, or anything else that the parents and [Bay Ridge] believed [the student] needed in his IEP" (Parent Exs. U at ¶¶ 92-96; V at ¶¶ 48-50). According to the affidavit testimony of the student's mother, the parents advised the district that they did not agree with the district's plans for the student, particularly because they did not believe the recommended program would provide the student with "executive functioning, anxiety-related, social and emotional, language processing, and other supports th[at] he needed to learn" (Parent Ex. V ¶ 19).

Based on the input from Bay Ridge staff, the IEP reflected that the student would benefit from a multisensory approach to learning "when feasible" (Tr. p. 70; Dist. Ex. 1 at p. 4). Further, in addition to the recommended 15:1 special class, the CSE considered integrated co-teaching (ICT) services for the student but rejected the option as being "insufficient to address [the student's] academic needs" and considered placement in a 12:1 special class in a community school but rejected this option as being "too restrictive to address [the student's] academic needs" (Dist. Exs. 1 at p. 17; 6 at pp. 1-2).[8] The parents point to the testimony of the district school psychologist that

[7] The Bay Ridge director did not attend the December 2019 CSE meeting but indicated that he spoke with the Bay Ridge staff that did attend and reviewed their notes from the meeting (see Parent Ex. U at ¶ 81; see also Dist. Exs. 2; 3 at p. 1).

[8] The CSE's reference to the restrictiveness of a 12:1 class is misleading insofar as LRE considerations have nothing to do with the ratio of students to adults. Rather, a student's LRE is defined by the student's access to nondisabled peers s (see 20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2]; 300.116[b], [c]; 300.117; 8 NYCRR 200.1[cc]; 200.6[a][1]) and there is no indication in the hearing record that a placement in a 12:1 special class in a community school would have provided the student with less access to nondisabled peers than the recommended 15:1 special class in a community school. It is more likely that the notation in the IEP referenced a view that the student did not require the degree of adult support available in a 12:1 special class in order to make progress.

the district "wanted [the student] in a community school" and her admissions that a State-approved nonpublic school was not considered by the December 2019 CSE as evidence that the CSE's decision was predetermined (see Tr. pp. 49, 62). However, the stances described by the school psychologist are permissible given the district's obligation to offer the student a FAPE in the LRE (see 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]). That is, once a CSE determines that an appropriate class placement for the student is available within the district, the district is not obligated to consider a more restrictive setting, such as a nonpublic school (see B.K., 12 F. Supp. 3d at 359 [indicating that "once the CSE determined that a 6:1:1 placement was appropriate for [the student], it was under no obligation to consider more restrictive programs"]; E.F., 2013 WL 4495676, at *15 [explaining that "under the law, once [the district] determined . . . the [LRE] in which [the student] could be educated, it was not obligated to consider a more restrictive environment"]; A.D. v. New York City Dep't of Educ., 2013 WL 1155570, at *7-*8 [S.D.N.Y. Mar. 19, 2013] [finding that "[o]nce the CSE determined that [the public school setting] would be appropriate for the [s]tudent, it had identified the [LRE] that could meet the [s]tudent's needs and did not need to inquire into more restrictive options"]).

Regarding the parents' argument that the district repeatedly failed to respond to their correspondence, the hearing record reflects that the parents sent communications dated January 13, 2020, July 1, 2020, and August 17, 2020, expressing their concerns with the CSE's recommendations, culminating in the October 27, 2020 due process complaint notice (Parent Exs. A; C; D; E). There is no indication in the hearing record that the district directly responded to or took any actions in response to any of the parents' letters (see Parent Ex. V at ¶¶ 16-17, 23-26).[9] While the district should engage more readily with parents seeking information in the spirit of the cooperative process envisioned under the IDEA by Congress (see Schaffer, 546 U.S. at 53), the district's failure to respond to the parents' communications does not support a finding that it denied the parents an opportunity to participate in the CSE process, particularly given evidence of the active and meaningful role taken by the parents during the CSE meeting.

