



The University of the State of New York

The State Education Department

State Review Officer

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No. 21-214

Application of the BOARD OF EDUCATION OF THE PLEASANTVILLE UNION FREE SCHOOL DISTRICT for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:

Shaw, Perelson, May & Lambert, LLP, attorneys for petitioner, by Garrett L. Silveira, Esq.

Littman Krooks LLP, attorneys for respondents, by Marion M. Walsh, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from the decision of an impartial hearing officer (IHO) following remand, which found that it failed to offer a free appropriate public education (FAPE) to respondents' (the parents') daughter and ordered it to reimburse the parents for their daughter's tuition costs at the Riverview School (Riverview) for the 2016-17 and 2017-18 school years. The parents cross-appeal from the IHO's decision not to address certain claims in finding a denial of FAPE. The appeal must be sustained. The cross-appeal must be dismissed.

II. Overview—Administrative Procedures

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

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

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

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

III. Facts and Procedural History

This appeal arises from an IHO's decision issued after remand by the United States District Court for the Southern District of New York (see G.S. and D.S. v. Pleasantville Union Free Sch. Dist., 2020 WL4586895 at *1 [S.D.N.Y. Aug. 10, 2020]). Additionally, the student has been the subject of a prior State-level administrative appeal (see Application of the Bd. of Educ., Appeal No. 19-007).

Due to developmental delays, the student received services through the Early Intervention Program and the Committee on Preschool Special Education (CPSE) (Parent Ex. A at pp. 2-3). At five and a half years old, she transitioned to the CSE where she was found eligible for special education as a student with an other health impairment (OHI) (id. at p. 3). The student attended a district elementary school for kindergarten; however, she "struggled to remain on task during independent work and demonstrated highly variable inattention" (id.). She was provided with the support of an aide to assist with attending (id.). In first grade the student began receiving daily resource room instruction; in second and third grades she received group counseling sessions and "[i]ntegrated [r]ecess" to support the development of social skills (id.). In addition to the support of a 1:1 aide, resource room services, counseling, and integrated recess, the student received speech-language, occupational, and physical therapies throughout elementary school (id.). For both middle school and high school the student received support through the district's individual support program (ISP) (id.). In tenth grade (2015-16 school year), the parent reported that the student was "back sliding," seemed lost in class, and demonstrated significant struggles with adaptive living skills, completing homework, and inattention (Dist. Ex. 9 at p. 3).

On January 29, 2016, the student's mother completed a residential profile form and wrote a parent statement that was submitted to Riverview (Parent Ex. Y at pp. 1-4). By letter dated April 21, 2016, the student's mother was notified of the student's acceptance at Riverview for summer 2016 and for the 2016-17 academic school year (Parent Ex. Z at pp. 1-2). Around this same time, the parents sought and obtained a private psychoeducational evaluation for the purpose of "gaug[ing] [the student's] current level of intellectual, academic, and emotional functioning for diagnostic impressions, personality dynamics, and educational recommendations" (Parent Ex. I at p. 3).¹ In a report dated May 7, 2016, the parents' private psychologist opined that the student required a residential placement to address her academic and organizational needs as well as foster her activities of daily living (ADL) skills and independence (Dist. Ex. 9 at pp. 18-20).

By letter dated May 9, 2016, the parents provided a copy of the private psychologist's May 7, 2016 evaluation to the district and requested that it reconsider the student's transition plan and services at her May 17, 2016 CSE meeting and "provide a completely different focus and level of intensity" (Parent Ex. I at p. 1). According to the letter, the parents believed that the CSE needed to "conduct a search for an appropriate residential program for [the student] with 24/7 conditioning that c[ould] help her make up transition/adaptive living skills and acquire some independence" (id.). The parents cited the recommendations in the private psychologist's evaluation as justification for a residential placement for the student (id.). In closing, the parents reserved their right to unilaterally place the student and seek reimbursement and compensatory services if the district did not recommend an appropriate residential program and services to address the student's "significant needs" (id. at p. 2).

A CSE convened on May 17, 2016 to conduct a program review and the student's annual review (Dist. Ex. 5 at p. 1). For the 2016-17 school year, the May 2016 CSE recommended that the student continue in the ISP, which, for the 2016-17 school year, consisted of a 15:1 special class for English (modified English) one time daily for 40 minutes; a 15:1 special class for social

¹ Parent exhibit I includes a cover letter along with the May 7, 2016 evaluation report of the parents' private psychologist. The May 7, 2016 private psychologist's evaluation report, without the parents' cover letter, was admitted as a separate district exhibit and is referenced in this decision (see Dist. Ex. 9).

studies (modified social studies) one time daily for 40 minutes; a 12:1+(3:1) special class for study skills one time daily for 40 minutes; a 12:1+(3:1) special class for study skills one time daily on alternate days for 40 minutes; consultant teacher services (direct) for math one time daily for 40 minutes; consultant teacher services (direct and indirect) in science class one time daily for 40 minutes; consultant teacher services (direct and indirect) for vocational skills two times daily for 40 minutes; and consultant teacher services (direct and indirect) for physical education one time on alternate days for 40 minutes (id. at p. 10). The CSE also recommended the following related services: one 30-minute session per week of small group speech-language therapy, one 30-minute session per week of small group social skills training, and one 60-minute session per week of individual family training in home and/or school (id. at pp. 10-11). The CSE recommended that the student receive a 12-month program; specifically, that during July/August she attend a 12:1+1 special class for six hours daily (id. at p. 12). The May 2016 CSE also recommended that the student receive modifications, accommodations, supports for school personnel, a shared (3:1) teaching assistant, a shared (3:1) aide, access to assistive technology devices, and a coordinated set of transition activities (id. at pp. 11-14).

On June 1, 2016, the parents executed a reservation and enrollment agreement with Riverview and paid a non-refundable deposit (Parent Ex. AA at pp. 1-6). By letter dated August 18, 2016, the parents provided notice advising the district that they were rejecting the IEP and placement recommended by the May 17, 2016 CSE on the grounds that it was not appropriate to meet the student's needs (Parent Ex. N at p. 1). The parents stated that they did not believe that the IEP offered the student sufficient and appropriate support and did not offer an accurate depiction of the student's present levels of performance or appropriate goals (id.). The parents opined that the student's "self-confidence across academic and social domains ha[d] plummeted" (id.). In addition, the parents asserted that the academic and social supports in the district's ISP "could not compensate for the discouraging fact that the academic demands of a Regents-based curriculum [we]re beyond [the student's] abilities as demonstrated by her very low Regents scores . . ." (id.). Among several reasons, the parents stated that "[t]he ISP program, by its very nature as a school day program, cannot address [the student's] needs" related to ADLs nor could it meet the student's socialization needs due to the lack of students with similar profiles (id. at p. 2). The parents asserted that due to her significant demonstrated difficulties the student required a residential placement to address her ADL deficits and prepare her for transition to adulthood and adult services (id.). The parents then advised the district that they had enrolled the student in Riverview for the 2016-17 school year and anticipated that they would be seeking tuition reimbursement from the district due to its failure to offer the student a FAPE (id.).

