



The University of the State of New York

The State Education Department

State Review Officer

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No. 21-174

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 Board of Education of the Arlington Central School District

Appearances:

Gina DeCrescenzo, PC, attorneys for petitioner, by Gina M. DeCrescenzo, Esq.

Shaw, Perelson, May & Lambert, LLP, attorneys for respondent, by Michael K. Lambert, 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 denied their request to be reimbursed for their son's tuition costs at the Pinnacle School (Pinnacle) for the 2019-20 school year and for compensatory relief related to the 2017-18 and 2018-19 school years. The appeal must be sustained in part.

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

With regard to the student's educational history, according to CSE meeting information included on the student's June 2, 2016 IEP, a CSE subcommittee convened to complete the student's reevaluation and annual review (Dist. Ex. 8 at p. 1). The student's classification was changed from other health-impairment to autism based on a medical diagnosis attributed to the student's neurologist (compare Dist. Ex. 7 at p. 1; with Dist. Ex. 8 at p. 1; see Parent Ex. Q).¹ The meeting information reflected that the student benefitted from the support of his program during the prior school year and that the assessments conducted for the student's reevaluation indicated

¹ The student's eligibility for special education and related services as a student with autism is not in dispute in this appeal (see 34 CFR 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

that the student presented with high average cognitive ability with academic skills ranging from the average to superior range of functioning (Dist. Ex. 8 at p. 1). It was further noted that the student's "sensory status" required and benefitted from support and that his attentional needs continued to impact his progress (id.). The student's report card reportedly reflected that the student was "[e]xcelling to [p]rogressing" (id.). Based on the student's then-current functioning, the CSE subcommittee recommended that for the 2016-17 school year (second grade), the student receive a 10-month program consisting of integrated co-teaching (ICT) services in English Language Arts (ELA), and math, related services of small group occupational therapy (OT), small group speech-language therapy, small group physical therapy (PT), and small group counseling (id. at pp. 1, 13-14). The hearing record reflects that program reviews were conducted by CSE subcommittees on November 1, 2016 and March 29, 2017 (see Dist. Exs. 9; 10). According to the meeting information included on the student's IEP to be implemented on April 26, 2017, the March 29, 2017 CSE subcommittee noted that the student had received a diagnosis of autism spectrum disorder with attention/concentration deficit from his neurologist (Dist. Ex. 10 at p. 1; see Parent Ex. Q). The March 29, 2017 CSE subcommittee also recommended a behavioral intervention consultation with the "Anderson School" (id. at p. 2). The hearing record reflects that a Board Certified Behavior Analyst (BCBA) from the Anderson Center for Autism (Anderson BCBA) observed the student at the request of the district and provided a written consultation report on June 12, 2017 (Dist. Ex. 31). The report indicated that the purpose of the request was to "support the team" with identifying supports and strategies to assist the student in attending to his work while refraining from engaging in off-task or impulsive behaviors and participating cooperatively in a group activity (id. at p. 1). The Anderson BCBA observed a variety of off-task behaviors and recommended five strategies to address them (id. at pp. 2-3).

For the 2017-18 school year (third grade), the March 29, 2017 CSE subcommittee recommended a 10-month program consisting of ICT services in ELA, and math, related services of individual PT once per week for 30 minutes, small group PT once per week for 30 minutes, small group OT once per week for 30 minutes, small group speech-language therapy 30 times per year for 30 minutes per session, and small group counseling once per week for 30 minutes with an implementation date of September 6, 2017 (Dist. Ex. 11 at pp. 1, 14-15). Behavioral consultation services were continued for the 2017-18 school year and the student was observed by the Anderson BCBA, who provided a second written consultation report dated October 30, 2017 (Dist. Ex. 32).

On December 20, 2017, a CSE subcommittee convened to discuss the student's progress (Dist. Ex. 12 at p. 1). The meeting information included on the student's IEP to be implemented on January 10, 2018 reflected that the student was both struggling and improving in "specials" (id.).² Reportedly, in music, the teacher had arranged a quiet space and the student was permitted to bring a book to music class if he needed to take a break (id.). The meeting information indicated that the parents were concerned about the amount of redirection the student required in the classroom (id.). According to the teachers in attendance, the student required the same level of redirection as the other students in the class (id.). The meeting information also noted that the

² The December 20, 2017 IEP states that the student has been struggling in special class (Dist. Ex. 12 at p. 1). The district's supervisor of special education testified that "special class" was a typographical error and that this referred to specials meaning music, library and gym (Tr. p. 84).

student responded to and was accepting of redirection and no changes to the student's program were recommended (id.).

On February 26, 2018, the student's IEP was amended by agreement without a CSE meeting to add five additional behavioral consults to be conducted by the Anderson Center for Autism (Dist. Ex. 13 at p. 1). The Anderson BCBA provided a third written consultation report on April 10, 2018, after observing the student on three dates (Dist. Ex. 33 at p. 1). By notice dated April 11, 2018, the parents were invited to attend the student's annual review at a CSE meeting to be held on May 8, 2018 (Dist. Ex. 40 at p. 1). On April 19, 2018, the district mailed a copy of the April 10, 2018 Anderson BCBA's consultation report to the parents (Dist. Ex. 42).

A CSE subcommittee convened on May 8, 2018 to conduct the student's annual review (Dist. Ex. 14 at p. 1). The meeting information reflected that the April 10, 2018 behavior consultation report was reviewed and district staff shared that the student's behavior began to decline in December 2017 (id.). The district teachers reported that the student's behavior was disruptive in the classroom, despite having individualized his instruction, giving him the opportunity to type his work in a computer and inviting him to create the class newsletter (id. at pp. 1-2). The CSE subcommittee discussed multigrade special classes within the district and recommended an 8:1+1 special class or a 12:1+1 special class (id. at p. 2).³ The parents then requested independent educational evaluations (IEEs) and were advised to make the request in writing (id.). The meeting information indicated that the CSE would reconvene after the IEEs (id.).

In an email dated May 8, 2018, the parent requested IEEs consisting of an OT evaluation with a sensory component, PT evaluation, speech-language evaluation, a neuropsychological evaluation and a functional behavioral assessment and behavioral intervention plan (FBA/BIP) (Dist. Exs. 104 at p. 2; 106 at p. 2). By email dated May 11, 2018, the district's director of special education acknowledged receipt of the parents' request for IEEs and advised the parents that she would be sending correspondence via certified mail (Dist. Exs. 104 at p. 1; 106 at pp. 1-2).

By notice dated June 12, 2018, the parents were invited to attend the student's annual review at a CSE meeting scheduled for June 20, 2018 (Dist. Ex. 46). On June 19, 2018, the parent signed authorizations for independent evaluators to conduct an FBA/BIP and for PT, OT, and neuropsychological evaluations (Dist. Exs. 47 at pp. 1-4; 110 at pp. 1-4; see also Dist. Exs. 36-39).

On June 20, 2018, a CSE subcommittee convened to continue the student's annual review (Dist. Ex. 14 at p. 1). The meeting information reflected that the CSE recommended ICT services and an FBA and "moving up the re-evaluation date," to which the parents would not consent (id.). The meeting information further indicated that the student's related services, modifications and testing accommodations would be maintained (id.). For the 2018-19 school year (fourth grade), the CSE subcommittee recommended 10-month programming that consisted of ICT services in ELA, math, science, social studies and related services of 30 sessions of individual PT per year for 30 minutes per session, 30 sessions of individual OT per year for 30 minutes per session, 30 sessions of small group speech-language therapy per year for 30 minutes per session, and 30

³ A recording of the May 8, 2018 CSE subcommittee meeting reflects that the discussion of multigrade special classes related to recommendations for "next year" (i.e., the 2018-19 school year) (Parent Ex. Z at 27:13).

sessions of small group counseling per year for 30 minutes per session with an implementation date of September 6, 2018 (id. at pp. 1, 11-12). By prior written notice dated June 20, 2018, the district advised the parents that the student would continue to receive special education and related services in accordance with an enclosed IEP (Dist. Ex. 48 at p. 1).

On July 24, 2018, the parent signed an authorization for an independent speech-language evaluation (Dist. Exs. 50; 110 at p. 5; see also Dist. Ex. 35). In a prior written notice dated August 1, 2018, the district notified the parents that the student was overdue for a triennial evaluation and requested consent for reevaluation testing consisting of psychological, educational, social history update, classroom observation and physical examination (Dist. Ex. 51 at pp. 1-2). By letter dated August 6, 2018, the parents wrote to the district's supervisor of special education (supervisor) advising that they did not consent to any reevaluations or additional evaluations because the district had approved their request for IEEs and enclosed the district's consent form (Dist. Ex. 53). In letters dated August 15, 2018, the district advised the parents' selected providers that IEEs had been approved for the student and further notified them of the maximum reimbursement rates (Dist. Ex. 54 at pp. 1-5).

By letter dated August 16, 2018, the district sent a second prior written notice requesting consent to conduct district reevaluations (Dist. Ex. 55 at pp. 1-3). On August 30, 2018, the parents provided consent for their selected providers to conduct IEEs and denied consent to the district to conduct the requested district reevaluations of the student (Dist. Exs. 56; 57). Five IEEs were conducted between September 28, 2018 and November 14, 2018 and received by the district between November 13, 2018 and November 29, 2018 (Parent Ex. ZZ; Dist. Exs. 35 at p. 1; 36 at p. 1; 37 at p. 1; 38 at pp. 1, 10; 39 at p. 1). By letter dated December 5, 2018, the district sent copies of the five IEEs to the parents (Dist. 59).

By notice dated January 14, 2019, the parents were invited to attend a "requested review" at a CSE meeting scheduled for January 28, 2019 (Dist. Ex. 60 at p. 1). Among the individuals invited to attend the meeting was each of the independent evaluators (id.). A CSE subcommittee convened on January 28, 2019, for the purpose of reviewing the five IEEs and to "make any necessary updates" to the student's program (Dist. Ex. 15 at p. 2). The meeting information reflected that the student's goals were discussed and were to be updated to address executive functioning deficits (id. at p. 3). Based on the discussion during the meeting, the January 2019 CSE subcommittee recommended behavior consultations in the classroom to assist with implementing the strategies outlined in the BIP, a 1:1 aide, small group counseling once per week for 30 minutes, two individual sessions of PT per week for 30 minutes per session, individual speech-language therapy once per week for 30 minutes, small group speech-language therapy once per week for 30 minutes to address organization and executive functioning skills, and individual OT once per week for 30 minutes (id.). The January 2019 CSE subcommittee also recommended three sessions of individual parent counseling and training per year for 30 minutes per session (id. at p. 1). The changes recommended during this meeting were to be implemented on February 13, 2019 (id.). The meeting information also indicated that the CSE subcommittee recommended sending referral packets to out-of-district placements (id. at p. 3).⁴ By prior written notice dated

⁴ The evidence in the hearing record shows that the referrals to nonpublic schools that the district sent out did not yield any placement offers for the student for the remainder of the 2018-19 school year (see Dist. Ex. 15 at p. 2; 64; 68; 69; 75).

January 28, 2019, the district advised the parents that the student would continue to receive special education and related services in accordance with an enclosed IEP (Dist. Ex. 61).

By letter dated February 6, 2019, the district requested ten one-hour behavior specialist consultations from the Center for Discovery for the 2018-19 school year (Dist. Ex. 62 at p. 2).

A CSE subcommittee convened at the request of the parents on February 27, 2019 (Dist. Ex. 15 at p. 1). The student's teachers reported that a 1:1 aide had been implemented to assist the student in the classroom, lunch and recess, however the student's work completion had not improved with the addition of the 1:1 aide and remained an area of weakness (*id.*). The district's director of special education stated that a behavioral consultant from the Center for Discovery (district's behavioral consultant) would be present in the classroom to provide strategies for improving the student's rate of work completion and to implement the behavior interventions recommended by the independent evaluators (Dist. Ex. 15 at pp. 1-2; *see* Dist. Ex. 70).⁵ The district planned to conduct its own FBA and the district's behavioral consultant and the district's director of special education had facilitated a team meeting to review the procedure and assign responsibilities (*id.* at p. 2). By prior written notice dated February 27, 2019, the district advised the parents that the student would continue to receive special education and related services in accordance with an enclosed IEP (Dist. Ex. 66).

On March 6, 2019 and March 18, 2019, the district sent a prior written notice and a request for consent to the parents to amend the student's IEP without a CSE meeting to add an additional five hours per week of behavior consultations (Dist. Ex. 73 at pp. 1-3). By letter dated March 7, 2019, the district requested an additional five hours per week of behavioral consultations from the Center for Discovery to begin on March 11, 2019 (Dist. Ex. 70).