As noted above, the parents' disagreement with the district regarding the recommendations in the IEP does not, without more, support a finding that the district denied them a meaningful opportunity to participate in the development of the student's IEP. Overall, the hearing record does not reflect that the district "engaged in the kind of 'persistent refusal' to discuss the [parents'] concerns such that the refusal could constitute 'a procedural denial of a FAPE'" (F.L. v. Bd. of Educ. of Great Neck Union Free Sch. Dist., 735 Fed. App'x 38, 40 [2d Cir. Aug. 24, 2018], quoting T.K. v. New York City Dep't of Educ., 810 F.3d 869, 877 [2d Cir. 2016]). There is no indication that the district thwarted the parents' ability to present their views at the CSE meeting or that the district members approached the meeting without an open mind. Moreover, as discussed below,

[9] Regarding the district's lack of response to the parents' due process complaint notice, State regulation requires that, if a district has not provided a parent with prior written notice regarding the subject matter of the parent's due process complaint notice, the district "shall, within 10 days of receiving the complaint, send to the parent a response" (8 NYCRR 200.5[i][4]; see 34 CFR 300.508[e]). In this instance, the district provided the parent with a prior written notice regarding the subject matter of the due process complaint notice. Although it is not included in the hearing record, the parents' January 2020 correspondence acknowledged that they had received a prior written notice dated December 20, 2019 (Parent Ex. C at p. 2). In addition, the district sent the parents another prior written notice dated June 23, 2020, prior to the beginning of the 2020-21 school year (Dist. Ex. 6).

the recommendations of the CSE were reasonably calculated to enable the student to receive educational benefit in light of his circumstances.

2. Consideration of Evaluations

Next, the parents argue that, contrary to the IHO's findings, the December 2019 CSE ignored certain information pertaining to the student's social/emotional functioning as well as the information and recommendations provided by the parent and the educational providers from Bay Ridge.

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]).

In developing the December 2019 IEP, the CSE considered a June 2017 neuropsychological evaluation report, the student's February 2018 IEP, a December 2019 vocational assessment, psychological information "that [wa]s on the [student's] case," and verbal reports from the parent and Bay Ridge staff (Tr. pp. 42-44; Dist. Ex. 6 at p. 1). The December 2019 CSE meeting minutes indicate that materials were reviewed by the committee and that results of the testing were explained to the parents (Dist. Ex. 3 at p. 1).

A review of the December 2019 IEP's present levels of performance reveals that they included cognitive and academic assessment results from the May and June 2017 psychological testing and closely followed the input from the parents and Bay Ridge staff at the December 2019 CSE meeting (compare Dist. Ex. 1 at pp. 1-4, with Parent Ex. O at p. 6, and Dist. Exs. 3 at pp. 1-2; 5 at pp. 1-2).

The December 2019 IEP present levels of performance included results of May 2017 cognitive testing that found the student functioned in the average range on tests of perceptual reasoning and in the low average range on tests of verbal comprehension, and that the results indicated that the student performed better with visual, hands-on information (Dist. Ex. 1 at p. 1). The December 2019 IEP included additional cognitive testing from June 2017, which yielded results in the below average range in the areas of verbal comprehension, visual spatial, and fluid reasoning and in the average range for working memory and processing speed (id.). May 2017 academic achievement testing results included in the December 2019 IEP showed that the student was performing in the average range on measures of word reading, reading comprehension, spelling and math numerical operations and that his math problem solving skills were in the low average range (id.; see Dist. Ex. 5 at p. 1).[10]

[10] The parents claim that other elements of the cognitive testing and related information concerning the student's academic functioning were not included in the December 2019 IEP, including that: the student's full-scale IQ was in the 18th percentile, he demonstrated weak verbal learning and memory, with his overall functioning in the very low range (1st percentile), he had difficulty with response inhibition, exhibited distractibility, issues with