In response to the parents' August 18, 2016 letter, the CSE reconvened on August 31, 2016 to address the concerns raised by the parents by reviewing their letter and the proposed IEP "point-by-point" (Dist. Ex. 4 at p. 1). Based on the CSE's discussion, the committee agreed to add goals addressing functional math, self-advocacy in the community, self-regulation, and flexibility with regard to changes in routines, and a conversational goal in speech (id. at p. 2).

On March 10, 2017, the student's mother completed a reservation and enrollment agreement for Riverview for the 2017-18 school year (Parent Ex. CC at pp. 1-4). A CSE convened on May 31, 2017 for a reevaluation and the student's annual review (Dist. Ex. 6 at p. 1). For the 2017-18 school year, the May 2017 CSE recommended that the student continue in the ISP, which, for the 2017-18 school year consisted of consultant teacher services (direct and indirect) English

language arts (ELA) one time daily for 40 minutes; consultant teacher services (direct and indirect) for social studies one time daily for 40 minutes; a 12:1+(3:1) special class for study skills one time on alternate days for 40 minutes; a 12:1+(3:1) special class for math one time daily for 40 minutes; consultant teacher services (direct and indirect) in science class one time daily for 40 minutes; a 12:1+(3:1) special class for vocational skills two times daily for 40 minutes; consultant teacher services (direct and indirect) for physical education one time on alternate days for 40 minutes (direct and indirect); and 5:1 resource room services one time daily for 40 minutes (id. at p. 18). The CSE also recommended the following related services: one 30-minute session per week of small group speech-language therapy, one 30-minute session per week of small group counseling, one 30-minute session per week of individual counseling, and one 60-minute session per week of individual family training in home and/or school (id.). The CSE recommended that the student receive a 12-month program; specifically, that during July/August she attend a 12:1+2 special class for six hours daily (id. at pp. 1, 20).² The May 2017 CSE also recommended that the student receive modifications, accommodations, supports for school personnel, a shared (3:1) teaching assistant, a shared (3:1) aide, access to assistive technology devices, and a coordinated set of transition activities (id. at pp. 18-22).

On June 8, 2017, the reservation and enrollment agreement was accepted and countersigned by Riverview (Parent Ex. CC at p. 4). By letter dated August 9, 2017, the student's mother advised the district that the parents were rejecting the recommended program for the 2017-18 school year and unilaterally enrolling the student at Riverview and seeking tuition reimbursement (Parent Ex. V at pp. 1-2).

On August 29, 2017, the CSE reconvened to review the student's May 2017 IEP; the district's director of educational services "explained that the intention of the meeting was to address the concerns that the parent outlined in her letter dated August 9, 2017 rejecting the IEP" (Dist. Ex. 7 at p. 1). According to the meeting information summary, the parent stated that she rejected the IEP because the district "could not provide her with 24-hour support for the student in the home to address functional and social/emotional needs" (id.). Further, the parent discussed the social benefits of Riverview and stated that the district's high school special education program was not meeting those social needs based on her perception of the ISP student profiles from previous years (id. at pp. 1-2). The district's director of educational services stated that the student had an appropriate program in her home district "with community internships and peers, building functional skills that the student will need for adulthood" and that the program continued to be "the least restrictive and most efficient for equipping the student to be a functional and effective adult in her home community" (id. at p. 2).

A. Due Process Complaint Notice

By due process complaint notice dated September 1, 2017, the parents alleged that the CSE for both the 2016-17 and 2017-18 school years deprived them of participation in the development of the student's IEPs by failing to consider whether the student required a residential placement (Dist. Ex. 1 at pp. 8-10, 11-12, 14, 15). The parents also contended that the CSE for the 2017-18 school year was required to include the participation of a representative from the county pursuant

² The "IEP Information" section indicates that extended school year services were declined (Dist. Ex. 6 at p. 1).

to State regulation, because the student had attended a residential placement for the 2016-17 school year and was "at risk" of requiring residential placement for the 2017-18 school year (*id.*). Substantively, the parents alleged that the 2016-17 IEP failed to provide direct counseling to address the student's significant social emotional needs; and that consultant teacher services recommended for the 2016-17 and 2017-18 school years were inappropriate and not supportive enough for the student because she could not function or absorb the material in the general education class (*id.* at pp. 14-15).³ Overall, the parents contended that the district failed to recommend an appropriately ambitious program that addressed the student's educational and transition needs (*id.* at p. 15).

The parents further argued that Riverview was an appropriate placement for the student (Dist. Ex. 1 at pp. 15-16). The parents described Riverview as a State-approved residential and day school for students ages 12 through 22, with complex language and learning challenges, and asserted that the school provided 24-hour support for the student, as well as a small, supportive educational environment (*id.*). According to the parents, at Riverview the student continued to make "significant progress in all areas with particular improvements . . . in her social pragmatics, independence, confidence and daily living skills" (*id.* at p. 16). The parents contended that the student was "socially engaged and integrated and had developed meaningful friendships" (*id.*). The parents further alleged that the student achieved excellent grades for the 2016-17 school year in academic classes tailored to her unique needs and targeted to her level (*id.*).

With regard to equitable considerations, the parents alleged that they have cooperated with the district for many years and have been supportive and engaged (Dist. Ex. 1 at pp. 15-16). They promptly returned all consents for evaluations and have cooperated with everything that the CSE requested (*id.*). Additionally, the parents argued that they have shared all information and private evaluative reports with the district promptly and consistently, and they authorized Riverview to share information with the district (*id.*). The parents further contended that they gave timely notice of their intention to unilaterally enroll the student at Riverview and seek tuition reimbursement (*id.*). The parents also argued that they attended and cooperated with both CSE program reviews, which were held in response to the parents' letters rejecting the 2016-17 and 2017-18 recommendations (*id.*).

As relief, the parents requested reimbursement for tuition and other expenses at Riverview, including ancillary services, a student activity fee, books, tuition insurance, finance charges, and travel costs for both the 2016-17 and 2017-18 school years (Dist. Ex. 1 at p. 18).

The district responded to the parents' due process complaint notice on September 11, 2017 (Dist. Ex. 2 at p. 1). The district asserted that any claims related to matters preceding September 1, 2015 were barred by the statute of limitations and further asserted that the programs developed by the CSEs for the 2015-16, 2016-17, and 2017-18 school years were appropriate (*id.* at pp. 2-4).

³ The parents also alleged that the district failed to provide appropriate parent counseling and training, however this claim appears in a section of the due process complaint notice describing the 2015-16 school year, which is outside the scope of the impartial hearing (Dist. Ex. 1 at p. 5). This claim is not included in the list of alleged legal violations related to the 2016-17 and 2017-18 school years (*id.* at pp. 14-15).

B. Impartial Hearing Officer and State Review Officer Decisions

A prehearing conference was held on an unspecified date (see Tr. p. 4).⁴ The impartial hearing convened on November 6, 2017, and concluded on June 1, 2018, after 12 hearing dates (Tr. pp. 1-2480). In a decision dated December 10, 2018, the IHO found that the CSEs committed a procedural violation by predetermining the student's recommended program for the 2016-17 and 2017-18 school years, which denied the parents the right to meaningfully participate in the development of the student's IEP and as a result the student was denied a FAPE (Dec. 10, 2018 IHO Decision at pp. 12-14).