On May 16, 2019, the parents completed a "Pinnacle Admissions Inquiry" form which indicated that the parents had been referred by "Winston Prep" (Dist. Ex. 96 at p. 1). In June 2019, the student was accepted into an Ulster County Boards of Cooperative Educational Services (BOCES) program for the 2019-20 school year and the parents had visited and rejected a Dutchess County BOCES program (Dist. Exs. 76; 77). On June 28, 2019, the parents completed an application for admission to Pinnacle for the 2019-20 school year (Dist. Ex. 98 at pp. 1-7).

The student's annual review began at a CSE subcommittee meeting held on August 1, 2019, and concluded on August 13, 2019 (Dist. Exs. 16 at p. 1; 17 at p. 1). For the 2019-20 school year (fifth grade), the August 13, 2019 CSE subcommittee recommended an Ulster County BOCES 6:1+1 Autism Program for Independent Education (APIE) special class, a 1:1 aide, small group counseling once per week for 30 minutes, two individual sessions of PT per week for 30 minutes per session, individual speech-language therapy once per week for 30 minutes, small group speech-language therapy once per week for 30 minutes, individual OT once per week for 30 minutes, and three sessions of individual parent counseling and training per year for 30 minutes per session (Dist. Ex. 17 at pp. 2, 14).

⁵ The meeting information on the February 27, 2019 IEP indicated that a BCBA from the Center for Discovery would be assisting the student (Dist. Ex. 15 at p. 1). The district's supervisor of special education testified that she misspoke at the CSE subcommittee meeting and that the behavioral consultant from the Center for Discovery was not fully credentialed at the time she was providing consultations (Tr. pp. 679-80).

By prior written notice dated August 13, 2019, the district advised the parents that the student would continue to receive special education and related services in accordance with an enclosed IEP (Dist. Ex. 83). By ten-day notice letter dated August 13, 2019, the parents notified the district of their intent to unilaterally enroll the student at Pinnacle for the 2019-20 school year and seek tuition reimbursement and/or prospective payment, transportation and related costs at public expense (Dist. Ex. 82).⁶ In a response dated August 21, 2019, the district acknowledged receipt of the parents' ten-day notice letter and asserted its belief that the student had been offered a FAPE for the 2019-20 school year (Dist. Ex. 84).

On August 28, 2019, the parents signed an enrollment contract with Pinnacle for the student's attendance for the 2019-20 school year (Parent Ex. B at pp. 1-2). In a Pinnacle admissions applicant profile reflecting a start date of August 28, 2019, the student was described as outgoing and effervescent with focus issues misinterpreted as behavioral and mainly due to "being [un]able to attend to a lesson when there are so many kids. School has labeled this as work avoidance and [the student] has started seeing himself as a bad kid" (Dist. Ex. 99 at p. 1). The profile further stated that the student "needs to get up, have movement breaks, and stamina looks reduced within the context of a larger, integrated classroom" (*id.*). The profile reflects that the parents were "seeking an individualized experience that knows how to support [the student] in developing the skills he needs" and that they had a "frustrating experience at the local public school whereby behaviors or presentation of [the student]'s learning challenges [we]re viewed as problematic" (*id.*). In a section on behaviors, the profile stated "[n]o major concerns; [the student] has a disciplinary record, which, when you read the details, supports the fact that [the student] misreads social situations" (*id.* at pp. 2-3). The profile provided an example from the student's disciplinary record stating that "[the student] thought friends were fighting because they were talking loudly, so he pushed a boy to defend his friend. He also has difficulty evaluating the possible outcomes of a situation, in that he will do what others tell him" (*id.* at p. 3). On September 24, 2019, the district notified Ulster County BOCES that the student would not be attending the recommended APIE program (Dist. Ex. 86).

A. Due Process Complaint Notice

In a due process complaint notice, dated February 25, 2020, the parents alleged that the district denied the student a free appropriate public education (FAPE) for the 2017-18, 2018-19, and 2019-20 school years (*see generally* Dist. Ex. 1).⁷

The parents asserted that specifically for all three school years, or for unspecified years, the CSE: (1) failed to recommend services and programs using methodologies or strategies that were based on peer-reviewed research; (2) failed to offer adequate instruction, supports and services; (3) recommended a program and placement that was not appropriately ambitious for the student in light of his intelligence and academic ability; (4) failed to offer parent counseling and training and failed to implement the parent counseling and training recommended in the January

⁶ The Commissioner of Education has not approved Pinnacle as a school with which school districts may contract to instruct students with disabilities (*see* 8NYCRR 200.1[d], 200.7).

⁷ The parents' due process complaint notice indicated that the parents were specifically challenging the period from March 14, 2018 through June 30, 2020 (Dist. Ex. 1 at p. 2). The due process complaint notice further stated that March 14, 2018 was the implementation date of an IEP developed on February 26, 2018 (*id.* at p. 2, n.1).

28, 2019 IEP; (5) failed to revise the student's IEPs to address his lack of progress toward annual goals; (6) failed to properly implement the student's various IEPs with respect to his mathematics goal, BIP, and integration in the general education environment; (7) failed to recommend 12-month services; (8) failed to recommend an appropriate classroom placement, specifically, the APIE program; (9) failed to recommend accommodations for the student's processing speed deficit, and sensory needs; (10) failed to recommend support and remediation for the student's social pragmatics deficits, and severe executive functioning deficits (Dist. Ex. 1 at pp. 15-18). The parents also alleged that the student "was unnecessarily segregated and stigmatized" due to his removal from the classroom and placement at a desk in the hallway in violation of the IDEA, section 504 of the Rehabilitation Act of 1973 (section 504), (29 U.S.C. § 794[a]), and the Americans with Disabilities Act (ADA), (42 U.S.C. § 12101 et seq.) (*id.* at pp. 1, 17). The parents further asserted generally that any procedural violations alleged impeded the student's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of FAPE, and caused a deprivation of educational benefits.

Next, the parents' argued that the student's unilateral placement at Pinnacle for the 2019-20 school year was an appropriate placement (Dist. Ex. 1 at pp. 18-19). As a proposed remedy, the parents sought declaratory relief, compensatory educational services consisting of executive functioning coaching, evidence-based skills training, and 1:1 academic tutoring by providers of the parents' choosing at prevailing rates, compensatory prospective funding of 12-month services at Pinnacle for the 2020-21 school year, tuition reimbursement for the cost of the student's attendance at Pinnacle for the 2019-20 school year, reimbursement of transportation expenses for the student's travel to and from Pinnacle during the 2019-20 school year, and an order directing the district to provide bussing to and from Pinnacle for the remainder of the 2019-20 school year.

B. Impartial Hearing Officer Decision

An impartial hearing convened on May 18, 2020 and concluded on March 22, 2021, after 14 days of proceedings (Tr. pp. 1-2195).

In a decision dated July 5, 2021, the IHO determined that the district offered the student a FAPE for a portion of the 2017-18 school year, as well as for the 2018-19 and 2019-20 school years, and denied the parents' requested relief (IHO Decision at pp. 20, 21, 22-26, 29).⁸

Regarding the 2017-18 school year, the IHO found that "the appropriately composed CSE took reasonable steps to make reasonable decisions based on the information before it" and that "no procedural or substantive violation that would give rise to a denial of [a] FAPE" occurred from "February 26, 2018 through June 2018" (IHO Decision at p. 21). The IHO determined that "[t]he decisions of the CSE and the IEPs arising from this period [we]re clearly appropriate" (*id.*). Concerning the time period of May 2018 through January 2019 (2018-19 school year), the IHO

⁸ The IHO determined that "[t]o the extent the due process complaint alleges the inadequacy of IEPs developed before February 25, 2018", those claims were barred by the IDEA's two-year statute of limitations and that no exceptions to the statute of limitations had been raised by the parents (IHO Decision at p. 20). The IHO did not determine specific accrual dates for the parents' claims. In an apparent typographical error, the IHO found the district offered the student a FAPE for the "2020-21 school year", when discussing his findings related to the parents' unilateral placement (compare IHO Decision at p. 26; with IHO Decision at pp. 7-8).

noted that the parents "were clear that they wished for no changes" while five IEEs were completed (id. at p. 22). While the IHO concluded that "the [d]istrict and the [p]arent[s] should have agreed to certain stop-gap changes in lieu of just allowing the [s]tudent to remain in place", he determined that penalizing the district for "adhering to the [p]arent[s]' wishes [wa]s inconsistent with the [] [p]arent[s]' inherent right to make decisions for their child" (id.). The IHO then found that "the IEPs and educational programming within this period of time [wa]s appropriate under the circumstances and given the [parent[s]' wishes at the time" (id.). For the remainder of the 2018-19 school year, the IHO found that the IEPs developed after January 2019 were "reasonably calculated in that they made numerous... changes in an effort to strengthen the [s]tudent's educational programming" while the district located an appropriate day program (id.).

With regard to the parents' specific claims related to 12-month services, social pragmatics, the district's proposed placement, parent counseling and training, the failure to implement the student's math goals, the failure to implement the student's BIP for the 2017-18 and 2018-19 school years, and the student's removal from the classroom, the IHO found the parents' claims were unsupported by the hearing record or did not rise to the level of a denial of a FAPE (IHO Decision at pp. 22-26).

While noting that he was not required to do so, having found the district offered the student a FAPE for a portion of the 2017-18 school year and for the 2018-19 and 2019-20 school years, the IHO determined that the parents had not demonstrated the appropriateness of their unilateral placement (IHO Decision at pp. 26-28). The IHO found that the parents' evidence did not demonstrate that the program at Pinnacle was "sufficiently unique to this [s]tudent" nor did the evidence provide any objective data from which the IHO could "formulate an opinion as to the appropriateness of the placement" (id. at p. 27). Specifically, the IHO noted that the parents' witnesses failed to describe how the student was grouped, the grade levels of the student's peers, and how the student's behavioral issues were addressed (id.). The IHO further found that testimony describing behavioral interventions as "in the moment coaching" meant that no data was collected and as a result, there was no objective measure by which the IHO could "gauge [the] efficacy of the intervention" (id. at p. 28). Turning to equitable considerations, the IHO found that the parents' refusal to allow for incremental changes to the student's program while the IEEs were completed did not bar tuition reimbursement, however, the IHO specifically declined to make a finding as to whether tuition reimbursement should be reduced (id. at pp. 28-29). In conclusion, the IHO determined that the district offered the student a FAPE for the "relevant time period" and that the parents' due process complaint was "denied as there is no cause of action upon which relief can be granted" (id. at p. 29).

IV. Appeal for State-Level Review

The parents appeal arguing that the IHO erred by failing to find the district denied the student a FAPE for the period beginning March 14, 2018 through June 30, 2020.

Initially, the parents contend that the IHO erred by determining that 14 of the parents' exhibits were not admitted into evidence at the impartial hearing, and that the IHO improperly failed to consider them. Regarding the 2017-18 and 2018-19 school years, the parents argue that the IHO erred by failing to find that (1) the student was improperly excluded from his classroom by excessive removals to a desk located in the hallway; (2) the recommended ICT class was

inappropriate; (3) the student required 12-month services; (4) the student's measurable annual goals were inappropriate; and (5) the student's annual math goal was not implemented.⁹ Concerning the district's recommendations for the 2019-20 school year, the parents asserted that the IHO erred by finding the class profile was appropriate and by failing to rule on the parents' claims that the recommended program did not meet the student's behavioral or executive functioning needs. The parents further alleged, with regard to the 2017-18, 2018-19 and 2019-20 school years, that the IHO failed to rule on the parents' claim that the district failed to recommend programs and services that were based on peer-reviewed research.

Next the parents alleged that the IHO erred by finding the parents' unilateral placement of the student at Pinnacle for the 2019-20 school year was not appropriate. The parents further contend that the IHO failed to rule on whether equitable considerations warranted a reduction in the amount of tuition reimbursement.

The parents seek a finding that district denied the student a FAPE for a portion of the 2017-18 school year, as well as the 2018-19 and 2019-20 school years. As relief for the alleged denials of FAPE, the parents request "compensatory education for the time period March 14, 2018 to June 30, 2019... consisting of prospective payment of tuition and transportation costs for an additional year" at Pinnacle (Req. for Rev. at p. 10). The parents further request a finding that Pinnacle was an appropriate unilateral placement for the 2019-20 school year and an award of tuition reimbursement and reasonable transportation costs. The parents also seek an award of money damages for the student's unlawful removal from the classroom.