The December 2019 IEP present levels of performance stated that according to Bay Ridge staff the student was in a reading and writing class of three students which met four times per seven-day cycle where he worked on reading comprehension strategies, research, vocabulary, and writing; was in a modified algebra I class of six students; and received "academic mentoring" three times per cycle in a group of four (Dist. Ex. 1 at p. 2). Receptively, the student followed directions and understood oral language, responded to verbal prompts, and answered literal comprehension questions correctly (id.). Bay Ridge staff reported that the student read fluently and sounded out new words, and that regarding writing skills the student's grammar errors were few, his spelling was good, and that he preferred to hand write as opposed to type (id.). According to the December 2019 IEP the student was working on responding to abstract questions and those related to literary devices, responding to shorter writing prompts, using active reading strategies, verbalizing and organizing his thoughts with 1:1 support, improving time management, using a planner, tracking assignments, and color coding (id.).

Bay Ridge staff reported that the student was "a couple of years" behind in reading, one to two years behind in math, and six months to a year behind in math computations (Dist. Ex. 1 at p. 2). Specifically, the December 2019 IEP noted that the student needed help finding and analyzing text evidence and organizing his written work and that he struggled with word recognition and decoding unfamiliar words to understand figurative language and multiple meanings of words, and with beginning the writing process (id.). According to the December 2019 IEP the student received supports of verbal scaffolding, group read alouds and discussions, comprehension checks, reworded texts, vocabulary reviews (including the use of analogies, words in a sentence, comparing and contrasting, and visualizing), 1:1 conferences, help elaborating writing assignments, assignments which were broken down into smaller/manageable pieces, sentence starters, 1:1 attention, feedback and praise, graphic organizers and outlines, "light" redirection and check-ins, and extended time (id.).

With respect to social development, the December 2019 IEP present levels of performance included the Bay Ridge staff reports that the student was respectful, socially mature, self-aware and self-motivated, and had exhibited self-advocacy skills (Dist. Ex. 1 at p. 2). Parent reports reflected in the IEP were that the student was kind and outgoing, had friends in and out of school, and enjoyed playing sports and video games, going to the movies, and spending time with friends (id. at p. 3). Reportedly the parents were concerned about the student's anxiety—for which he saw a social worker every two weeks—and wanted the student to better plan his time (id.). Regarding the student's physical development, the parents reported that the student had received diagnoses of fetal alcohol spectrum disorder, language disorder, specific learning disorder, and an unspecified anxiety disorder; that he no longer needed glasses; and that they were concerned about the student's auditory processing skills (id.).

Also included within the December 2019 IEP were parent concerns about the student that included reading comprehension, time management, organization, community awareness,

organization and visual spatial skills, deficits in problem solving, comprehension, inferences, writing, word problems and multi-step problems, and was one year behind in all of his academics.

financial management, self-advocacy, health/first-aid, consumer, interpersonal, safety, problem solving, and auditory processing skills, as well as his anxiety (Dist. Ex. 1 at pp. 2-3, 17).

As detailed above, a review of hearing record reveals that the December 2019 CSE provided the parents and Bay Ridge staff the opportunity to participate in the development of the student's IEP, considered the necessary evaluative information, and included this evaluative information in the student's December 2019 IEP.

3. Management Needs

The parents argue that the IHO erred in concluding that the management needs in the December 2019 IEP were sufficient to address the student's significant learning disabilities including his need for multisensory instruction and could be properly implemented in the 15:1 special class at the assigned school.[11]

State regulation and guidance documents define management needs as the "means the nature and degree" to which "environmental modifications," "human resources" and "material resources" "are required to enable the student to benefit from instruction" (8 NYCRR 200.1[ww][3][i][d]; see "Guide to Quality Individualized Education Program [IEP] Development and Implementation," at p. 20, Office of Special Educ. [Dec. 2010], available at http://www.p12.nysed.gov/specialed/publications/iepguidance/IEPguideDec2010.pdf [providing examples of environmental modifications (i.e., consistency in routine, limited visual or auditory distractions, adaptive furniture), human resources (i.e., assistance in locating classes, following schedules, and note taking), and material resources (i.e., instructional materials in alternative formats)]). Additional examples of management needs can be found in the general directions for the use of the State's model IEP form (see "General Directions to Use the State's Model IEP form," Office of Special Educ. Mem. [Revised Mar. 2010], available at http://www.p12.nysed.gov/specialed/formsnotices/IEP/directions.htm). A student's management needs must be developed in accordance with the factors identified in the areas of academic or educational achievement and learning characteristics, social development, and physical development, and reported in the student's IEP (see 8 NYCRR 200.1[ww][3][i][d], 200.4[d][2][i]).