Specifically, the IHO found that the recommended ISP was the only program considered during the May 2016 CSE meeting and that the parents' role in the CSE process was significantly impeded (Dec. 10, 2018 IHO Decision at p. 12). The IHO further found "that the context of the District position was not to intentionally preclude the Parents' participation"; however, the district staff's "pride" in the district's ISP caused "a failure to account for the Parents' position" (*id.* at pp. 12-13). The IHO also noted that "District personnel were simply very confident in their belief that the ISP placement was a very good program and that the Student was progressing in the Least Restrictive Environment" (*id.* at p. 13).

For the following school year, the IHO determined that "[t]his mindset of the District carried into the 2017/2018 school year as well" (Dec. 10, 2018 IHO Decision at p. 13). The IHO found that the May 2017 CSE was unpersuaded by reports of the student's substantial progress during the 2016-17 school year and that the "problem was more than a disagreement over the appropriate placement" (*id.*). The IHO further determined that "the parents were effectively 'minimized'" and their position was not recognized by the CSE (*id.*). Relying on the testimony of the private psychologist and the student's mother, the IHO found that the parent was dismissed by the CSE and the recommendations of the parents' private psychologist were treated as invalid (*id.*). Noting the parents' history of avid participation in the student's education, including attendance at CSE meetings as well as frequent communication with the district providers, the IHO nevertheless determined that the parents' role in the CSE had been "stifled and substantially impaired" (*id.* at pp. 13-14).

The IHO then moved on to the appropriateness of the parents' unilateral placement of the student at Riverview without addressing any of the parents' other claims regarding the appropriateness of the CSE recommended programs for the 2016-17 or 2017-18 school years (Dec. 10, 2018 IHO Decision at p. 14).

With regard to the parents' unilateral placement, the IHO found Riverview to be "a fit" for the student on several levels (Dec. 10, 2018 IHO Decision at p. 15). The IHO noted that while Riverview was located out-of-State, it was an approved nonpublic school (*id.*). The IHO found that the student had exhibited progress for two years, had achieved many academic goals, and received good grades (*id.*). Socially, the IHO found that the student had formed friendships and maintained contact with friends while at home (*id.* at pp. 15-16). The student also participated in clubs, sports, and a cooking class (*id.* at p. 16). The IHO also noted testimony by the student's

⁴ The hearing record does not include a transcript or written summary of the prehearing conference as required by State regulation (8 NYCRR 200.5 [j][3][xi]).

mother that the student had shown improvement in conversational skills (id.). The student's advisor and the parents' private psychologist also reported social/emotional progress as well as improvement in the student's daily living skills following her attendance at Riverview (id.). Based on those findings, the IHO then determined that the parents' unilateral placement at Riverview was appropriate (id.).

Lastly, the IHO found that the parents had cooperated with the district and that there was no equitable basis upon which to reduce or deny tuition reimbursement (Dec. 10, 2018 IHO Decision at p. 17). The IHO then determined that equitable considerations favored the parent (id.).

As relief, the IHO ordered the district to reimburse the parents for payments made to Riverview for the 2016-17 and 2017-18 school years upon proof of payment, and directly fund any unpaid tuition, including transportation and ancillary costs of the student's attendance (Dec. 10, 2018 IHO Decision at p. 17).

In a decision dated March 13, 2019, an SRO reversed the IHO's determination that the district had engaged in predetermination of the student's program and placement for the 2016-17 and 2017-18 school years (Application of the Bd. of Educ., Appeal No. 19-007). In addition, the SRO found that the parents did not cross-appeal from the IHO's failure to address issues raised in the parents' due process complaint notice related to the appropriateness of consultant teacher services for the 2016-17 and 2017-18 school years, the failure to provide direct counseling to address the student's significant social emotional needs during the 2016-17 school year, and the failure to include the participation of a county representative during the CSE meeting for the 2017-18 school year because the student had previously attended a residential placement (id.). The SRO determined that because the parents failed to cross-appeal, those claims were abandoned (id.). Having found that the district did not fail to offer a FAPE in the least restrictive environment (LRE) for the 2016-17 and 2017-18 school years, it was not necessary to determine whether Riverview was an appropriate unilateral placement or whether equitable considerations supported the parents' claim (id.).

The parents appealed the decision to the United States District Court for the Southern District of New York (see G.S. and D.S. v. Pleasantville Union Free Sch. Dist., 2020 WL4586895 at *1 [S.D.N.Y. Aug. 10, 2020]). The parents argued that (1) the SRO erred by finding that their substantive FAPE claims had been waived by failing to cross-appeal the IHO's decision which did not address them, (2) the SRO erred by finding that the district properly considered the continuum of services; (3-4) the SRO erred by finding that the district did not predetermine the student's placement for the 2016-17 and 2017-18 school years, and (5) the district failed to offer the student a substantive FAPE for the 2016-17 and 2017-18 school years (id. at *9). In dismissing the parents' second, third and fourth claims, the District Court found that the SRO correctly determined that the district did not predetermine the student's program and placement for the 2016-17 and 2017-18 school years (id. at *12-15). The District Court sustained the parents' first and fifth claims, finding that the SRO had erred by determining that the parents had waived their substantive FAPE

claims and remanded the matter to the IHO to determine whether the district offered the student a FAPE for the 2016-17 and 2017-18 school years in the first instance (*id.* at *17).⁵

C. Impartial Hearing Officer Decision After Remand

By decision dated September 13, 2021, the IHO found that the district failed to offer the student a FAPE for the 2016-17 and 2017-18 school years, that the parents' unilateral placement of the student at Riverview was appropriate, and that equitable considerations did not warrant a reduction in the amount of tuition reimbursement awarded (IHO Decision at pp. 2, 9, 11-22). The IHO indicated that no further evidence or exhibits were considered beyond the certified record received after remand (*id.* at p. 2 n.1). The IHO determined that the district's ISP was not appropriate for the student and "led to regression academically and social isolation with school avoidance" (*id.* at p. 9).