In an answer, the district denies each of the parents' allegations and argues that the IHO's decision should be upheld in its entirety. The district first asserts that the IHO's rationale for determining that 14 of the parents' exhibits were not admitted into evidence was both reasonable and supported by the hearing record. Further, the district argues that the IHO correctly noted that due to the lack of witness testimony related to the exhibits, the IHO would have given the exhibits little weight had they been admitted. Concerning the student's removal from the classroom, the district argues that the IHO's finding was supported by the hearing record and further contends that the student was not routinely placed at a desk in the hallway. The district also asserts that other students used the desk and that most teachers maintained a desk in the hallway outside of their respective classrooms. The district further argues that the student occasionally removed himself from the classroom to read or take a break at the desk and that such an accommodation was included on his IEP. The district denies that use of the desk was discriminatory and argues that the parents' claims related to section 504 and the ADA are not properly raised in an administrative forum. Next the district argues that the parents' claims regarding the lack of programs and services based on peer-review research are unsupported by the hearing record and that the IEP in place from March 14, 2018 through June 30, 2018 constituted a comprehensive educational program with appropriate behavioral supports. For the 2018-19 school year, as concerns the parents' peer-reviewed research claim as well as the parents' assertion that the student's ICT class was not appropriate, the district argues that the parents should be equitably estopped from asserting these claims due to their refusal to consent to any changes to the student's program while five IEEs were completed. The district contends that it was prevented from making any changes until the January

⁹ The parties refer to the student's receipt of ICT services in a general education classroom as his placement in an "ICT class" or "ICT classroom" interchangeably (see e.g. Req. for Rev. at p. 1; Answer at p. 5).

28, 2019 CSE meeting as a result of the parents' lack of cooperation and delays in obtaining the five IEEs. The district specifically claims that the parents did not contact an evaluator for the independent neuropsychological evaluation and FBA/BIP until September 2018 after receiving approval in May 2018. Regarding the recommendations for the 2019-20 school year, the district argues that ample evidence supported the IHO's determination that the program was appropriate, the class profile and executive functioning goals were appropriate, and that the student's executive functioning needs and behavioral needs were addressed by the student's proposed IEP. The district also argues that the IHO correctly found that the student's math goal was implemented and that the student did not require 12-month services.

With regard to the appropriateness of the parents' unilateral placement, the district argues that the IHO correctly determined that Pinnacle was not appropriate and failed to address the student's behavioral needs. As to equitable considerations, the district reiterated the parents' lack of cooperation during the time the IEEs were conducted as an appropriate bar to full tuition reimbursement. The district further argues that parents denied multiple requests from the district to evaluate the student and failed to provide the five IEEs to the CSE until the end of November 2018. The district asserts that the parents' conduct prevented the CSE from finding an appropriate placement for the remainder of the 2018-19 school year, and further that the parents had begun visiting nonpublic schools during this time. Lastly, the district alleges that the parents were "irretrievably invested in Pinnacle" by the time the CSE had recommended a placement (Answer ¶18). In conclusion, the district contends that the IHO correctly dismissed the parents' due process complaint notice.

V. Applicable Standards

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

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

violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ. of the Chappaqua Cent. Sch. Dist., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). "The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created" (Endrew F., 137 S. Ct. at 1001). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Endrew F., 137 S. Ct. at 1001 [holding that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"]; Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).¹⁰

¹⁰ The Supreme Court has stated that even if it is unreasonable to expect a student to attend a regular education

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. Conduct of the Impartial Hearing

The parents argue that the IHO erred by determining that parents' exhibits P, Q, Y, Z, AA, NN, PP, QQ, RR, TT, UU, VV, WW, and XX were not admitted into evidence at the impartial hearing, and that the IHO improperly failed to consider them.¹¹ The district asserts that the IHO reasonably found that the parents' exhibits were not admitted into the record and that his finding was supported by the hearing record. In his decision, the IHO noted a disagreement between the parties regarding whether the above-referenced parents' exhibits were admitted into the hearing record. In the parents' closing brief, the parents' attorney asserted that the exhibits had been admitted pursuant to a discussion on the record (Tr. pp. 1366-1367). The district argued that the exhibits in question were never entered into the record. The IHO found that the district's position was supported by the lack of entries in the transcript from the court reporter establishing that they had not been admitted, as well as the lack of any witness testimony in support of the documents (IHO Decision at pp. 3-4).

State regulations set forth the procedures for conducting an impartial hearing and address, in part, minimal process requirements that shall be afforded to both parties (8 NYCRR 200.5[j]). Among other process rights, each party shall have an opportunity to present evidence, compel the attendance of witnesses, and to confront and question all witnesses (8 NYCRR 200.5[j][3][xii]). Furthermore, each party "shall have up to one day to present its case" (8 NYCRR 200.5[j][3][xiii]). State regulation provides that the IHO "shall exclude any evidence that he or she determines to be

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" (Andrew F., 137 S. Ct. at 1000).

¹¹ Consistent with State regulation, these exhibits were not included in the hearing record submitted to the Office of State Review by the district (see 8 NYCRR 279.9[a]). The parents have not submitted copies as part of a request that they be considered as additional evidence.

irrelevant, immaterial, unreliable, or unduly repetitious" and "may limit examination of a witness by either party whose testimony the impartial hearing officer determines to be irrelevant, immaterial or unduly repetitious" (8 NYCRR 200.5[j][3][xii][c], [d]).

According to the hearing transcript, the IHO stated,

[j]ust so we are clear, the total number of exhibits are A through XX, most of which are being entered into evidence without objection of the district. Just to be clear what's remaining for identification and subject to connection with witnesses is Exhibit N, T, U, CC through LL, OO and SS. The remaining items are entered into evidence without objection or have been previously entered

(Tr. pp. 1366-1367).

The hearing transcript also reflects that the district objected to parents' exhibits N, P, Q, U, V, W, and X (Tr. pp. 8-9). The hearing officer stated that exhibits N, P and Q would be "held in abeyance" and exhibits U, V, W, and X were marked for identification but not admitted (Tr. pp. 10, 11). The parents' exhibit list indicates that exhibits N and BB-KK were withdrawn. The IHO's statement on the record noted above tends to support the parents' position that these exhibits were admitted. Further, the parents correctly argue that the district's attorney questioned a witness about parents' exhibit NN, and that parents' witnesses testified about parents' exhibits UU and VV (Tr. pp. 1584, 1755, 1774).

In an effort to ensure that the hearing record was complete with regard to evidence relevant to the period of time at issue based on the parents' claims, I directed the submission of the parents' exhibits delineated in the request for review as additional evidence and offered the parties an opportunity to be heard regarding whether the requested evidence should be considered (see 8 NYCRR 279.10[b] [permitting a State Review Officer to seek additional evidence if he or she determines that such additional evidence is necessary]). Specifically, the district was directed to submit 14 parent exhibits. The district's response, sent by letter dated August 31, 2021, did not fully comply with this request and necessitated an additional request for three remaining parent exhibits, which were sent by letter dated September 2, 2021.

Unless specifically prohibited by regulations, IHOs are provided with broad discretion, subject to administrative and judicial review procedures, with how they conduct an impartial hearing, in order that they may "accord each party a meaningful opportunity" to exercise their rights during the impartial hearing (Letter to Anonymous, 23 IDELR 1073 [OSEP 1995]; see Impartial Due Process Hearing, 71 Fed. Reg. 46704 [Aug. 14, 2006]). At the same time, the IHO is expected to ensure that the impartial hearing operates as an effective method for resolving disputes between the parents and district (id.). State and federal regulations balance the interests of having a complete hearing record with the parties having sufficient opportunity to prepare their respective cases and review evidence.

The IHO correctly noted that the weight afforded to any evidence—documentary or testimonial—was a matter within his discretion. However, his statement that even if he had admitted the exhibits, he would have done so "without context or background" and "would have afforded these items de minimus weight" appears to have been based on an erroneous assumption that none of the exhibits were supported by witness testimony (IHO Decision at p. 3).

The impartial hearing in this matter was held on 14 nonconsecutive dates over a 10-month period and accumulated over 2,000 pages of transcript. In hearing records of this size, it is not uncommon for there to be discrepancies between the parties' exhibit lists, the court reporter's recording of admitted evidence in the transcript, and the individual recall of the IHO and parties' counsel. As such, the IHO's apparent reliance on the transcript exhibit list as the primary determinant of what evidence was admitted during the impartial hearing may be not by itself, a reliable practice, and the IHO should have examined the transcript more thoroughly. Suffice it to say, I have conducted an impartial and independent review of the entire hearing record, including the 14 exhibits the parents assert were improperly excluded from evidence (34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]).¹²

B. FAPE - ICT Services

In their appeal, the parents allege that the student's recommended ICT "class" was not appropriate, that the CSE failed to recommend 12-month services, that the student's measurable annual goals were inappropriate, the student's annual math goal was not implemented, and that the student was improperly excluded from his classroom by excessive removals to a desk located in the hallway.

At the outset, I find that the hearing record supports the IHO's specific determinations with regard to 12-month services, social pragmatics, parent counseling and training, the failure to implement the student's math goal, and the student's removal from the classroom (IHO Decision at pp. 22-26). Thus, I see no reason to depart from the IHO's findings on those matters. Nevertheless, as discussed below, while the IHO accurately described the parents' conduct and resistance to changes in the student's "educational programming", the hearing record reflects that ICT services in a general education classroom became inappropriate due to the district's failure to address the student's interfering behaviors during the 2017-18 school year and the CSE's continued recommendation of ICT services for the 2018-19 school year resulted in a denial of a FAPE to the student.

While the student's needs are not at issue in this case, a review thereof and of his behavioral presentation and classroom performance leading up to the May and June 2018 CSE meetings will help to facilitate the discussion of the issues to be resolved - namely the appropriateness of continuing to recommend ICT services within a general education classroom for the 2018-19 school year.

¹² In the course of my independent review of the hearing record—albeit during a late stage of the review—it was discovered that parents' exhibit X should have been included with the district's certified hearing record. Parents' exhibit X was not among the 14 exhibits explicitly put at issue by the parents. Nevertheless, the transcript reflects that the district had initially objected to the admission of parents' exhibit X and it was marked for identification (Tr. pp. 9, 11). However, later in the hearing when the parents' attorney asserted that parents' exhibit X was in evidence, the district's attorney did not challenge that assertion, in fact he did not object to the student's father reading from the exhibit during his testimony and also cross-examined the student's father while referencing parents' exhibit X (Tr. pp. 9, 11, 1749, 1750, 1859). That exchange during the hearing would seem to indicate that the district's attorney's initial objection had been waived. Much of the confusion concerning what evidence was admitted during the impartial hearing could have been avoided had the IHO maintained and annexed his own list of exhibits that he admitted into evidence to his decision as required by State regulation (8 NYCRR 200.5[j][5][v]).

A CSE subcommittee convened on March 29, 2017 to make recommendations for the 2017-18 school year (Dist. Ex. 11 at p. 1). The March 2017 CSE subcommittee recommended a 10-month program consisting of ICT services in ELA and math, related services of individual PT once per week for 30 minutes, small group PT once per week for 30 minutes, small group OT once per week for 30 minutes, 30 sessions of small group speech-language therapy per year for 30 minutes per session, and small group counseling once per week for 30 minutes with an implementation date of September 6, 2017 (Dist. Ex. 11 at pp. 1, 14-15). The hearing record reflects that behavioral consultation services were continued for the 2017-18 school year and the student was observed by the Anderson BCBA, who provided a second written consultation report dated October 30, 2017 (Dist. Ex. 32). The Anderson BCBA observed the student during math, social studies, writing and a "turn and talk" activity (id. at pp. 1-2). The Anderson BCBA again observed some off-task behavior, but reported that "[o]verall, [the student] participated in class activities well and responded to teacher prompts and redirection when necessary" (id. at p. 2). The Anderson BCBA reviewed and updated the recommendations from the report related to the prior school year (id. at pp. 2-3; see Dist. Ex. 31).

The student's physical education instructor wrote to the student's mother in an email dated November 3, 2017, stating that she was "having continued difficulty" with the student in class (Parent Ex. S at p. 1). The physical education instructor wrote that she had redirected the student, offered him rewards, and given him modifications, but the student remained off-task (id.). In a response dated November 6, 2017, the student's mother stated that she spoke to the student about "it" and stated that "[i]t appears as if he would have benefitted from having the aid for PE Class that he had in previous years" (id.). The parent noted that a program review was scheduled for the same month and that she would discuss the situation then (id.).

The student's music teacher wrote to the student's mother in an email dated November 21, 2017 (Parent Ex. T at p. 7). The student's music teacher asked the parent to speak to the student "about making better choices in music class" (id.). The music teacher indicated that the student laid across a chair, moved around the room, moved chairs, talked to other students and "caused a big disruption to instruction", noting that she was aware that "the other students were upset" (id.). By email dated November 21, 2017, the student's mother replied that the student was upset because he forgot his recorder and "[w]hile his behavior was not typical, he was just trying to cope" (id. at p. 6). The parent requested that in the future, if no one was available to assist the student with a coping strategy, "to send him to the principal[']s office and I will deal with it then" (id.). By email dated November 22, 2017, the student's music teacher asked the parent if she could "suggest to me some coping techniques that are usually successful" with the student (id.).