The parents assert that the December 2019 IEP did not identify all of the student's management needs, including that the student would become overwhelmed in large, crowded environments and could not remain regulated, required teacher assistance for comprehension, as

[11] Regarding the parents' claim that the assigned public school site could not implement multisensory instruction, the parents focus on statements made during the December 2019 CSE meeting that the district could not guarantee multisensory instruction since not all district special education teachers were trained in such approaches (Parent Exs. U at ¶ 96; V at ¶ 50). As the parents' challenge in this regard is really a substantive challenge to the IEP couched as a challenge to the adequacy of the assigned public school site (see M.O. v. New York City Dep't of Educ., 793 F.3d 236, 245 [2d Cir. 2015]), it is addressed herein in the context of examining the IEP. In addition, in their memorandum of law, the parents assert additional challenges to the appropriateness of the assigned public school site, but as these challenges were not raised in the request for review, they have not been properly preserved for review on appeal and, therefore, they will not be further discussed (see Parent Mem. of Law at p. 9; see also 8 NYCRR 279.4, 279.6; Davis v. Carranza, 2021 WL 964820, at *11 [S.D.N.Y. Mar. 15, 2021] [noting that issues for review in an appeal to an SRO "must be listed in the request for review itself, rather than any supplemental memorandum of law"]).

well as frequent sensory breaks, and experienced heightened anxiety due to his awareness of his needs. However, the IEP addressed reports that the student could become overwhelmed in the large environments by recommending support during the student's transition to the public school (Dist. Ex. 1 at p. 4). As for teacher assistance for comprehension, among other supports, the IEP specified that the student would benefit from refocusing as needed, repetition and review, encouragement and praise, and check-ins with his teacher (id.). Further, that the IEP did not identify the student's anxiety or need for sensory breaks as management needs does not support a finding that the district failed to offer the student a FAPE, particularly given the counseling services included on the IEP and the annual goal targeting the student's ability to cope with overwhelming emotions (id. at pp. 9, 11).

The crux of the parent's allegation is that the IEP did not sufficiently detail the type of multisensory instruction that the student required to learn and that the CSE failed to recommend Orton-Gillingham instruction in particular. As for the parents' preference for Orton-Gillingham instruction, the precise teaching methodology to be used by a student's teacher is usually a matter to be left to the teacher's discretion—absent evidence that a specific methodology is necessary (Rowley, 458 U.S. at 204; R.B. v. New York City Dep't of Educ., 589 Fed. App'x 572, 575-76 [2d Cir. Oct. 29, 2014]; A.S. v. New York City Dep't of Educ., 573 Fed. App'x 63, 66 [2d Cir. July 29, 2014]; K.L. v. New York City Dep't of Educ., 530 Fed. App'x 81, 86 [2d Cir. July 24, 2013]; R.E., 694 F.3d at 192-94; M.H., 685 F.3d at 257). As long as any methodologies referenced in a student's IEP are "appropriate to the [student's] needs," the omission of a particular methodology is not necessarily a procedural violation (R.B., 589 Fed. App'x at 576 [upholding an IEP when there was no evidence that the student "could not make progress with another methodology"], citing 34 CFR 300.39[a][3] and R.E., 694 F.3d at 192-94).

In his written testimony, the director of Bay Ridge indicated that a multisensory program employs several of the student's senses to deliver instruction, including visual, auditory, and tactile senses (Parent Ex. U at ¶ 20). The director described Orton-Gillingham as an "evidence-based multisensory program . . . proven effective for teaching reading skills to children with Dyslexia" and as "a decoding-based program that, similar to phonics-based instruction, teaches children to read through the practice and learning of blends and letter relationships in order to allow the students to improve their decoding skills and ultimately their comprehension skills" (id. at ¶ 19).