Specifically, the IHO found that the district's recommendations for the student were "too ambitious and unintentionally competitive," which caused the student to "suffer[] a regression academically and socially while enrolled in the [d]istrict placement" and to "fear school" as well as to increase "her anxiety, her emotional fragility and a lack of confidence" (IHO Decision at pp. 11, 16-17). The IHO found that the recommendations in "2016-17 IEP" were "quite ambitious" including annual goals to increase functional academics, increase independence with life skills and improved functional communication, individualized instruction to improve academics, and an increase in prerequisite skills for participating in internships related to post-secondary interests (*id.* at p. 12).⁶ The IHO further found that the ISP was unduly confusing and insufficiently supportive for the student and resulted in the student becoming very anxious about attending school (*id.* at p. 13).⁷ The IHO also noted that the district failed to provide direct counseling and failed to provide parent counseling and training which contributed to the district's denial of a FAPE to the student

⁵ In finding that the SRO in Application of the Bd. of Educ., Appeal No. 19-007 "failed to take into account the overwhelming authority in this Circuit that has found that a non-aggrieved party's failure to cross-appeal an unaddressed issue does not constitute a waiver" (*G.S.*, 2020 WL4586895 at *16), the District Court cited to cases which were all decided prior to the implementation of amendments to the State regulations governing practice before the Office of State Review. In particular, although it is not clear if it would have changed the Court's position, the Court did not address an amendment to the regulations that expressly provides that "any issue not identified in a party's request for review, answer, or answer with cross-appeal shall be deemed abandoned and will not be addressed by a State Review Officer" (8 NYCRR 279.8[c][2], [4]). At least one other district court has acknowledged that the amended regulations require a parent, who won tuition reimbursement at the impartial hearing level, to set forth in a cross-appeal any issues the parent wants to be addressed on appeal to a State review officer (*see M.C. v. Mamaroneck Union Free Sch. Dist.*, 2018 WL 4997516, at *23 [S.D.N.Y. Sept. 28, 2018] [upholding dismissal of allegations set forth in a cross-appeal to an SRO for "failure to identify the precise rulings presented for review and [failure] to cite to the pertinent portions of the record on appeal, as required in order to raise an issue" for review on appeal).

⁶ The CSE initially convened to develop an IEP for the 2016-17 school year on May 17, 2016 (Dist. Ex. 5). After receipt of the parents' August 18, 2016 letter, the CSE reconvened on August 31, 2016, wherein changes were made to the May 2016 IEP to address some of the parents' concerns (Parent Ex. N; Dist. Ex. 4 at pp. 1, 2, 14).

⁷ This finding of fact was adopted verbatim by the IHO from the opening statement of the parents' attorney (IHO Decision at p. 13 quoting Tr. p. 42).

(id. at p. 15, 17-18).⁸ Next, the IHO determined that the parents' unilateral placement of the student at Riverview for the 2016-17 and 2017-18 school years was appropriate (id. at pp. 18-20). Lastly, the IHO found that equitable considerations did not warrant a reduction in tuition reimbursement (id. at pp. 20-22).

IV. Appeal for State-Level Review

The district appeals and asserts that the IHO erred in finding that it failed to offer the student a FAPE for the 2016-17 and 2017-18 school years. The district argues that the IHO improperly relied on the parents' attorney's opening statement in making his findings of fact and failed to consider the evidence in the hearing record in determining that the student was denied a FAPE. The district further argues that the student was offered a program of special education classes specially designed for students with educational characteristics and needs that were similar to the student for the 2016-17 and 2017-18 school years. The district asserts that the IHO erred in finding that the recommended program was too ambitious for the student and ignored evidence that the program was specifically crafted to allow the student to work toward receiving a Regent's diploma. The district also contends that the IHO improperly relied on the parents' attorney's opening statement in determining that the student experienced academic and social regression and further alleges that such a finding is unsupported by the hearing record.

Next, the district asserts that the IHO inappropriately engaged in a comparison of the recommended program for the 2016-17 and 2017-18 school years with the student's actual performance at Riverview and again relied on the parents' attorney's opening statement as evidence. The district further argues that the IHO improperly relied on the flawed assessment of the parents' private psychologist and failed to consider that the private psychologist did not determine that the student had regressed socially or emotionally; he testified that the student could feel that way. The district also contends that the IHO erred in finding that the district failed to offer direct counseling, appropriate parent counseling and training, and that the student's anxiety and lack of confidence resulted in a fear of school. In making these determinations, the district alleges that the IHO failed to cite to any record evidence and relied on the student's performance at Riverview and the parents' attorney's opening statement.

The district also argues that Riverview was not an appropriate unilateral placement for the student and that equitable considerations did not favor the parents. As relief, the district requests that the IHO's decision be reversed in its entirety. In the alternative, the district requests a finding that the parents' unilateral placement was not appropriate, and that equitable considerations do not warrant an award of tuition reimbursement.

In an answer and cross-appeal the parents deny the district's allegations and argue that the IHO erred in failing to determine whether the district's recommendation of consultant teacher services was procedurally and substantively appropriate. The parents assert that consultant teacher services "were inappropriate under New York State Law" and the lack of support caused the

⁸ These findings of fact were adopted verbatim by the IHO from the opening statement of the parents' attorney (IHO Decision at p. 15 quoting Tr. p. 45).

student anxiety. The parents further assert that the 2016-17 and 2017-18 IEPs did not clarify the special education program or class size or services that the student would receive. The student was placed in a regular education classroom for core academics with consultant teacher services and "[t]here is no ratio listed on the IEPs for either year, for the general education classes" (Answer and Cross-appeal ¶31). The parents also contend that the district's ISP was not described on the IEPs as a service and the IEPs do not indicate that the regular education classroom teachers were dually certified. The parents argue that the "IEPs were inappropriate on their face" and that the IHO erred in "not barring the [d]istrict from using retrospective testimony to rehabilitate the inappropriate IEPs" (Answer and Cross-appeal ¶32). In all other respects, the parents request that the IHO's decision be affirmed.

In an answer to the parents' cross-appeal the district denies that the IHO permitted retrospective testimony to rehabilitate inappropriate IEPs. The district also asserts that the parents have improperly raised a new claim—that the consultant teacher services were inappropriate under New York law—for the first time in their cross-appeal. The district also alleges that the parents' answer and cross-appeal does not conform to the practice regulations in that there are no citations to the record on appeal or identification of the relevant page numbers. Specifically, the district argues that the parents have failed to identify where in the hearing transcript the IHO improperly permitted retrospective testimony to rehabilitate inappropriate IEPs. For these reasons, the district asserts that the parents' cross-appeal should be dismissed.

V. Applicable Standards

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

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

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

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

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (*see* 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (*see* 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (*see* 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).⁹

⁹ 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. Preliminary Matter

1. Scope of Impartial Hearing

On remand from the District Court, the IHO was directed to address the parents' substantive FAPE claims raised in their due process complaint notice. As noted in Application of the Bd. of Educ., Appeal No. 19-007, claims raised by the parents in their due process complaint notice, but not initially addressed by the IHO, included claims related to the substantive appropriateness of consultant teacher services for the 2016-17 and 2017-18 school years, the failure to provide direct counseling to address the student's significant social emotional needs during the 2016-17 school year, and the failure to include the participation of a county representative during the CSE meeting for the 2017-18 school year because the student had previously attended a residential placement.¹⁰ Overall, the parents contended that the district failed to recommend an appropriately ambitious program that addressed the student's educational and transition needs.

The district asserts, in its answer to the cross-appeal, that the parents have alleged for the first time in their answer and cross-appeal that the recommended consultant teacher services were inappropriate under New York law. The district further argues that this issue was not raised in the

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

¹⁰ To the extent that the parents asserted that the CSE meeting for the 2017-18 school year did not include a county representative, the May 2017 CSE included the participation of a "SPOA coordinator" and a mental health representative (Dist. Ex. 7 at p. 1). According to the meeting minutes, "[t]he county representative asked about a middle ground between the [district high school] and the student's boarding school" (id. at p. 2). Based on the above, no further analysis of the parents' allegation is necessary.

parents' due process complaint notice and the district did not agree to expand the scope of the impartial hearing.