According to meeting information included on an IEP dated December 20, 2017, a discussion about the student's progress included the student's reported struggles in music (Dist. Ex. 12 at p. 1). It was noted that the music teacher had arranged a quiet space for the student and additionally reflected that the student was allowed to read a book during music class if he needed to take a break (id.). The hearing record also indicated that during this meeting the parents expressed concern about the amount of redirection the student required in the classroom (id.). According to the student's teachers in attendance at the meeting, the student required the same level of redirection as the other students in his ICT class (id.). The meeting information also noted that the student responded to and was accepting of redirection and no changes to the student's program were recommended (id.).

The supervisor testified that coming into the December 2017 CSE subcommittee meeting, the student presented with average to above average cognitive abilities and was functioning on grade level in reading and math (Tr. p. 82). She reported that he struggled with self-regulation in the classroom, and at times required refocusing and redirection in order to complete work, checking for understanding, and was "provided with visual support and other modifications throughout his day to assist him in being successful" (Tr. pp. 82-83). The supervisor explained that the purpose of the December 2017 meeting was to discuss the student's cognitive and behavioral progress in the classroom and to determine if any changes were needed including additional supports (Tr. p. 83). At that time, the teachers reported that the student was doing well, he responded to refocusing and redirection, and there was no need for additional supports (Tr. pp. 83-84). The supervisor further explained that the teachers reported that the student had some challenging behaviors, but was responding to redirection and refocusing in the classroom and "didn't really require any more supports in the classroom than other students" (Tr. pp. 85-86). Additionally, the supervisor reported from the social worker that at that time the student was exhibiting more self-control and was responding in counseling (Tr. p. 86). Finally, the supervisor reported that because the student was responding to interventions including refocusing and redirection and was doing well in class, there was no need for an FBA at that time (Tr. pp. 86-87).

The student's regular education teacher in his ICT classroom testified that he attended the December 2017 CSE subcommittee meeting (Tr. pp. 164, 165, 169). The regular education teacher reported that at the time of the meeting, the student was productive "for the most part", while not always on task, the student was following directions and was able to be redirected to be kept on task (Tr. pp. 169-70). He reported that "in the second half of the year", the student's behaviors became "much more difficult for him to control and for us to manage" (Tr. p. 173). The teacher opined that "there was a remarkable difference" between the student's behaviors in the beginning half of the 2017-18 school year and the second half of the 2017-18 school year (Tr. p. 189). He described that as of December 2017, the student struggled "on occasion" within a whole class setting; however, during the second half of the school year the student would often have outbursts and was less likely to respond to the strategies they attempted to implement (Tr. pp. 173, 186-87). The teacher reported that the student's behaviors, and not his academic abilities, prevented him from completing tasks, and noted that a strategy that worked for a few days would stop working (Tr. p. 180). He further explained that the student was given a break card to use when he needed a break or to meet with a staff member; however, he did not utilize the break card, and the teacher opined that "it became much more difficult in the classroom for him" (Tr. p. 173). The teacher described that the student showed a lot of inconsistencies, citing for example, that he would often understand a math concept, but would not always demonstrate his ability in the subject (Tr. pp. 180-81). He further explained that the student's ability to focus was inconsistent from day-to-day and from one subject to another (Tr. p. 190).

The supervisor testified that after winter break, the student's ability to focus had decreased and he was no longer responding well to refocusing and redirection, and his level of work completion had decreased (Tr. p. 88). She further reported that the teachers began implementing more strategies such as small group work, using a break card and positive reinforcement and praise for completing his work (*id.*).

In an email dated January 30, 2018, the student's music teacher wrote to the student's mother to update her about "how [the student] [wa]s doing in music class" (Parent Ex. T at p. 5). The teacher advised that the "station" she had set up for the student with "worksheets, paper and

pencils" for the student to use to take a break had initially worked for one class; however, the student had thereafter spent the entire class drawing (id.). The music teacher further reported that when asked to rejoin the class, the student would become very disruptive, blowing into his recorder repeatedly, laying on his chair and crawling on the floor (id.). On the day of her email, the music teacher stated that "[t]oday was not a good day" and reported that the student was taken to the office due to disruptive behavior and "[w]hen he returned, he was very angry to discover that he missed an assessment" (id.). The music teacher asked the parent for advice on how to proceed, stating that she could grade the student on worksheets, however, the student refused to do them during class (id.). The music teacher further stated that she did not want to send the student to the office every week, "but the interruptions slow the class down" (id.).

By email dated February 5, 2018, the parent responded to the student's music teacher noting similarities between the student's reported behavior in the teacher's November message and the current situation (Parent Ex. T at p. 3). The parent explained that the student's behavior was "typical of kids with Autism and/or ADHD" and stated that she understood "how challenging this is for you" (id.). The parent further explained to the music teacher that the student's behavior was a form of communication and that the student was expressing the frustration, anxiety, stress and sensory overload he was experiencing (id. at pp. 3-4).

By email dated February 6, 2018, the music teacher thanked the parent for her "insight" and reported that she had asked the student to focus on one task (not blowing into the recorder and calling out during class) and that the student "was able to keep it to a minimum and class was more productive" (Parent Ex. T at p. 3). The student did engage in other behaviors; however, because she had asked the student to focus on one task, the teacher chose not to address the other behaviors (id.).

By email dated February 12, 2018, the parent advised the music teacher that the student had made five commitments that she had written as "reminders" inside the cover of the student's music folder (Parent Ex. T at p. 2). The student agreed to (1) be a first-time listener, (2) raise his hand and write down the answer, (3) remember the recorder is an instrument, not a toy, (4) control his body, and (5) take a break, when needed (id.). The parent stated that the student responded well to praise and that if the student was "having a bad day" and it was affecting her ability to "run the class", the parent suggested that the student be given an errand outside of the classroom to give him a chance to "cool off" without the "embarrassment/upset feeling" of removal from class or calling an additional adult to the classroom (id.). In an email response dated February 13, 2018, the music teacher reported that the student had a great day in class and had earned a "Karate Recorder" belt (id.).

In an email dated February 23, 2018, the parents wrote to the student's ICT classroom teachers acknowledging that the student had "been having a more difficult time navigating his day recently" and noting that the student had "been removed from the classroom several times and put into the hallway to calm down before being allowed reentry" (Parent Ex. UU at p. 1). The parents stated that they were concerned that this practice was unsafe for the student and requested that different interventions be utilized within the classroom and if it was necessary to remove the student that he be taken to the sensory room or the social worker's office (id.). By email dated February 26, 2018, the ICT classroom teachers stated that they "underst[ood] [the parents'] concerns" (id.).

The student's social worker testified that third grade (the 2017-18 school year) started out "much better" than the prior school year in that the student's "off-task behaviors were not really present" and that he was more engaged during the first half of the 2017-18 school year (Tr. pp. 234, 235, 246-47). She further testified that at the time of the December 2017 CSE meeting, with the exception of music class, the student was demonstrating improvement in his behaviors (Tr. pp. 252-53). The social worker then described that "there was a distinct change in [the student's] behavior in January moving into February of that year" (Tr. p. 254). She described that he was having some difficulties, was off task, out of his seat, and having difficulty engaging (Tr. pp. 254-55).¹³

According to a March 15, 2018 IEP annual goals progress report, the student was progressing inconsistently toward a study skills annual goal requiring the student to maintain his attention on task during class lessons and assignments in order to complete assignments on time on a daily basis across all academic settings 85 percent of the time (Parent Ex. L at p. 2; Dist. Ex. 91 at p. 1). The report indicated that the student may not achieve the goal and that his ability to maintain his attention had declined from the beginning of the year (*id.*). The student was described as often out of his seat, running around the classroom and making disruptive noises (*id.*). In reading, although the report reflected that in December the student was making satisfactory progress towards his annual goal, by March the student was making "less than anticipated progress" and the report indicated that it was "difficult to assess [the student's] reading progress, since he [was] reluctant to participate during reading groups and independent work" (*id.*). The student was progressing gradually toward a mathematics annual goal that required him to solve multiple word problems using addition, subtraction, multiplication, or division and to explain his thinking for eight out of ten trials; however, he was described as making less than anticipated progress, which was reportedly inconsistent and impacted by his difficulty remaining on task (*id.*). The report further noted that the student's math performance did not reflect his ability (*id.*). On a speaking/listening annual goal requiring the student to demonstrate appropriate turn-taking, maintain eye contact and actively listen while engaging in appropriate verbal exchanges for four out of five trials, the student's progress was described as inconsistent and the report indicated that the student may not achieve the goal (Parent Ex. L at pp. 2-3; Dist. Ex. 91 at pp. 1-2). According to the report, during social language groups the student demonstrated difficulty attending and participating appropriately, and he had difficulty with self-control and using appropriate conversational turn-taking (Parent Ex. L at p. 3; Dist. Ex. 91 at p. 2). The progress report noted that movement breaks and mindfulness breathing were utilized to assist the student (*id.*). On a speech/language annual goal requiring the student to demonstrate age-appropriate judgment and appropriate communication for social interactions with adults and peers for eight out of ten trials, the student was progressing inconsistently and may not achieve the goal (*id.*). The progress report indicated that the student was able to verbalize a socially appropriate interpretation, comment or reaction to picture scenes but had difficulty generalizing comments to everyday situations and interactions (*id.*). The student's overall performance was "highly inconsistent", on some days the student would call out and have difficulty controlling his body and on other days he was calm, cooperative and eager to please (*id.*).

¹³ On February 26, 2018, the student's IEP was amended by agreement without a CSE meeting to add five additional behavioral consults to be conducted by the Anderson Center for Autism (Dist. Ex. 13 at p. 1).

With regard to the student's three social/emotional/behavioral annual goals, the March 2018 IEP annual goals progress report reflected that the student was progressing inconsistently toward one goal and the remaining two annual goals were denoted as "See Comments" (Parent Ex. L at pp. 3-4; Dist. Ex. 91 at pp. 2-3). On an annual goal requiring the student to communicate and interact in a positive manner with peers for 30 minutes 80 percent of the time, the student was described as able to interact appropriately in a small group setting (Parent Ex. L at p. 3; Dist. Ex. 91 at p. 2). However, in the classroom setting, the student's "struggles" to manage calling out and keep a calm body were impacting his peers (*id.*). The report stated that the student had been unable to modulate his behavior "even when asked to do so by peers" (*id.*). On an annual goal requiring the student to identify and comply with teacher directives, classroom rules/expectations and school rules throughout the school day for 85 percent of the time, the student was described as progressing inconsistently and may not achieve the goal (Parent Ex. L at p. 3; Dist. Ex. 91 at pp. 2-3). The student's third annual goal stated that when he expressed a negative emotion at school, he would identify and appropriately use a coping skill to maintain acceptable school behavior 85 percent of the time (Parent Ex. L at p. 4; Dist. Ex. 91 at p. 3). The progress report indicated that the student was "struggling in the classroom" at the time of the report, had difficulty following classroom routines and staying on task, and had been less able to use positive coping strategies to get himself back on track (*id.*).

In an email dated April 5, 2018, the parent wrote to the music teacher inquiring about the student's progress for the third trimester (Parent Ex. T at p. 1). In a reply dated April 5, 2018, the music teacher reported that "the progress we had been making did not continue" (*id.*). The teacher stated that "[t]he few weeks before break, [the student] had difficulty transitioning from the start of class" (*id.*). Although the student's station was always set up, the music teacher noted new behaviors began such as running around the room, hitting the other students' music stands, throwing himself on the floor, and that the student had resumed loudly blowing into his recorder and calling out (*id.*). Further, the student did not acknowledge any of the music teacher's requests to cease the behaviors (*id.*). The music teacher also reported that during the most recent class at the time of her writing, the student read quietly for the first ten minutes of class, then began blowing into his recorder and calling out, had scribbled all over his worksheet and at the end of class, he ran to her computer and "pound[ed]" on the keyboard causing the screen to freeze (*id.*). The music teacher concluded that her primary concern was that the student might injure himself as he sometimes ran around the room with his recorder in his mouth (*id.*).