In his written testimony the Bay Ridge director stated that the student could not properly process language and could only learn if he was taught using an evidence-based multisensory methodology, such as Orton-Gillingham (Parent Ex. U at ¶ 84). In addition, he stated that the student could only learn if his teachers used a multisensory approach to instruction in all subject areas and across all domains throughout the school day and he noted that the Bay Ridge staff shared this information with the December 2019 CSE (id. at ¶ 86).

The district school psychologist testified that the student's need for a multisensory approach for learning was discussed by Bay Ridge at the December 2019 CSE meeting and that was why the CSE identified the "use of a multisensory approach to learning when feasible" as a management need (Tr. p. 70). The parents took exception with the district's "mistaken testimony" that "chunking of material" would have met the student's need for a multisensory instructional program (see Tr. p. 71). However, the school psychologist also noted that color coding in order to try to enhance the visual component as well as "certain aspects" that were "not necessarily stated by

name" would also fall into the category of multisensory instruction (id.). Further, a review of the December 2019 IEP shows that the CSE identified additional supports for the student such as highlighting, modeling, color coding, previewing, repetition and review, graphic organizers and outlines for reading and writing activities, and use of a calculator (Dist. Ex. 1 at p. 4). Additionally, the December 2019 IEP included speech-language annual goals which specifically called for the utilization of multisensory stimuli (verbal visual, tactile) (id. at p. 8).

While the December 2019 IEP did not include the specificity regarding multisensory instruction desired by the parents, the hearing record demonstrates that the December 2019 IEP identified the student's need for a multisensory approach to learning and included supports and annual goals to address this need.

4. 15:1 Special Class

The parents contend that the IHO erred in finding that the district provided a cogent and responsive explanation for the CSE's program and placement recommendations. Here the relevant question is whether the December 2019 IEP was reasonably calculated to enable the student to make progress appropriate in light of his circumstances (see Endrew F., 137 S. Ct. at 1001). The hearing record demonstrates that the district appropriately identified the student's needs, as detailed above, and developed an IEP to address these needs.

The December 2019 CSE recommended a 15:1 special class placement for math, ELA, social studies, and sciences and related services of one 30-minute session per week of counseling in a group of three, one 30-minute session per week of individual counseling, and two 30-minute sessions per week of speech-language therapy in a group of three (Dist. Ex. 1 at pp. 1, 10-11, 16). The December 2019 IEP included math annual goals which involved solving multi-step equations and identifying the proper operations needed to solve multi-step word problems (id. at pp. 5-6). The IEP included ELA annual goals which addressed general academic and domain specific vocabulary words and phrases, explicit story details and the use of inferencing, conventions of standard English grammar and usage, and the appropriate development and organization of written work (id. at pp. 6-7). Speech-language annual goals included in the December 2019 IEP targeted increasing vocabulary, making inferences and predictions, formulating simple and expanded/complex sentences, interpreting information and recalling details, developing auditory skills, and increasing comprehension and the use of figurative language (id. at pp. 7-8). Additionally, the December 2019 IEP included counseling annual goals addressing independently writing assignments and homework in a daily planner, using a weekly calendar to write upcoming due dates and tests, utilizing a requirement checklist prior to turning in projects or complex tasks, using mnemonics to aid in the memorization of content material, using graphic organizers to record or recall content knowledge, using "Post-it" notes to record questions that could not be answered immediately, and increasing the ability to cope with overwhelming emotions (id. at p. 9).