Generally, the party requesting an impartial hearing has the first opportunity to identify the range of issues to be addressed at the hearing (Application of a Student with a Disability, Appeal No. 09-141; Application of the Dep't of Educ., Appeal No. 08-056). Under the IDEA and its implementing regulations, a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.507[d][3][i], 300.511[d]; 8 NYCRR 200.5[j][1][ii]), or the original due process complaint notice is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.507[d][3][ii]; 8 NYCRR 200.5[i][7][b]). Indeed, "[t]he parent must state all of the alleged deficiencies in the IEP in their initial due process complaint in order for the resolution period to function. To permit [the parents] to add a new claim after the resolution period has expired would allow them to sandbag the school district" (R.E., 694 F.3d 167 at 187-88 n.4; see also B.M. v. New York City Dep't of Educ., 569 Fed. App'x 57, 58-59 [2d Cir. June 18, 2014]).

Here, a careful review of the due process complaint notice shows that the parents alleged that the consultant teacher services recommended for the 2016-17 and 2017-18 school years "were inappropriate and not supportive" for the student "as she could not function or absorb the material in the general education class" (Dist. Ex. 1 at p. 15). The parents also asserted that the district's ISP was unduly confusing and insufficiently supportive for the student (id. at p. 5).

In their cross-appeal, the parents specifically argue that the district's consultant teacher services were procedurally and substantively inappropriate, alleging that the IEPs did not clarify the special education program or class size or services that the student would receive and that there was no class-size ratio listed on the IEPs (Answer and Cross-appeal ¶31). The specific procedural claims regarding how consultant teacher services were identified on the student's IEPs, as included in the cross-appeal, cannot be found within the due process complaint notice.

The next inquiry focuses on whether the district through the questioning of its witnesses "open[ed] the door" under the holding of M.H. v. New York City Department of Education (685 F.3d at 250-51; see also B.M. v. New York City Dep't of Educ., 569 Fed. App'x 57, 59 [2d Cir. June 18, 2014]; D.B. v. New York City Dep't of Educ., 966 F. Supp. 2d 315, 327-28 [S.D.N.Y. 2013]; N.K. v. New York City Dep't of Educ., 961 F. Supp. 2d 577, 584-86 [S.D.N.Y. 2013]; A.M. v. New York City Dep't of Educ., 964 F. Supp. 2d 270, 282-84 [S.D.N.Y. 2013]; J.C.S. v. Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, *9 [S.D.N.Y. Aug. 5, 2013]).

During the impartial hearing, the parents' attorney reiterated in her opening statement that the consultant teacher services listed in the IEPs were inappropriate and not supportive for the student "as she could not function or absorb material in her class and the lack of support caused her great anxiety" (Tr. p. 45). The district witnesses spoke generally about the ISP staffing ratio in response to questions asking for descriptions of the student's recommended programming (Tr. pp. 1027, 1046, 1412, 1428). The only mention of class sizes and the lack of specific class ratios being listed on the student's IEPs occurred when the parents' attorney cross-examined the district's witnesses, the specifics as detailed by the parents in their cross-appeal were not discussed (Tr. pp.

501, 502, 513, 1498, 1513, 1903). As the district did not open the door to the procedural issues regarding how consultant teacher services were identified on the student's IEPs, these issues were outside the scope of the impartial hearing and are outside the scope of review in this appeal (see A.M., 964 F. Supp. 2d at 282-84; J.C.S., 2013 WL 3975942, at *9). In addition, the parents' attorney's inquiries appeared to be related to the issue of whether the CSE considered a more restrictive recommendation in accordance with the parents' request, an issue that was upheld by the District Court and is therefore outside the scope of remand. Nevertheless, a substantive review of whether the programs recommended for the student for the 2016-17 and 2017-18 school years were appropriate to address the student's special education needs has been conducted and is set forth below.

Next, the district appeals from the IHO's determination that the district failed to provide appropriate parent counseling and training for the 2016-17 and 2017-18 school years. The district also appeals from the IHO's findings of fact which were adopted from the parents' attorney's opening statement as improper and in contravention of the evidence in the hearing record. As noted above, the parents' claim of inadequate parent counseling and training, as included in the due process complaint notice, was related to the 2015-16 school year and, accordingly, application of that claim to a different school year is outside the scope of the impartial hearing. In addition, the district correctly notes that the IHO adopted some of his findings verbatim from the parents' attorney's opening statement (compare Tr. p. 45, with IHO Decision at p. 15).

It was incumbent upon the IHO to disclose his intention to reach an issue which the parties have not raised as a matter of basic fairness and due process of law (Application of a Child with a Handicapping Condition, Appeal No. 91-40; see John M. v. Bd. of Educ. of Evanston Tp. High Sch. Dist. 202, 502 F.3d 708, 713 [7th Cir. 2007]). Although an IHO has the authority to ask questions of counsel or witnesses for the purposes of clarification or completeness of the hearing record (8 NYCRR 200.5[j][3][vii]), or even inquire as to whether the parties agree that an issue should be addressed, it is impermissible for the IHO to simply expand the scope of the issues raised without the express consent of the parties and then base his or her determination on new issues raised sua sponte (see Dep't of Educ., Hawai'i v. C.B., 2012 WL 220517, at *7-*8 [D. Haw., Jan. 24, 2012] [finding that the administrative hearing officer improperly considered an issue beyond the scope of the parents' due process complaint notice]).

The hearing record reflects that the parties agreed and the IHO allowed that any testimony related to a school year other than 2016-17 and 2017-18 was being admitted for the purpose of background (Tr. pp. 11-12, 15, 30-31, 241-42, 417-18, 667-70, 906-08, 1026, 1142-43, 1473-75, 1973-74, 1980-82, 2283-84). The district's attorney objected to the parents' attorney's questioning of the assistant superintendent on the issue of parent counseling and training because it was related to the 2015-16 school year (Tr. p. 667-73). It cannot be said that the district elicited testimony to refute a claim of inappropriate parent counseling and training beyond offering evidence of the family training recommended in the student's IEPs; therefore, the district did not open the door to this issue (see A.M., 964 F. Supp. 2d at 282-84; J.C.S., 2013 WL 3975942, at *9). Accordingly, the allegation that the district failed to recommend appropriate parent counseling and training was an issue that was raised for the first time by the IHO in his decision and was outside the scope of the impartial hearing (see B.P. v. New York City Dep't of Educ., 841 F. Supp. 2d 605, 611 [E.D.N.Y. 2012] [explaining that "[t]he scope of the inquiry of the IHO, and therefore the SRO

. . . , is limited to matters either raised in the . . . impartial hearing request or agreed to by [the opposing party]]").