The Anderson BCBA provided a third written consultation report on April 10, 2018, after observing the student on three dates (Dist. Ex. 33 at p. 1). Initially, the Anderson BCBA noted that the student had prior knowledge of the observation and had shared that information with district staff and other students (*id.*). However, teachers reported that the student's behavior during the observed periods was consistent with the behaviors "that had resulted in the request for consult support" (*id.*). The student was observed in the morning during music, snack, reading, math, and writing, and the observation included both whole group and small group work, as well as during independent work tasks (*id.* at pp. 1, 3). The Anderson BCBA reported challenging behaviors that prevented the student's participation in and completion of lessons and activities that occurred throughout the length of the observation, including more actively disruptive behaviors in addition to off-task behaviors (*id.* at p. 1). The student reportedly engaged in running, dancing, spinning around the room, making loud noises, loudly speaking or yelling, and/or singing during instruction; "drawing/writing/scribbling over teacher materials while they were being presented to the class",

using teacher materials inappropriately, banging loudly on classroom items, yelling in a peer's face or distracting a peer by demanding attention, writing or drawing on task materials, laying on the floor or hiding under a table, yelling out comments during class discussions, drawing on the table or cleaning tables during instruction (id. at pp. 1-2). "Less active" off-task behaviors observed by the Anderson BCBA were reading books or magazines during instruction or while work completion was expected, drawing on papers, or quietly walking around the room when the student was expected to be working (id. at p. 2). The Anderson BCBA indicated that the student was observed to be off-task and/or disruptive during "entire or nearly entire lessons or classes", specifically in music class, wherein he did not comply with any of the expected behaviors or directions and instead was engaging with the student next to him, drawing and writing on his folder and worksheets, yelling out, banging on a music stand, loudly blowing into a recorder, laying on the floor, or reading a book (id.). During a 45-minute reading group, wherein the expectation was for the student to remain seated and quiet, the Anderson BCBA reported that the student remained seated for approximately three minutes despite the presence of an additional adult in close proximity to the student (id.). The student was observed coloring on the table with a highlighter, getting up to retrieve cleaning supplies to clean and dry the table, then running to the back of the classroom and cleaning a different table while the teacher was instructing the class (id.). The Anderson BCBA reported that the student willingly participated in one academic activity during the observation, which was to write a story using a laptop computer (id.). The Anderson BCBA also recorded data during a 90-minute observation broken into five-minute intervals (id.). The Anderson BCBA found that 82 percent of the time, the student engaged in off-task behavior at some point during each interval and that 65 percent of the time the student was off-task for the entirety of the interval (id.). The student reportedly engaged in disruptive behaviors 29 percent of the time (id.). The Anderson BCBA reported that the majority of the behaviors exhibited by the student were "not responded to or redirected by teaching staff" and most behaviors were ignored (id. at p. 3). The Anderson BCBA noted that on a few occasions, staff intervened by calling the student's name, offering for him to join in, reminding him to reference written expectations (music class) "or by calling for someone to come assist him in leaving the room because the disruptions had gone on too long" (id.). The Anderson BCBA noted that none of the responses from district staff "appeared to have sustained effect on redirecting behaviors" (id.). The student readily left the room with an adult calmly and quietly, however, upon returning after a break, the student "quickly resumed" engaging in disruptive behaviors (id.).

The Anderson BCBA further reported that the student's behaviors did result in some attention and reactions from peers (Dist. Ex. 33 at p. 3). At times, other students appeared "to find enjoyment in being the audience" to the student's behaviors, sometimes peers attempted to correct or remind the student of what he should have been doing, they made comments/facial expressions to indicate shock/annoyance with what was occurring, and often actively ignored the student's behaviors (id.). Based upon her observation and teacher reports, the Anderson BCBA recommended that clear expectations be set for acceptable in-school behaviors, noting the status quo that "some degree or duration" of off-task and disruptive behavior were permissible while "some degree or duration" of the behaviors resulted in the student being redirected, corrected or removed from the classroom sent "conflicting messages" to the student about what behaviors were expected and "significantly reduced teacher instructional control" (id.). Further, the Anderson BCBA recommended the clear outlining of expected behaviors for the student and reinforcing them with immediate redirection and correction of impermissible behaviors, establishing items that were off-limits, such as the teacher's computer, refraining from giving the student the option

to participate in class and instead giving him choices of how to participate, removing tempting items from reach, and moving his seat closer to the teacher (*id.* at pp. 3-4). The Anderson BCBA reported that the student's off-task behavior was "highly reinforcing" and allowed him to avoid work, and engage with peers and/or in preferred activities, and she recommended a reinforcement system for on-task behaviors and task completion (*id.* at p. 4). The Anderson BCBA recommended reinforcers such as allowing the student to earn preferred activities and incorporating appropriate versions of the behaviors the student was likely to engage in as a means of participating in class (*id.*).

By notice dated April 11, 2018, the parents were invited to attend the student's annual review at a CSE meeting to be held on May 8, 2018 (Dist. Ex. 40 at p. 1). On April 19, 2018, the district mailed a copy of the April 10, 2018 Anderson BCBA's consultation report to the parents (Dist. Ex. 42).

A CSE subcommittee convened on May 8, 2018 to conduct the student's annual review (Dist. Ex. 14 at p. 1). The meeting information reflected that the April 10, 2018 behavior consultation report was reviewed and district staff shared that the student's behavior began to decline in December 2017 (*id.*). The district teachers reported that the student's behavior was disruptive in the classroom, despite having individualized his instruction, giving him the opportunity to type his work in a computer, and inviting him to create the class newsletter (*id.* at pp. 1-2). The student engaged in the newsletter activity briefly (*id.* at p. 2). The student was given a break card to use to request a break; however, the teachers reported that the student refused to take a break when needed (*id.*). The parents indicated that the student had difficulty with music and physical education and reported that the student did not feel successful in school (*id.*). The parents were concerned that the student's grades and work had declined (*id.*). The meeting information further reflected that the student had difficulty with the district assessment in the classroom, so the district social worker brought the student to her office to complete it; however, the student was "resistant to completing the district assessment" (*id.*). It was further noted that the student's behavior impacted his performance and social skills in the classroom (*id.*). The parents stated that the student had difficulty relating to peers (*id.*). The district social worker reported that the student could attend to the social skill lesson in a small group (*id.*). The parents inquired about programs for the student (*id.*). The CSE subcommittee discussed multigrade special classes within the district and recommended an 8:1+1 special class or a 12:1+1 special class (*id.*). The parents then requested five IEEs and were advised to make the request in writing (*id.*). The meeting information indicated that the CSE would reconvene after the IEEs (*id.*).

The school psychologist testified that during the May 2018 CSE meeting there was a discussion regarding the shift in the student's behaviors and it was noted that the student seemed to do better in smaller settings (Tr. p. 546). She repeated the example from a related service provider who reported that when the group setting (5:1) was reduced to a smaller group setting, the student improved in his ability to attend and participated with more meaningfully and seemed to be more engaged (Tr. pp. 546-47). The school psychologist opined that "because he was having difficulty accessing the information he [wa]s capable of" a smaller program was recommended so that "he would again be able to participate in a meaningful way" (Tr. p. 548). The supervisor testified that May 2018 CSE engaged in a discussion regarding the student's need for a smaller classroom, including two different classrooms within the district (8:1+1 and 12:1+1) and indicated that the parents were encouraged to visit those programs (Tr. pp. 91-93). She further indicated that during the May 2018 CSE meeting, the parents requested several IEEs and were told they had

to submit their request in writing to the director of special education (Tr. p. 93). The supervisor testified that at that point "everything kind of stopped" (Tr. p. 93). The supervisor indicated that the parents did not visit the suggested programs, did not agree with moving up the re-evaluation date to complete district testing, and indicated that they wanted the IEEs completed before they would agree with any program changes (Tr. p. 94).

According to the regular education teacher, during the second half of the school year the student would often have outbursts, he was less likely to respond to breaks or to utilize a card to request breaks that he had been given (Tr. p. 173). The regular education teacher further testified that he and the student's special education teacher in the ICT classroom attended a May 8, 2018 CSE subcommittee meeting to discuss the student's then-current behavior (Tr. p. 175). When asked what he recalled about the May 2018 meeting, the regular education teacher testified that he believed, "during that meeting we discussed [the student]'s behavior during the second half of the school year, and [the special education teacher] and I felt the ICT setting wasn't working for [the student] at that point. We recommended for the following year a smaller class setting" (Tr. pp. 175-76). In response to a follow-up question on why the regular education teacher believed that the ICT class was no longer working for the student as of the date of the CSE subcommittee meeting, the regular education teacher testified that the student "was off task much of the time and his behavior was disruptive to the class and to his own learning as well" (Tr. pp. 176-77). The teacher opined that a 12:1+1 smaller setting would be more appropriate and would provide him with more attention (Tr. pp. 177-78).

The student's social worker testified that the May 2018 CSE discussed conducting a program search of other classes within the district to look for a smaller setting for the student for the 2018-19 school year (Tr. pp. 256-57). The social worker testified that she supported that recommendation, because despite trying the Anderson BCBA's recommendations, "it wasn't working" (Tr. pp. 257-58). She opined that at that point in counseling, the student was able to hear information, talk about skills and feelings, look back in retrospect on his behaviors, and see different choices he could have made; however, he was not able to implement any of that within the classroom (Tr. p. 258). She felt that in a smaller classroom setting the student would have increased social-emotional support embedded into the day instead of pull-out counseling services, and staff would provide additional support for academics (Tr. p. 259). The social worker indicated that the May 2018 CSE suggested the parents visit the other programs within the district; however, the parents were not in agreement with that recommendation and wanted to stop the meeting in order to pursue several independent evaluations (Tr. pp. 259-61).

In an email dated May 8, 2018, the parent requested an independent OT evaluation with a sensory component, a PT evaluation, a speech-language evaluation, a neuropsychological evaluation and an FBA/BIP (Dist. Exs. 104 at p. 2; 106 at p. 2). By email dated May 11, 2018, the district's director of special education acknowledged receipt of the parents' request for IEEs and advised the parents that she would be sending correspondence via certified mail (Dist. Exs. 104 at p. 1; 106 at pp. 1-2).

By letter dated May 18, 2018, the district provided the parents with a copy of the district's IEE policy, reimbursement rates, a request for consent to evaluate and a request for authorization of release of information for each evaluator selected, as well as prior written notice to the parents requesting consent to reevaluate the student in the areas of OT, PT, speech-language and to conduct a neuropsychological evaluation and an FBA (Dist. Exs. 43 at p. 1; 105 at pp. 1-4).

By email dated May 30, 2018, the parent wrote to the district's director of special education thanking her for granting their request for IEEs and advising that the district's IEE policy and reimbursement rates were not included in the mailing (Dist. Ex. 108 at p. 2). By email dated May 31, 2018, the district's director of special education sent the requested documents (id. at p. 1).

The parents returned the consent form with the box checked indicating their refusal to consent to additional district assessments with a handwritten note dated June 1, 2018, stating that their request for IEEs in all the areas listed in the prior written notice had been approved by the district (Dist. Ex. 44). The parents' refusal to consent was received by the district on August 10, 2018 (id.). By notice dated June 4, 2018, the parents were invited to attend the student's annual review at a CSE meeting scheduled for June 11, 2018 (Dist. Ex. 45).

By email dated June 11, 2018, the parent wrote to the CSE subcommittee that "[a]s per my discussions this morning with [the supervisor of special education's assistant], the CSE meeting scheduled for today... has been canceled. A CSE meeting will be scheduled upon the completion of the independent education[al] evaluations" (Dist. Ex. 100).

By notice dated June 12, 2018, the parents were invited to attend the student's annual review at a CSE meeting scheduled for June 20, 2018 (Dist. Ex. 46). On June 19, 2018, the parent signed authorizations for independent evaluators to conduct an FBA/BIP and for PT, OT, and neuropsychological evaluations (Dist. Exs. 47 at pp. 1-4; 110 at pp. 1-4; see also Dist. Exs. 36-39). By letter dated June 19, 2018, the parent wrote to the district's director of special education with the list of the parents' chosen evaluators and stated that the district's reimbursement rates did "not reflect what providers and doctors around here charge" (Dist. Ex. 109). The parent requested that the board of education "update its criteria... to reflect prevailing rates in the community... otherwise... I will... be denied my right to an independent educational evaluation" (id.).¹⁴

On June 20, 2018, a CSE subcommittee convened to continue the student's annual review (Dist. Ex. 14 at p. 1). The meeting information reflected that the CSE recommended ICT services, an FBA, and "moving up the re-evaluation date", to which the parents would not consent (id.). The meeting information further indicated that the student's related services, modifications and testing accommodations would be maintained (id.). For the 2018-19 school year, the CSE subcommittee recommended a 10-month program consisting of ICT services in ELA, math, science, social studies and related services of individual 30 sessions of PT per year for 30 minutes per session, 30 sessions of individual OT per year for 30 minutes per session, 30 sessions of small group speech-language therapy per year for 30 minutes per session, and small 30 sessions of group counseling per year for 30 minutes per session with an implementation date of September 6, 2018 (id. at pp. 1, 11-12). By prior written notice dated June 20, 2018, the district advised the parents that the student would continue to receive special education and related services in accordance with an enclosed IEP (Dist. Ex. 48 at p. 1).