According to the affidavit testimony of the Bay Ridge director and the student's mother, during the CSE meeting, Bay Ridge staff and the parents shared their belief that the student needed a small class in a "a small, nurturing school with a small student population" and that a 15:1 special class in a district community school would be too large and overwhelming for the student given his distractibility (Parent Exs. U at ¶¶ 85, 90-91, 97; V at ¶ 45; see Dist. Exs. 1 at p. 2; 3 at p. 2). In addition, the director testified that Bay Ridge staff shared at the December 2019 CSE meeting

that they did not think a 15:1 special class was an appropriate setting for the student, especially for his core academic subjects as it would make it difficult for him to attend and engage in his classwork (Parent Ex. U at ¶ 97). However, the CSE was aware of the student's distractibility and included several supports for the student's management needs that were targeted to address this area of need, such as preferential seating, refocusing, and check-ins with teacher (Dist. Ex. 1 at pp. 2, 4). The school psychologist testified that it was "not uncommon to have students that have distractibility in a 15:1" special class (Tr. pp. 60-61). In addition, the IEP reflected that, in transitioning into a larger public school environment, the student would be encouraged to request aid from a teacher when necessary and provided with information about the specific school he would attend (Dist. Ex. 1 at p. 3).

As discussed earlier, the CSE considered ICT services for the student but rejected the option as being insufficient to address the student's academic needs and considered placement in a 12:1 special class in a community school but rejected that option as being "too restrictive" to address the student's academic needs (Dist. Exs. 1 at p. 17; 6 at pp. 1-2). The school psychologist explained further that a 12:1+1 setting would have been "way too restrictive" for the student considering his cognitive abilities since that setting included students with delays of about three to four years and students who were cognitively impaired (Tr. pp. 53, 55). She also stated that in the 12:1+1 setting there would be students who had significant behavioral or emotional difficulties which, she explained, was something that the parents would not necessarily have wanted (id.). The school psychologist elaborated, stating that in looking at the continuum of services there was a 6:1+1 special class for students with autism, a 12:1+4 special class within a specialized program for child who were "significantly and medically needy," and an 8:1+1 special class for students with "autism but a significant emotional disturbance" and she noted that the student did not meet the criteria for any of those programs (Tr. p. 62).

Putting aside the school psychologist's description of particular special class ratios being for students with particular eligibility classifications, State regulations do define the special class ratios with regard to students' varying degrees of need.[12] State regulations indicate that a student with a disability shall be placed in a special class for instruction on a daily basis to the extent indicated in the student's IEP and that the maximum class size for those students whose special education needs consist primarily of the need for specialized instruction which can best be accomplished in a self-contained setting shall not exceed 15 students (8 NYCRR 200.6[h][4]). By way of contrast, State regulation provides that "[t]he maximum class size for special classes" containing students whose management needs interfere with the instructional process or whose management needs are determined to be intensive or highly intensive and requiring a significant degree of individualized attention shall not exceed twelve, eight, or six students, respectively, with one or more supplementary school personnel assigned to each class during periods of instruction" (8 NYCRR 200.6[h][4][i]).

The IEP included supports for the student's management needs, including scaffolding, preferential seating, highlighting, refocusing as needed, modeling, color coding, previewing. repetition and review, sentence starters and checklists for writing, encouragement and praise, check-ins with teacher, aid with mathematical word problems, graphic organizers and outlines for

[12] The parents do not argue that the CSE should have recommended a general education class for the student.

reading and writing activities, instructions and assignments broken down into smaller units of learning, practical understanding of how a subject relates to real life experiences, a multisensory approach to learning when feasible, use of calculator, grouping the student functionally with peers with similar strengths and weaknesses as determined by classroom teacher, and supports for the transition into the larger public school environment (Dist. Ex. 1 at p. 4). These management needs are not the type that might be characterized as interfering with instruction or intensive or highly intensive and would not require more individualized attention to implement. The IEP stated that the management needs could be implemented in a 15:1 special class setting (id.). There is nothing in the hearing record to suggest that this would not be the case.[13]