Thus, based on the due process complaint notice in this matter, the IHO improperly determined that the district denied the student a FAPE by failing to recommend appropriate parent counseling and training; moreover, upon review of the hearing record, there is no indication that the district subsequently agreed to add issues related to parent counseling and training and the parent did not attempt to amend the due process complaint notice to include such issues.

B. FAPE

The district alleges that the IHO erred by finding that it failed to offer the student a FAPE for the 2016-17 and 2017-18 school years. The district argues that the IHO improperly relied on the parents' attorney's opening statement as evidence and failed to consider the actual evidence in the hearing record in determining that the student was denied a FAPE. The district further asserts that the student was offered a program of special education classes specially designed for students with educational characteristics and needs similar to the student for the 2016-17 and 2017-18 school years. According to the district, the IHO erred in finding that the recommended program was too ambitious for the student and the IHO ignored evidence that the program was specifically crafted to allow the student to pursue a Regent's diploma through the framework provided for in State regulations. The district also argues that the IHO inappropriately engaged in a comparison of the recommended program for the 2016-17 and 2017-18 school years with the student's actual performance at Riverview. The district further argues that the IHO improperly relied on the flawed assessment of the parents' private psychologist and failed to consider that the private psychologist did not determine that the student had regressed socially or emotionally but instead testified that the student felt as though she had regressed. The district also contends that the IHO erred in finding that the district failed to offer direct counseling, and that the student's anxiety and lack of confidence resulted in a fear of school. In making these determinations, the district alleges that the IHO failed to cite to any record evidence and relied on the student's performance at Riverview and the parents' attorney's opening statement.

In their cross-appeal, the parents assert that the IHO permitted retrospective testimony by the district to improperly rehabilitate the IEPs for the 2016-17 and 2017-18 school years.

At the outset, I will address the district's allegations that the IHO improperly relied on the parents' attorney's opening statement as evidence and further erred by comparing the CSE's recommendations for the 2016-17 and 2017-18 school years with the student's progress at the unilateral placement for those school years. While I agree that the IHO did improperly adopt allegations made by the parents' attorney in her opening statement when making specific findings of fact, it does appear that the IHO attempted to address each school year separately and did not consider the student's performance at Riverview when determining the appropriateness of the CSE's recommendations for the 2016-17 school year (IHO Decision at pp. 12-15). With regard to the 2017-18 school year however, the IHO did consider the student's progress at Riverview, testimony from the parents' witnesses, and an updated report from the parents' private psychologist when considering the appropriateness of the May 2017 and August 2017 CSEs' recommendations for the 2017-18 school year. It is unclear from the IHO's decision whether he relied solely on information available to the May 2017 and August 2017 CSEs when determining that the district

failed to offer the student a FAPE for the 2017-18 school year (IHO Decision at pp. 15-18). To the extent the IHO compared the May 2017 and August 2017 CSE's recommendations to the program the student received at Riverview during the 2017-18 school year and relied on the testimony of the parents' witnesses, this was error. Comparisons of a unilateral placement to the public placement are not a relevant inquiry when determining whether the district offered the student a FAPE; rather, an IHO must determine whether or not the district established that it complied with the procedural requirements set forth in the IDEA and State regulations with regard to the specific issues raised in the due process complaint notice, and whether the IEP developed by its CSE through the IDEA's procedures was substantively appropriate because it was reasonably calculated to enable the student to receive educational benefits—irrespective of whether the parent's preferred program was also appropriate (Rowley, 458 U.S. at 189, 206-07; R.E., 694 F.3d at 189-90; M.H., 685 F.3d at 245; Cerra, 427 F.3d at 192; Walczak, 142 F.3d at 132; see R.B. v. New York City Dep't. of Educ., 2013 WL 5438605 at *15 [S.D.N.Y. Sept. 27, 2013] [explaining that the appropriateness of a district's program is determined by its compliance with the IDEA's requirements, not by its similarity (or lack thereof) to the unilateral placement], aff'd, 589 Fed. App'x 572 [2d Cir. Oct. 29, 2014]; M.H. v. New York City Dep't. of Educ., 2011 WL 609880, at *11 [S.D.N.Y. Feb. 16, 2011] [finding that "'the appropriateness of a public school placement shall not be determined by comparison with a private school placement preferred by the parent'"], quoting M.B. v. Arlington Cent. Sch. Dist., 2002 WL 389151, at *9 [S.D.N.Y. Mar. 12, 2002]; see also Angevine v. Smith, 959 F.2d 292, 296 [D.C. Cir. 1992] [noting the irrelevancy of comparisons that were made of a public school and unilateral placement]; B.M. v. Encinitas Union Sch. Dist., 2013 WL 593417, at *8 [S.D. Cal. Feb. 14, 2013] [noting that "'[e]ven if the services requested by parents would better serve the student's needs than the services offered in an IEP, this does not mean that the services offered are inappropriate, as long as the IEP is reasonably calculated to provide the student with educational benefits'"], quoting D.H. v. Poway Unified Sch. Dist., 2011 WL 883003, at *5 [S.D. Cal. Mar. 14, 2011]).¹¹

Further, the parents' cross-appeal alleging the IHO admitted retrospective evidence must be dismissed. The district correctly argues that the parents have not cited to the hearing record or specified any findings the IHO made which rely on improper retrospective evidence. A thorough review of the hearing record reflects that the district's witnesses explained the recommendations in each of the IEPs at issue and testified as to how the IEPs would have been implemented as written if the student had attended the public school placement for the 2016-17 and 2017-18 school years. The IHO did not permit testimony describing "additional services beyond those listed in the IEP" (R.E., 694 F.3d at 186).

1. 2016-17 School Year

Turning to the parents' substantive claims, the May 2016 IEP reflects that it was based on a number of evaluation and progress reports, an education summary, a functional behavioral assessment (FBA), a behavioral intervention plan (BIP), the parents' private psychoeducational evaluation, and speech-language and counseling progress notes, which were reviewed during the May 2016 CSE meeting (Dist. Ex. 5 at p. 4). The parties do not dispute the adequacy of the

¹¹ However, where, as in this case, the student is attending a unilateral private placement, some reference to a student's performance at a nonpublic school may be necessary if preparing a new or revised IEP while the student is attending the nonpublic school.

evaluative information before the CSE, but rather the conclusions that the CSE should have drawn from it. To the extent that the identification of the evaluative information relied on in developing the May 2016 and August 2016 IEPs is relevant, it will be discussed below along with the student's needs.