The school psychologist testified that at the end of third grade (2017-18) a recommendation was made to move up his re-evaluation as well as to complete an FBA (Tr. pp. 538-39). She testified that despite having the support of the behavioral consultations in the classroom, the

¹⁴ District exhibit 109 appears to be the cover letter that accompanied the parents' authorization forms. The speech-language provider listed in the cover letter was not the provider the parents ultimately used (compare Dist. Ex. 109, with Dist. Exs. 110 at p. 5; 35).

student continued to struggle; therefore, an FBA was recommended to try and "identify more specifically" what was motivating the student's behaviors (Tr. pp. 548-49). Additionally, she indicated that moving up the re-evaluation date would have provided a "better understanding with more updated information" in order to provide "a full understanding of his needs and his strengths" (Tr. p. 550). However, the parents did not agree to move up the re-evaluation date, and indicated that they wanted the IEE results before they would agree to a program change (Tr. p. 96). The regular education teacher testified that he also attended the June 20, 2018 CSE subcommittee meeting and recalled that the parents "were not on board" with recommendations for smaller class sizes and that the CSE subcommittee decided to do more observations the following school year (Tr. pp. 178-79). The teacher agreed that despite his view that the student required a smaller class size, the CSE recommended an ICT program for the 2018-19 school year, and he opined that the parents were not happy with the smaller classes that had been offered (Tr. pp. 209-10; see Tr. p. 551). The social worker testified that the district personnel wanted to look for a smaller program, but the parents wanted time to complete the IEEs, so the CSE continued the same type of ICT program for the 2018-19 school year "to start" (Tr. p. 263).

The hearing record reflects that the student's behavior was impeding his learning and that of others as early as winter 2018 (see e.g. Tr. pp. 88, 173, 186-89, 254-55; Parent Ex. T). A March 2018 IEP progress report indicated that the student was at risk for not achieving several IEP goals due to his lack of classroom work completion (see Parent Ex. L). His inability to complete work in class was universally attributed to the student's off-task behavior and disruptive behavior (see Dist. Ex. 33). The student's teachers and related service providers were all in agreement that by May 2018 the student required a smaller more supportive setting; however, the CSE continued to recommend a general education classroom with ICT services and related services; a setting in which he was struggling despite all of the strategies and supports attempted since January 2018 (see Dist. Ex. 14 at pp. 1-2). Further, despite the addition of supports and services to the student's IEP, the student continued to exhibit significant behavioral needs and he remained in the ICT program for the entirety of the 2018-19 school year (see Parent Ex. DDD; Dist. Exs. 15 at pp. 1-3; 62 at p. 2).

Additionally, while the district obtained the services of a BCBA to provide consultation, the district did not consider conducting an FBA/BIP until the June 20, 2018 CSE subcommittee meeting, after the parents had requested IEEs in May 2018 (Dist. Ex. 14 at p. 1; 33). The hearing record reflects that the district did not take any steps to begin conducting its own FBA until February 2019.

Under the IDEA, a CSE may be required to consider special factors in the development of a student's IEP. Among the special factors in the case of a student whose behavior impedes his or her learning or that of others, the CSE shall consider positive behavioral interventions and supports, and other strategies, to address that behavior (20 U.S.C. § 1414[d][3][B][i]; 34 CFR 300.324[a][2][i]; see 8 NYCRR 200.4[d][3][i]; see also E.H. v. Bd. of Educ. of Shenendehowa Cent. Sch. Dist., 361 Fed. App'x 156, 160 [2d Cir. Oct. 16, 2009]; A.C., 553 F.3d at 172). State procedures for considering the special factors of a student's behavior that impedes his or her learning or that of others may also require that the CSE consider developing a BIP for a student that is based upon an FBA (8 NYCRR 200.4[d][3][i]; 200.22[a], [b]). Additionally, a district is required to conduct an FBA in an initial evaluation for students who engage in behaviors that impede their learning or that of other students (8 NYCRR 200.4[b][1][v]).

State regulation defines an FBA as the process of determining why a student engages in behaviors that impede learning and how the student's behavior relates to the environment" and

include[s], but is not limited to, the identification of the problem behavior, the definition of the behavior in concrete terms, the identification of the contextual factors that contribute to the behavior (including cognitive and affective factors) and the formulation of a hypothesis regarding the general conditions under which a behavior usually occurs and probable consequences that serve to maintain it

(8 NYCRR 200.1[r]). According to State regulations, an FBA shall be based on multiple sources of data including, but not limited to, "information obtained from direct observation of the student, information from the student, the student's teacher(s) and/or related service provider(s), a review of available data and information from the student's record and other sources including any relevant information provided by the student's parent" (8 NYCRR 200.22[a][2]). An FBA must also be based on more than the student's history of presenting problem behaviors (8 NYCRR 200.22[a][2]). An FBA must include a baseline setting forth the "frequency, duration, intensity and/or latency across activities, settings, people and times of the day," so that a BIP (if required) may be developed "that addresses antecedent behaviors, reinforcing consequences of the behavior, recommendations for teaching alternative skills or behaviors and an assessment of student preferences for reinforcement" (8 NYCRR 200.22[a][3]).

Although State regulations call for the procedure of using an FBA when developing a BIP, the Second Circuit has explained that, when required, "[t]he failure to conduct an adequate FBA is a serious procedural violation because it may prevent the CSE from obtaining necessary information about the student's behaviors, leading to their being addressed in the IEP inadequately or not at all" (R.E., 694 F.3d at 190; see L.O., 822 F.3d at 113). The Court also noted that "[t]he failure to conduct an FBA will not always rise to the level of a denial of a FAPE," but that in such instances particular care must be taken to determine whether the IEP addresses the student's problem behaviors (R.E., 694 F.3d at 190).

With respect to a BIP, State regulation requires that the BIP shall identify: (i) the baseline measure of the problem behavior, including the frequency, duration, intensity and/or latency of the targeted behaviors . . . ; (ii) the intervention strategies to be used to alter antecedent events to prevent the occurrence of the behavior, teach individual alternative and adaptive behaviors to the student, and provide consequences for the targeted inappropriate behavior(s) and alternative acceptable behavior(s); and (iii) a schedule to measure the effectiveness of the interventions, including the frequency, duration and intensity of the targeted behaviors at scheduled intervals (8 NYCRR 200.22[b][4]). However, neither the IDEA nor its implementing regulations require that the elements of a student's BIP be set forth in the student's IEP ("Student Needs Related to Special Factors," at p. 16, Office of Special Educ. [April 2011], [available at http://www.p12.nysed.gov/specialed/formsnotices/IEP/training/QA-411.pdf](http://www.p12.nysed.gov/specialed/formsnotices/IEP/training/QA-411.pdf)). Once a student's BIP is developed and implemented, "such plan shall be reviewed at least annually by the CSE or CPSE" (8 NYCRR 200.22[b][2]).

As with the failure to conduct an FBA, the district's failure to develop a BIP in conformity with State regulations does not, in and of itself, automatically render the IEP deficient, as the IEP

must be closely examined to determine whether it otherwise addressed the student's interfering behaviors (see C.F., 746 F.3d at 80; F.L., 553 Fed. App'x at 6-7; M.W., 725 F.3d at 139-41; R.E., 694 F.3d at 190).

Based on the foregoing, the district's failure to conduct an FBA/BIP impeded the student's right to a FAPE (see 20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]). Further, the CSE's recommendation to continue the student in an ICT classroom for the remainder of the 2017-18 school year and again for the 2019-20 school year, when the student's teachers had already concluded that he was clearly failing to progress denied the student a FAPE.

C. FAPE - APIE Program

The parents allege that the district's recommendations for the 2019-20 school year failed to meet the student's behavioral or executive functioning needs and that the IHO erred by finding the class profile was appropriate. Additionally, the parents argue that the student would not be grouped with students with similar needs in the APIE program.¹⁵

¹⁵ The parents allege that the IHO failed to rule on the issue of whether or not the district's recommended APIE program was based on peer-reviewed research (Req. for Rev. at p. 3). The parents argue that the district did not present evidence beyond vague and conclusory statements that "it had either considered or used" services or programs based on peer-reviewed research (*id.*). The IDEA and State and federal regulations require that an IEP must include a "statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child, or on behalf of the child" (20 U.S.C. § 1414[d][1][A][i][IV]; 34 CFR 300.320[a][4]; see 8 NYCRR 200.4[d][2][v][b]). While recognizing the IDEA's requirements regarding peer-reviewed research, courts have generally declined to find an IEP or a recommended program was not appropriate on the sole basis that it violated this provision of the IDEA (see Ridley Sch. Dist. v. M.R., 680 F.3d 260, 275-79 [3d Cir. 2012]; Joshua A. v. Rocklin Unified Sch. Dist., 319 Fed. App'x 692, 695 [9th Cir. Mar. 19, 2009] [finding that "[t]his eclectic approach, while not itself peer-reviewed, was based on 'peer-reviewed research to the extent practicable'"]; A.G. v. Bd. of Educ. of Arlington Cent. Sch. Dist., 2017 WL 1200906, at *9 [S.D.N.Y. Mar. 29, 2017] [rejecting the parents' arguments that the Wilson Reading System must be used "with fidelity" or exclusively in order to provide a FAPE and finding that the incorporation of aspects of Wilson instruction as part of a balanced literacy program was permissible]; see also Pitchford v. Salem-Keizer Sch. Dist. No. 24J, 155 F. Supp. 2d 1213, 1230-32 [D. Or. 2001] [rejecting an argument that a district's proposed IEP was not appropriate because it provided for an eclectic program and holding that the district's offer of FAPE was appropriate notwithstanding its refusal to offer an ABA approach]). The IDEA expresses a preference that educational services be based on peer-reviewed research, but it is far less clear that, if a student's educational program is reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances, that the lack of peer-reviewed research will nevertheless result in a denial of a FAPE. As one court recently stated of the requirement "To the contrary, the IDEA explicitly says 'to the extent practicable,' which in and of itself suggests that peer-reviewed research is not always required (E.M. v. Lewisville Indep. Sch. Dist., 2018 WL 1510668, at *10 [E.D. Tex. Mar. 27, 2018], *aff'd*, 2019 WL 1466959 [5th Cir. Apr. 1, 2019]; see also Bd. of Educ. of Albuquerque Pub. Sch. v. Maez, 2017 WL 3278945, at *7 [D.N.M. Aug. 1, 2017]; J.S., 2017 WL 3149947, at *10 [noting that there is no absolute requirement that an IEP be supported by peer-reviewed research, but only that it be supported to the 'extent practicable.']; Damarcus S. v. Dist. of Columbia, 190 F. Supp. 3d 35, 51 [D.D.C. 2016] [rejecting the student's claim that an IEP that failed to specify the research-based, peer-reviewed instruction resulted in a denial of a FAPE]). Here, the parents have failed to assert with any particularity what aspect of the APIE program they are challenging within the realm of peer-reviewed research. Moreover, the requirement that the recommended special education program or services be based on peer-reviewed research generally arises in the context of methodology disputes, in which the district is given deference. To the extent that the IHO failed to rule on this claim, I find that any lack of evidence that the recommended APIE program

In February, 2019, the district sent referrals to the Dutchess County BOCES, the Putnam-Northern Westchester County BOCES, and the Ulster County BOCES APIE program (Dist. Exs. 63 at pp. 1-2; 65). By letter dated June 7, 2019, Ulster County BOCES notified the district that the student had been accepted into the APIE program for the 2019-20 school year (Dist. Ex. 76). In a letter dated June 13, 2019, Dutchess County BOCES informed the district that the parents had attended the March 22, 2019 intake with the student and "sat in on instruction in one of our ABC classrooms for an observation" (Dist. Ex. 77). The letter further advised that the parents "do not wish for him to attend our program" and as a result the referral packet was returned "based on the parent[s'] oppositional stance to our program" (*id.*).

By letter dated July 17, 2019,¹⁶ the parents wrote to the director of special education thanking her for her request for their input stating, "[w]e had hoped to share our input for these two placement options being offered by the district at a CSE [m]eeting, but regardless we appreciate the opportunity" (Dist. Ex. 101 at p. 1). The parents then asserted that based on the characteristics of the two programs, it appeared that the student was "being presented as a child with emotional/behavioral challenges along with academic difficulties, rather than a child with Autism, ADHD and its related behaviors complicated with severe executive functioning deficits" (*id.*). The parents then detailed their concerns with the program at Putnam-Northern Westchester County BOCES and the APIE program at Ulster County BOCES (*id.* at pp. 1-2). In conclusion, the parents stated that both programs were "focused on social skills instruction with the teachers' experience in teaching children with executive functioning deficits lacking or unknown", neither program would meet the student's needs and that they were rejecting both placement options (*id.* at p. 2).