The parents argue that the IHO erred in finding the description of Bay Ridge, with an average class size of 15 students, somehow rendered the 15:1 special class recommendation appropriate. In his written testimony, the Bay Ridge director stated that all of the student's classes at Bay Ridge were small and had ten or fewer students so that the student was never overwhelmed and was able to receive increased attention during his classes (Parent Ex. U at ¶¶ 64, 67, 69-75). While perhaps, factually, the student's classes at Bay Ridge were smaller than 15 students, this is of limited relevance in that districts are not merely required to replicate the identical setting used in private schools (see, e.g., M.C. v. Mamaroneck Union Free Sch. Dist., 2018 WL 4997516, at *28 [S.D.N.Y. Sept. 28, 2018]; Z.D. v. Niskayuna Cent. Sch. Dist., 2009 WL 1748794, at *6 [N.D.N.Y. June 19, 2009]; Watson v. Kingston City Sch. Dist., 325 F. Supp. 2d 141, 145 [N.D.N.Y. 2004]).

The school psychologist acknowledged that at Bay Ridge the student was in classes as small as three students but stated that she did not believe that the student met the criteria for a class ratio that was smaller than the 15:1 special class recommend by the district (Tr. pp. 57-58). She further explained that Bay Ridge was a private school and had its own guidelines concerning classroom settings and ratios of students which they could provide, but that she was looking at the programs the district offered in order to best address the student's needs (Tr. p. 58). Indeed, while the parents focus on the appropriateness of the CSE's recommendation that the student transition from a nonpublic school with small classes to a purportedly larger class in a district public school, the parents unilaterally placed the student in the nonpublic school settings without the input of the CSE, and it is the CSE's responsibility to develop recommendations based on the student's needs consistent with the IDEA and its implementing regulations, which recommendations may not be consistent with the parents' choices that came before. Prior to the parents' enrollment of the student in nonpublic schools, he attended a general education class in the district with ICT services (see Dist. Ex. 5 at p. 1). The December 2019 CSE's recommendations for the student represent a more supportive placement on the continuum that was aligned with the student's needs and represented the student's LRE.

Finally, given the CSE's recommendations for individual and group counseling and group speech-language therapy, as well as the specific annual goals to be addressed during these services summarized above, there is no support in the hearing record for the parents' position that the IEP

[13] As noted above, the parents' attempts to argue otherwise are based on speculative allegations regarding the assigned public school site's capacity to implement the IEP.

failed to address the student's executive functioning, anxiety-related, social/emotional, and language processing needs.

5. Transitional Support Services

Additionally, the parents contend that the IHO erred in failing to consider the absence of statutorily required transitional support services in the December 2019 IEP.

Transitional support services are defined as "temporary services, specified in a student's [IEP], provided to a regular or special education teacher to aid in the provision of appropriate services to a student with a disability transferring to a regular program or to a program or service in a less restrictive environment." (8 NYCRR 200.1[ddd]). Thus, the service is a support for school personnel on the student's behalf as opposed to a service directly delivered to the student (see "Guide to Quality Individualized Education Program (IEP) Development and Implementation," at p. 42, Office of Special Educ. [Dec. 2010], available at http://www.p12.nysed.gov/specialed/publications/iepguidance/IEPguideDec2010.pdf). Here, even if the district may have been required to include transitional support services on the student's IEP, the lack of such services in this instance would not support a finding that the district denied the student a FAPE. As noted above, included in the management needs section of the December 2019 IEP was the CSE's recommendation that to support the student's transition into a larger public school environment, the student would be encouraged to request aid from the teacher when necessary and would be provided with information about the specific school (Dist. Ex. 1 at p. 4). Moreover, the parents make no allegation as to how the lack of a recommendation of transitional support services to be delivered to the student's teacher would result in a deprivation of educational benefit to the student, particularly given the IEP's provision for direct support to the student during the transition.

VII. Conclusion

Having determined that the evidence in the hearing record establishes that the district offered the student a FAPE in the LRE for the 2020-21 school year, the necessary inquiry is at an end and there is no need to reach the issue of whether Bay Ridge was an appropriate unilateral placement for the student or whether equitable considerations weigh in favor of the parents' request for tuition reimbursement (Burlington, 471 U.S. at 370; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 66 [2d Cir. 2000]).

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
October 4, 2021

CAROL H. HAUGE
STATE REVIEW OFFICER