With respect to the student's academic achievement, functional performance, and learning characteristics, the May 2016 IEP indicated that in reading the student had been more independent in her ability to answer questions and locate textual evidence in her English and global history classes (Dist. Ex. 5 at p. 5; see Parent Ex. K). The IEP explained that when the textual evidence was explicit in a short passage the student was better able to find it, but that she continued to require support to locate textual evidence in longer passages or when it was implicit (Dist. Ex. 5 at p. 5). In writing, the IEP noted that the student was able to independently create an outline using a graphic organizer (id. at p. 6). With respect to writing mechanics, the student was able to write 3 out of 5 sentences without errors in a paragraph when she was reminded to use correct capitalization, punctuation, and spelling at the beginning of writing (id.). According to the IEP, the student continued to receive 1:1 writing support during activity period, which helped to increase her independence in writing (id.). In math, the IEP indicated that the student had made significant progress in her ability to calculate tax and tip, through repetition and practice (id.). The student was able to independently convert percentages to decimals and multiply to calculate tax and tip, as well as commission and interest (id.). The IEP noted that the student had shown improvement in her ability to solve multistep word problems and was better able to calculate the answers to familiar problems; however, she required more support for problems that were newly introduced (id.). With respect to the student's speech-language development, the IEP indicated that the student had demonstrated progress in her problem-solving skills (id.). The IEP narrative explained that the student was often given hypothetical situations and asked to analyze them; specifically, she was asked to state the problem, provide more than one possible solution, and make inferences in order to predict outcomes (id.). According to the IEP, the student could typically identify a problem and provide one or more possible solutions (id.). The student was also focused on understanding abstract language (id.). She read non-fiction articles and passages and was asked to identify expressions which appeared within the headline or article (id.). The student was also asked the meaning of abstract language used as part of conversations during therapy sessions (id.).

Next the IEP described the student's basic cognitive/daily living skills (Dist. Ex. 5 at p. 6). Although the IEP listed the parents' May 2016 private psychological evaluation in the "evaluation results" section, it was not used in the present levels of performance to describe the student's then-current cognitive or daily living skills (compare Dist. Ex. 5 at p. 6, with Dist. Ex. 9 at pp. 14-16). Rather, it appears that the May 2016 CSE relied on the district's June 2014 psychoeducational evaluation when describing the student's cognitive abilities and ADL skills (compare Dist. Ex. 5 at p. 6, with Parent Ex. A at pp. 5-13). Briefly, the IEP stated that the student's full-scale IQ as measured by the Wechsler Intelligence Scale for Children – Fourth Edition (WISC-IV) fell within the "[e]xtremely [l]ow" range (standard score 64) (Dist. Ex. 5 at p. 6). According to the IEP, the student's ability on verbally based tasks was consistently better than on nonverbal tasks (id.). More specifically, the student's performance on nonverbal tasks fell within the borderline range, her verbal reasoning was an area of personal strength in comparison to her overall profile, her working memory skills were inconsistent across tasks, and processing speed was the student's area of greatest weakness (id.). The IEP described the student as conveying a "generally positive attitude" and noted that she reported feeling happy (id.). With respect to adaptive functioning, the IEP

indicated that the student's overall skills in the domains of communication, socialization and daily living skills fell in the low range (id.).

The May 2016 IEP indicated that the student navigated the district's high school building independently and easily (Dist. Ex. 5 at p. 6). The IEP stated that the student had begun to use more strategies independently to stay focused (for example hiding her computer mouse so that she would not be tempted to scroll, which distracted her from her work) (id.). The student liked to create and use lists and was beginning to initiate this strategy independently in order to stay focused (id.). The IEP noted that the student had been receiving 1:1 support after school to help her become more independent in completing her homework (id.). According to the IEP the student expressed a vocational interest in fashion and was increasingly interested in socializing with peers (id. at p. 7). With respect to the student's academic needs, the IEP indicated that the student needed to focus on the task at hand and use strategies to reduce distractions; for reading, the student needed to work on comprehension and identifying textual evidence when answering questions; for writing, the student required assistance paraphrasing information and putting it in written form, as well as teacher reminders and support to stay on task; for math, the student required support in determining the operation needed to solve more complex functional word problems and refocusing to help her complete the problems; for vocational skills, the student needed to work on initiating and completing tasks at her internship; and for speech-language, the student needed to work on her ability to make inferences and predictions when responding to questions and also improve her vocabulary (id.).

Turning to the student's social development, the IEP described the student as "polite, funny, and respectful" and noted that she was well-liked by her teacher and peers (Dist. Ex. 5 at p. 7). The student was able to empathize with peers and often offered them valuable advice (id.). According to the IEP, the student was endearing and hardworking; she could be a leader in the classroom and responded well to praise and attention (id.). The student had a great sense of humor (id.). The IEP indicated that although the student had made significant progress in her ability to initiate and maintain conversations with peers, she needed to work on doing so in less structured settings (id.). The IEP noted that the student "indicated solid family relationships" and was open to discussing concerns relating to academics and feelings about changes in her life (id. at p. 6).

The IEP stated that the student's physical and writing skills were consistent with her overall ability and further stated that the student did not have any physical or motor needs that should be addressed through special education (id.). With respect to the student's management needs, the IEP indicated that the student presented with significant attentional, cognitive, and language weaknesses which warranted a highly individualized curriculum and special education support in all academic areas (id.). The IEP further indicated that the student's needs interfered with her ability to participate in age-appropriate activities (id.). With regard to special factors, the IEP noted that the student required a BIP to address her difficulty attending and focusing and also that she required an assistive technology device and/or service (id. at p. 8).

The May 2016 IEP included post-secondary goals that included pursuing a post-secondary training program or supported employment, to be gainfully and happily employed, and to live independently (Dist. Ex. 5 at p. 8). The student's transition needs included: to increase functional academics, independence with regard to life skills, functional communication, to receive individualized instruction to improve academics, and to increase pre-requisite skills for

participating in internships related to post-secondary interests (id.). The IEP stated that the student would receive ISP support for all academics with the goal of acquiring the independence needed to achieve post-secondary goals (id. at p. 9).

The student's May 2016 IEP included annual goals that addressed the student's weaknesses relative to study skills, academic skills, speech-language development, social/emotional/behavioral development, daily living skills, and career/vocational/transition skills (Dist. Ex. 5 at pp. 9-10). More specifically, the annual goals targeted the student's ability to use strategies to help her focus (study skills); state the central idea of a text and explain how it was supported by key details (reading); cite textual evidence to support analysis of what a text says explicitly, as well as draw inferences from text (reading); use correct capitalization, punctuation and spelling when writing (writing); use the process of planning, revising, and editing to strengthen writing (writing); write, read, and solve expressions in which letters stand for numbers (mathematics); define vocabulary within functional reading material (speech-language); make inferences and predictions while responding to questions regarding reading/listening material (speech-language); initiate conversation with peers in both the classroom and less structured settings (social/emotional/behavioral); use strategies for time management in order to complete daily living tasks in an appropriate amount of time (daily living skills); perform tasks related to money in real or simulated purchases (daily living skills); and initiate and complete tasks at her internship (career/vocational/transition) (id. at p. 10).