By notice dated July 24, 2019, the parents were invited to attend the student's annual review at a CSE meeting scheduled for August 1, 2019 (Dist. Ex. 79 at p. 1). In an email dated July 24, 2019, the district's director of special education wrote to the parents and stated that she had shared their July 17 letter with a representative of Ulster County BOCES, and had received responses to their specific concerns (Dist. Ex. 102 at pp. 1-2). In a July 24, 2019 reply to the representative of Ulster County BOCES, the parent requested the names and the amount of time that BCBA's were "allocated to the APIE Elementary Program" (*id.* at p. 1). By email dated July 29, 2019, the representative from Ulster County BOCES advised the parent that two BCBA's were full-time BOCES employees who "worked in our building the equivalent of one day per week last year" (*id.*). The email also stated that social workers and school psychologists worked with teachers and other related service providers in a team approach to create individual behavior plans when more behavior support is needed above and beyond a whole classroom management plan (*id.*).

A CSE subcommittee convened on August 1, 2019, to conduct the student's annual review (Dist. Ex. 16 at p. 1). The meeting information reflected that the student had been accepted at two programs following an out-of-district search (*id.*). Following a discussion which included the participation of staff from Putnam-Northern Westchester County BOCES by telephone, it was

was based on peer-reviewed research does not rise to the level of a denial of a FAPE given that the August 13, 2019 IEP offered the student a FAPE.

¹⁶ District exhibit 101 is dated July 17, 2018, however it appears that the year is a typographical error. The district's response contains excerpts from the parents' original letter in emails dated July 24, 2019 and July 29, 2019 (*see* Dist. Ex. 102 at pp. 1-2).

determined that the student required a more supportive program (id. at pp. 1-2). The student's progress since the last CSE subcommittee was then reviewed (id.). The student's teachers reported that the 1:1 aide was helping the student with transitions and on-task focus, the student was more focused and worked at a station more at the end of the school year; however, work completion remained an area of weakness (id.). The teachers also reported that the student's avoidance behaviors had decreased but the student continued to defer to preferred activities (id. at p. 2). The parents stated that the student continued to have a positive feeling toward school (id.). Recommended goals were reviewed with the teachers noting that they were similar to previous goals because the student did not master the prior year's goals due to weakness in task completion (id.). The parents requested that data on task completion be collected (id.). Behavioral data was reviewed which showed that the student had increased accurate responses by 10 to 20 percent, he exhibited a greater willingness to participate in class, responses to people around the student were improved with prompting, and the 1:1 aide proved to be helpful overall (id.). It was noted that noncompliant behaviors continued, and that positive praise was important to utilize when addressing behaviors in the classroom (id.).

By prior written notice dated August 1, 2019, the district advised the parents that the student would continue to receive special education and related services in accordance with an enclosed IEP (Dist. Ex. 80). By notice dated August 9, 2019, the parents were invited to attend a "requested review" at a CSE meeting scheduled for August 13, 2019 (Dist. Ex. 81 at p. 1).

A CSE subcommittee convened on August 13, 2019, to review the student's program and services for the 2019-20 school year (Dist. Ex. 17 at p. 1). Following a discussion with staff from the Ulster County BOCES APIE program, the CSE subcommittee recommended a 10-month program consisting of the APIE 6:1+1 special class placement, a 1:1 aide, one session per week of small group counseling for 30 minutes, two individual sessions of PT per week for 30 minutes per session, one individual session of speech-language therapy per week for 30 minutes, one session of small group speech-language therapy per week for 30 minutes, one session of individual OT per week for 30 minutes, and three sessions of individual parent counseling and training per year for 30 minutes per session (id. at pp. 1-2, 14, 15). The district's director of special education stated that the student's FBA/BIP would need to be revised as the current plan was for use in the student's ICT classroom (id. at p. 2). The meeting information reflected that the APIE program provided individualized supports and instruction from highly qualified staff including behavior support specialists (id.). Academics and prosocial skill development were delivered through a multidisciplinary framework and the program provided a high ratio of adult support to meet the student's needs (id.). The Ulster County BOCES administrator who participated in the CSE subcommittee meeting explained that instruction would be individualized to provide the support the student required including the use of graphic organizers, manipulatives, and breaks in the classroom to assist students with organizational skills and task completion (id. at p. 1). The BOCES administrator also stated the APIE program was maintained in a separate part of the building and students from other programs did not interact with APIE students (id. at p. 2). The BOCES administrator also indicated that APIE students were supervised at all times by classroom staff and the CSE had agreed to continue the 1:1 aide to assist the student with transitioning to the new program (id.). The August 2019 CSE subcommittee also recommended continuation of the testing accommodations and the program modifications recommended in the prior IEP (id.). The student's program was to be implemented on September 4, 2019 (id. at p. 1).

By prior written notice dated August 13, 2019, the district advised the parents that the student would continue to receive special education and related services in accordance with an enclosed IEP (Dist. Ex. 83). The student began attending Pinnacle in late August 2019 (see Dist. Ex. 99 at p. 1). On September 24, 2019, the district notified Ulster County BOCES that the student would not be attending the recommended APIE program (Dist. Ex. 86).

The IHO noted that the parents' primary challenge to the appropriateness of the APIE program was based on a class profile (IHO Decision at p. 24; see Parent Ex. MM). The IHO determined that given the size of the class and the number of teaching support staff and resulting ability to differentiate instruction, the grouping was appropriate (*id.* at pp. 24-25). The parents allege that their experts testified that the student would not be able to perform in the APIE classroom and that the discrepant profiles of the students would require so much differentiation of instruction that the benefit of the student-to-teacher ratio would be lost. The parents further assert that the IHO failed to engage with their experts' testimony.

Generally, the sufficiency of the program offered by the district must be determined on the basis of the IEP itself (R.E., 694 F.3d at 186-88). The Second Circuit has explained that "[s]peculation that the school district will not adequately adhere to the IEP is not an appropriate basis for unilateral placement" (R.E., 694 F.3d at 195; see *E.H. v. New York City Dep't of Educ.*, 611 Fed. App'x 728, 731 [2d Cir. May 8, 2015]; *R.B. v. New York City Dep't of Educ.*, 603 Fed. App'x 36, 40 [2d Cir. Mar. 19, 2015] ["declining to entertain the parents' speculation that the 'bricks-and-mortar' institution to which their son was assigned would have been unable to implement his IEP"], quoting *T.Y. v. New York City Dep't of Educ.*, 584 F.3d 412, 419 [2d Cir. 2009]; *R.B. v. New York City Dep't of Educ.*, 589 Fed. App'x 572, 576 [2d Cir. Oct. 29, 2014]). However, a district's assignment of a student to a particular public school site must be made in conformance with the CSE's educational placement recommendation, and the district is not permitted to deviate from the provisions set forth in the IEP (*M.O. v. New York City Dep't of Educ.*, 793 F.3d 236, 244 [2d Cir. 2015]; *R.E.*, 694 F.3d at 191-92; *T.Y.*, 584 F.3d at 419-20; see *C.F. v. New York City Dep't of Educ.*, 746 F.3d 68, 79 [2d Cir. 2014] [holding that while parents are entitled to participate in the decision-making process with regard to the type of educational placement their child will attend, the IDEA does not confer rights on parents with regard to the selection of a school site]). The Second Circuit has held that claims regarding an assigned school's ability to implement an IEP may not be speculative when they consist of "prospective challenges to [the assigned school's] capacity to provide the services mandated by the IEP" (*M.O.*, 793 F.3d at 245; see *Y.F. v. New York City Dep't of Educ.*, 659 Fed. App'x 3, 6 [2d Cir. Aug. 24, 2016]; *J.C. v. New York City Dep't of Educ.*, 643 Fed. App'x 31, 33 [2d Cir. 2016]; *B.P. v. New York City Dep't of Educ.*, 634 Fed. App'x 845, 847-49 [2d Cir. 2015]). Such challenges must be "tethered" to actual mandates in the student's IEP (see *Y.F.*, 659 Fed. App'x at 5). Additionally, the Second Circuit indicated that such challenges are only appropriate, if they are evaluated prospectively (as of the time the parent made the placement decision) and if they were based on more than "mere speculation" that the school would not adequately adhere to the IEP despite its ability to do so (*M.O.*, 793 F.3d at 244). In order for such challenges to be based on more than speculation, a parent must allege that the school is "factually incapable" of implementing the IEP (see *Z.C. v. New York City Dep't of Educ.*, 2016 WL 7410783, at *9 [S.D.N.Y. Nov. 28, 2016]; *L.B. v. New York City Dep't. of Educ.*, 2016 WL 5404654, at *25 [S.D.N.Y. Sept. 27, 2016]; *G.S. v. New York City Dep't of Educ.*, 2016 WL 5107039, at *15 [S.D.N.Y. Sept. 19, 2016]; *M.T. v. New York City Dep't of Educ.*, 2016 WL 1267794, at *14 [S.D.N.Y. Mar. 29, 2016]). Such

challenges must be based on something more than the parent's speculative "personal belief" that the assigned public school site was not appropriate (K.F., 2016 WL 3981370, at *13; Q.W.H. v. New York City Dep't of Educ., 2016 WL 916422, at *9 [S.D.N.Y. Mar. 7, 2016]; N.K. v. New York City Dep't of Educ., 2016 WL 590234, at *7 [S.D.N.Y. Feb. 11, 2016]).

The hearing record supports the IHO's determination. Neither the IDEA nor federal regulations require students who attend a special class setting to be grouped in any particular manner. The United States Department of Education has opined that a student must be assigned to a class based upon his or her "educational needs as described in his or her IEP" and not on "a categorical placement," such as one based on the student's disability category (Letter to Fascell, 18 IDELR 218 [OSEP 1991]). While unaddressed by federal law and regulations, State regulations set forth some requirements that school districts must follow for grouping students with disabilities. In particular, State regulations provide that in many instances the age range of students in a special education class in a public school who are less than 16 years old shall not exceed 36 months (8 NYCRR 200.6[h][5]). State regulations also require that in special classes, students must be suitably grouped for instructional purposes with other students having similar individual needs (8 NYCRR 200.1[ww][3][ii]; 200.6[a][3], [h][3]; see Walczak, 142 F.3d at 133 [approving an IEP that placed a student in a classroom with students of different intellectual, social, and behavioral needs, where sufficient similarities existed]).¹⁷ State regulations further provide that determinations regarding the size and composition of a special class shall be based on the similarity of the individual needs of the students according to levels of academic or educational achievement and learning characteristics, levels of social development, levels of physical development, and the management needs of the students in the classroom (see 8 NYCRR 200.6[h][2]; see also 8 NYCRR 200.1[ww][3][i][a]-[d]). SROs have often referred to grouping in the areas of academic or educational achievement, social development, physical development, and management needs collectively as "functional grouping" to distinguish that set of requirements from grouping in accordance with age ranges (see, e.g., Application of a Student with a Disability, Appeal No. 17-026).

While the district must implement a student's IEP consistent with the grouping requirements of State regulation, the Second Circuit has held that the IDEA does "not expressly require school districts to provide parents with class profiles" (Cerra, 427 F.3d at 194; see N.K., 961 F. Supp. 2d at 590 [noting that a district is not required to provide parents with "details about the specific group of children with which their child will be placed"]; E.A.M. v New York City Dep't of Educ., 2012 WL 4571794, at *11 [S.D.N.Y. Sept. 29, 2012]). Here, concerns about the likelihood that the student would be appropriately grouped with other students are speculative given that the student never attended the assigned public school site (M.C. v. New York City Dep't of Educ., 2015 WL 4464102, at *7 [S.D.N.Y. July 15, 2015]; R.B. v. New York City Dep't of Educ., 15 F. Supp. 3d 421, 436 [S.D.N.Y. 2014], aff'd, 603 Fed. App'x 36 [2d Cir. Mar. 19, 2015]; B.K. v. New York City Dep't of Educ., 12 F. Supp. 3d 343, 371 [E.D.N.Y. 2014]; N.K., 961 F. Supp. 2d at 590; see J.L. v. City Sch. Dist. of New York, 2013 WL 625064, at *11 [S.D.N.Y. Feb. 20, 2013] [noting that the "IDEA affords the parents no right to participate in the selection of . . . their child's classmates"]). Indeed, claims regarding grouping are inherently speculative as the district cannot guarantee the composition of the class that the student would have attended (M.S.

¹⁷ To be clear, there is no requirement in the IDEA or State regulation requiring that grouping be conducted in accordance with a student's chronological grade.

v. New York City Dep't of Educ., 2 F. Supp. 3d 311, 332 n.10 [E.D.N.Y. 2013]; cf. R.E., 694 F.3d at 187, 192 [noting that at the time of the placement decision, a parent cannot have any guarantee that a specific teacher will be available to implement an IEP]).

With regard to the parents' allegation that the APIE program would not address the student's behavioral and executive functioning needs the hearing record shows that APIE would have been appropriate to meet the student's identified needs.

According to the APIE principal (principal), the APIE program was a departmentalized "autism specific program" that was developed for students whose cognitive, intellectual academic functioning are average to above average and who have the social challenges common to students on the autism spectrum (Tr. pp. 413-15). The program was developed to support those students whose home districts had difficulty programming for students who needed more support socially and for whom the "regular schools" were too big, too loud, and overwhelming (Tr. p. 415). The principal explained that the APIE elementary program for students in grades three through five began in 2019-20, with students who were "cognitively typical, their difficulties [were] social, possibly sensory" (Tr. pp. 425-26). The principal described the APIE elementary program as a 6:1+1 special class with embedded speech, OT and counseling groups as part of the weekly program; however, she noted that all mandated services were also available (Tr. pp. 415-16, 431, 467). She further explained that the OT, speech, and counseling groups provided support for social skills development by teaching the students: how to work together on a project, such as in the kitchen to cook a recipe; to use nonverbal communication; to join a group; vocabulary for social situations; how to talk about feelings; how to get along with and compliment others; or how not to be perceived in a negative fashion (Tr. pp. 476-77). Finally, the principal indicated that there were two BCBA's who were contracted to work part time in the building (Tr. p. 419).

The principal opined that the environment in the APIE classroom needed to be appropriate to students' sensory needs and described that the floors were carpeted in order to reduce sound, there was a little quiet area in every single space to reduce sound and visual stimulation and would allow students to take a break within the class (Tr. pp. 425-27). Further, the rooms had flexible seating and used visual schedules and visually presented materials (Tr. pp. 427-28). The principal explained that the elementary classes were in their own wing of the building so the students would not have to interact with other students and would not be mixing with the older students (Tr. p. 432).

With regard to the class profile, the principal explained that the students in the APIE elementary program would have an average to above average IQ and were able to do "average student work in terms of their academics" (Tr. p. 436). She further explained that a student who was highly aggressive, dysregulated or exhibited unsafe behavior would not be a good candidate for the APIE elementary program (Tr. p. 436). The principal described that the students who attended APIE were "a lot like [the student]" in that they were bright students who may have some deficits, may have difficulty attending and focusing, might need redirection to stay on task, and need support to develop social skills (Tr. pp. 436-37). She opined that the student would have "fit right in" to the program noting that he was bright and had some good academic skills; however, he also had difficulties in attending, and needed redirection, help with "persevering with tasks", support with executive functioning deficits, and support with social skills, which were "very, very typical characteristics of students that come to our APIE" program (Tr. pp. 437-38). She further explained that the APIE program would address executive functioning deficits through the small

class ratio along with additional supports such as visuals and redirection (Tr. p. 464). Finally, the principal testified that the APIE program followed the grade level New York State standards (Tr. p. 438).

The district's director of special education testified that the APIE program was a smaller class setting that "fell in line with the recommendations that were made in the IEEs" (Tr. pp. 694-95). She explained that counselors were available on an as needed basis, and there were part-time BCBA's assigned to the site who were available to consult with the teachers and staff, including taking data for the FBA and BIP (Tr. p. 696). The director of special education opined that the program was appropriate for the student because it was a 6:1+1 ratio that allowed for more individualized instruction as well as integrated related services within the program and full-time 1:1 aide services (see Tr. pp. 694-96).

The supervisor testified that during the August 13, 2019 CSE meeting, information shared about the APIE program indicated that it was a small program that provided individualized multisensory instruction with a focus on social skills, understanding social skills, pragmatic language and that instruction in core academics was individualized to the student (Tr. pp. 117-19). She further explained that the APIE program followed the New York State curriculum and the "outcome" for students who attended the program was a Regents diploma (Tr. p. 119). The supervisor opined that the program was a good match for the student because it was a small learning environment, with instruction at his level, delivered by one team in a self-contained classroom, with a behavior consultant integrated into the program and it would provide the support he needed to address his executive functioning deficits and improve his social skills (Tr. pp. 119-21, 139).

The student's fourth grade special education teacher (2018-19 school year) testified that based on the information she was given, the APIE program would have been "academically and cognitively challenging for [the student] which sounded very appropriate, but also supportive of his management needs" (Tr. pp. 317, 382-83). The district school psychologist testified that the APIE program was a "program that allows children that exhibit autistic tendencies or have a diagnosis of autism to be in a setting that supports them educationally, social-emotional supports and prepares them to obtain a [R]egents diploma" (Tr. pp. 561-62). She explained that she felt that for the 2019-20 school year the student needed "to be in a more supportive but rigorous program" that provided PT, OT, social/emotional support, and an opportunity to receive a Regents diploma and opined that APIE would have been appropriate (Tr. pp. 563-64, 609). She further clarified that the APIE program offered social/emotional, academic, OT, speech-language, and PT supports as well as occupational therapists who could provide any sensory needs recommendations (Tr. pp. 607-08). The school psychologist explained that the APIE program offered a "smaller supportive setting with continued academic rigor, addressing the social-emotional and physical needs he presents with" noting that the program was different than what he had attended in the past, and worked with students identified on the autism spectrum (Tr. pp. 610-13).

One of the psychologists who evaluated the student for the independent neuropsychological evaluation (parents' psychologist) testified that one of the students shown in the 2019-20 APIE class profile had an IQ that was "at least three standard deviations" below the student's IQ and another student's IQ was approximately "two and a half standard deviations below" the student's IQ (Tr. pp. 943-44; see Parent Ex. MM; Dist. Ex. 36 at pp. 1, 30). According to the parents' psychologist, the differences in IQ was problematic because the "level of differentiation of

instruction that would have to take place would be so incredible, it would most certainly serve as a distraction to [the student]" (Tr. pp. 944-45). The parents' psychologist further testified that she could "not understand from a neuropsychological perspective how students with such vastly discrepant profiles could be working toward similar goals" (Tr. p. 945). The BCBA who completed the independent FBA/BIP (parents' BCBA), testified similarly to the parents' psychologist regarding the need for differentiation in instruction of students with disparate IQs (Tr. pp. 1277-1279; Dist. Ex. 39). The parents' BCBA opined that the student would only receive half the amount of instruction of a regular school day because the teacher would spend half her time with the low functioning students in the classroom (Tr. pp. 1278-79).

Here, the testimony of the parents' independent evaluators regarding the students included on the May 20, 2019 APIE class profile (Parent Ex. MM) does not overcome the speculative nature of grouping claims when a student never attended the assigned public school site (M.C. v. New York City Dep't of Educ., 2015 WL 4464102, at *7 [S.D.N.Y. July 15, 2015]; R.B. v. New York City Dep't of Educ., 15 F. Supp. 3d 421, 436 [S.D.N.Y. 2014], aff'd, 603 Fed. App'x 36 [2d Cir. Mar. 19, 2015]; B.K., 12 F. Supp. 3d at 371; N.K. v. New York City Dep't of Educ., 961 F. Supp. 2d 577, 590 [S.D.N.Y. 2013]; see J.L. v. City Sch. Dist. of New York, 2013 WL 625064, at *11 [S.D.N.Y. Feb. 20, 2013] [noting that the "IDEA affords the parents no right to participate in the selection of . . . their child's classmates"]). Even assuming that the parents' independent evaluators' assumptions were accurate, there is no basis in the hearing record to find that the range of skills among the students included in the May 20, 2019 class profile violated State regulations, which require students to be grouped by similarity of needs, or that such a violation would impede the student's ability to receive a FAPE (8 NYCRR 200.6[a][3][h][2]). Furthermore, even if the students would not have been appropriately grouped in the specific 6:1+1 classroom as of the date of the class profile, no evidence was presented that the students shown on the May 20, 2019 class profile would have been the students with whom the student would have been placed had he attended the assigned school on September 4, 2019 and, in any event, any claim based on this class profile would necessarily be speculative in that classroom groupings may change over time (see, e.g., M.S., 2 F. Supp. 3d at 332 n.10).

Accordingly, as the IEP was appropriate to meet the student's needs for the reasons set forth above, any conclusion regarding the functional grouping of the proposed classroom would necessarily be based on impermissible speculation, and the district was not obligated to present retrospective evidence at the impartial hearing regarding the implementation of the student's program at the assigned public school site or to refute the parents' claims related thereto (M.O., 793 Fed. App'x at 245; R.B., 589 Fed. App'x at 576; R.E., 694 F.3d at 187 & n.3).

D. Relief

Regarding the IHO's determinations related to the 2019-20 school year, the parents assert that the IHO erred by finding that the parents' unilateral placement was not appropriate and further argue that the IHO failed to make a finding as to whether or not equitable considerations barred a partial award of tuition reimbursement. Because the IHO correctly determined that the district offered the student a FAPE for the 2019-20 school year, it was not necessary for him to consider the remaining two prongs of a Burlington/Carter analysis. Notwithstanding, the hearing record supports the IHO's determinations, and I decline to revisit whether or not equitable considerations bar a partial award of tuition reimbursement for the 2019-20 school year.

Turning to the parents' requested relief for the denial of a FAPE during a portion of the 2017-18 school year and for the entirety of the 2018-19 school year, the parents seek prospective payment of the cost of the student's attendance at Pinnacle for "an additional year" (Req. for Rev. at p. 10).

The parents' requested relief is unwarranted for several reasons. An award of prospective placement or services for a student, under certain circumstances, has the effect of circumventing the statutory process, pursuant to which the CSE is tasked with reviewing information about the student's progress under current educational programming and periodically assessing the student's needs (see Adams v. Dist. of Columbia, 285 F. Supp. 3d 381, 393, 396-97 [D.D.C. 2018] [noting with approval the hearing officer's finding "that the directives of IDEA would be best effectuated by ordering an IEP review and revision, rather than prospective placement in a private school"]; see also Student X v. New York City Dep't of Educ., 2008 WL 4890440, at *16 [E.D.N.Y. Oct. 30, 2008] [noting that "services found to be appropriate for a student during one school year are not necessarily appropriate for the student during a subsequent school year"]).¹⁸

At this point, the school years at issue—2017-18 and 2018-19—are over and, in accordance with its obligation to review a student's IEP at least annually, the CSE should have already convened to produce IEPs for the 2020-21 and 2021-22 school years (see also Eley v. Dist. of Columbia, 2012 WL 3656471, at *11 [D.D.C. Aug. 24, 2012] [noting that prospective placement is not an appropriate remedy until the IEP for the current school year has been completed and the parent challenges the IEP for the current year]). As such, the more appropriate course is to limit review in this matter to remediation of past harms that have been explored through the development of the underlying hearing record.

In their appeal, the parents have not requested any compensatory educational services, which is understandable given that the hearing record does not lend itself to a quantitative or qualitative measure of determining an award. Specifically, this is because the hearing record demonstrated that the student's lack of progress was never due to any academic needs or cognitive delays and solely the result of interfering behaviors that prevented him from task and work completion from which to measure his achievement toward mastering IEP annual goals. The district did not offer any evidence of what the student's program should have been during the time period in which the student was denied a FAPE. Equally problematic is the parents' requested relief itself, which is so speculative that they have failed to even specify the school year for which they seek prospective payment. This matter involves the 2017-18, 2018-19 and 2019-20 school years. The impartial hearing was held during the 2019-20 and 2020-21 school years and this decision will be rendered during the 2021-22 school year.

Lastly, even if I were to find that the parents' request for prospective payment was appropriate, the parents' conduct would preclude an award under equitable considerations when considering the particular time period in which there was a denial of a FAPE. The chronology of

¹⁸ For a detailed discussion of relief in the form of future placement in a nonapproved nonpublic school, including the varying characterizations of the relief as either as prospective placement, tuition reimbursement or funding, or compensatory education, see Application of a Student with a Disability, Appeal No. 19-018 (also discussing at length the potential pitfalls that may arise as a result of an award of prospective placement). Here, were I to view the parents' request for future funding of the student's attendance at a nonapproved nonpublic school as compensatory education as it is framed in the request for review, the outcome would not differ.

the parents' refusal to consent to district evaluations, assessments and changes to the student's ICT program was documented above. The parents withholding of consent thwarted the CSE's attempts to find the student an appropriate placement for the end of the 2017-18 school year which is not cooperative, and contributed to the student remaining in an inappropriate setting for the entirety of the 2018-19 school year to his detriment. The IHO incorrectly relied on the parents' conduct in finding that the district offered the student a FAPE for a portion of the 2017-18 school year and for the 2018-19 school year. The parents' conduct was not relevant when considering the district's obligation to offer a FAPE, and the IHO erred by doing so. However, the parents' conduct is relevant when fashioning relief. Based on all of the foregoing, there is no reason to grant the parents' request for prospective funding at Pinnacle.

VII. Conclusion

In summary, the evidence in the hearing record demonstrates that the IHO incorrectly determined that the student was offered a FAPE for a portion of the 2017-18 school year and for the 2018-19 school year. The IHO correctly determined that the student was offered a FAPE for the 2019-20 school year.

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

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision dated July 5, 2021, is modified by reversing those portions which found the district offered the student a FAPE for a portion of the 2017-18 school year and for the 2018-19 school year.

**Dated: Albany, New York
September 17, 2021**

**JUSTYN P. BATES
STATE REVIEW OFFICER**