The May 2016 CSE recommended the following special education programs and services for the student for the 2016-17 school year: a 15:1 special class for English (modified English) one time daily for 40 minutes; a 15:1 special class for social studies (modified social studies) one time daily for 40 minutes; a 12:1+(3:1) special class for study skills one time daily for 40 minutes; a 12:1+(3:1) special class for study skills one time daily on alternate days for 40 minutes; consultant teacher services (direct) for math one time daily for 40 minutes; consultant teacher services (direct and indirect) in science class one time daily for 40 minutes; consultant teacher services (direct and indirect) for vocational skills two times daily for 40 minutes; and consultant teacher services (direct and indirect) for physical education one time on alternate days for 40 minutes (Dist. Ex. 5 at p. 10). The CSE also recommended the following related services: one 30-minute session per week of small group speech-language therapy, one 30-minute session per week of small group social skills training, and one 60-minute session per week of individual family training in home and/or school (id. at pp. 10-11). The CSE recommended that the student receive 12-month services; specifically, that during July and August 2016, she attend a 12:1+1 special class for six hours daily (id. at p. 12).

In addition to special education and related services, the May 2016 CSE recommended that the student be afforded the following modifications and accommodations: refocusing and redirection, breaks, directions clarified, special seating arrangements, graphic organizers, copy of class notes, and the support of an aide and teaching assistant (Dist. Ex. 5 at p. 11). The CSE recommended assistive technology devices and services for the student including the use of a computer or mini laptop throughout the school day to increase the student's motivation to complete tasks and to facilitate generalization of the student's typing skills (id. at p. 12). The CSE also recommended the following supports for school personnel on behalf of the student: a 30-minute counseling consultation one time per week; a 60-minute counseling consultation as part of an ISP team meeting one time per week; a 60-minute speech-language consultation as part of an ISP team

meeting one time per week; a 60-minute occupational therapy consultation as part of an ISP team meeting one time per week; a 120-minute psychiatric consultation "[a]s needed. x [e]very 2 weeks"; a 30-minute speech-language consultation with the student's ELA class one time per week; a 20-minute teacher consultation for the modified science class one time per week; a 20-minute teacher consultation for social studies class one time per week; and a 20-minute teacher consultation for modified English class one time per week (*id.*). Turning to testing accommodations, the CSE recommended that, for all tests, the student receive breaks, directions repeated/clarified (minimal extraneous noises), extended time (double time), flexible scheduling, flexible setting, use of a computer/word processor to record responses, and multiple day administration of tests (*id.* at p. 13). With regard to multiple day administration of tests, the IEP stated that "the slow processing speed and mental fatigue associated with the student's learning disability ma[de] it challenging for the student to fulfill all requirements of assessment tasks at one time" (*id.*). The IEP indicated that the student would participate in the same State and district-wide assessments of student achievement that were administered to general education students (*id.* at p. 14).

Next, the May 2016 CSE recommended a coordinated set of transition activities for the student (Dist. Ex. 5 at p. 13). With respect to instruction, the May 2016 IEP indicated that the student would receive ISP support for all academics with the goal of acquiring the independence needed to participate in the vocational programming in line with her post-secondary goals (*id.*). With respect to related services, the IEP indicated that the student would continue to receive speech-language therapy to support her functional communication and language development and the life instruction continued to be a major focus of special education programming (*id.* at p. 14). Next, the IEP indicated that the student would be provided opportunities to participate in school field trips and community-based instruction opportunities to foster independence, that she would participate in an internship in the community and that the school would work with the parents to assist the student with joining a club (*id.*). In terms of development of employment, the IEP indicated that the student would discuss her strengths and weaknesses and how they impacted her internship experience (*id.*). For acquisition of daily living skills, the IEP indicated that the student would receive instruction to improve functional communication, daily living skills, independence and socialization through the ISP in line with reaching maximal independence and post-secondary goals (*id.*). The IEP indicated that the student did not need a vocational assessment at the time the IEP was developed (*id.*).

The student's IEP progress report for the 2015-16 school year indicated that she achieved several of her IEP goals and demonstrated progress toward others (Parent Ex. M). The progress report included a narrative description of the student's performance at the end of each of four marking periods (November, January, April, June) (*id.* at pp. 2, 4, 6, 8-11, 13-14). In addition, the progress report included data plotted on graphs that measured the student's performance in relation to the mastery criteria established for each annual goal (*id.* at pp. 3, 5, 7-9, 11-14). With respect to the first annual goal, related to using strategies to help focus on the task at hand, the progress report showed that the student advanced from 20 percent mastery in November 2015 to 60 percent mastery in June 2016 (*id.* at pp. 2, 3). The June 2016 progress report indicated that the student continued to use strategies such as the use of timers and checklists to remain focused and that she had shown improvement in this area (*id.* at p. 2). While the student demonstrated progress, the criteria for mastery of the goal was 80 percent; therefore, the progress report indicated that the student would continue to work on the same goal the following school year (*id.*). The IEP progress

report indicated that the student achieved the second annual goal, related to locating and referencing textual evidence (*id.* at p. 4, 5). The June 2016 progress report stated that the student continued to become more independent in her ability to answer questions and locate textual evidence when doing homework and classwork (*id.* at p. 4). According to the progress note, the student was able to read a one-page current event article and answer questions referencing textual evidence and could also respond to questions from a science lab by locating the answers in a 2-3 page packet (*id.*). The progress report indicated that the student continued to require support on longer passages or when textual evidence was implicit (*id.*). With respect to the third annual goal, related to writing a multi-sentence paragraph and using proper writing mechanics, the progress report indicated that the student improved from 20 percent mastery in November 2015 to 70 percent mastery in June 2016 (*id.* at pp. 6-7). Notably, at the end of the second quarter the student began to receive additional support afterschool in the form of 1:1 staff assistance with capitalization, punctuation, and spelling (*id.*). The June 2016 progress report indicated that the student had shown improvement in her ability to write a multi-sentence paragraph but would continue to work on the goal the following school year (*id.* at p. 6). The student did not begin working on the fourth annual goal, which targeted her ability to calculate tax and tip, until the second marking period (*id.* at p. 8). However, the student progressed from 25 percent mastery of the goal in January 2016 to 75 percent mastery in June 2016 (*id.*). The June 2016 progress report indicated that the student was able to calculate tax and tip with repetition and practice, although when introduced to a novel problem related to money the student required teacher support to solve it (*id.*). The progress report indicated that the student would continue this same goal the following school year (*id.*). According to the 2015-16 progress report, the student achieved the fifth annual goal which required her to solve multi-step functional word problems (*id.* at p. 9). The student moved from 25 percent to 80 percent mastery of the goal over the course of the school year (*id.*). Notations on the June 2016 progress report indicated that the student continued to show progress in her ability to solve multi-step word problems; however, the student also continued to be more independent in calculating the answers to familiar problems and required some support in solving less familiar problems (*id.*).

Included in the 2015-16 IEP progress report was anecdotal information and data related to the student's progress toward her speech-language annual goals (Parent Ex. M at p. 10).¹² The progress report indicated that the student had advanced from 50 percent to 70 percent mastery of the first speech-language goal, which related to understanding abstract and ambiguous language (*id.* at pp. 10-11). The fourth marking period progress note indicated that the student was making satisfactory progress toward the goal and was expected to achieve it (*id.* at p. 10). The progress note further indicated that the student had achieved 70 percent mastery for describing abstract language that appeared within reading passages and structured conversation (*id.*). According to the 2015-16 progress report, the student also showed improvement in her ability to provide multiple solutions to a hypothetical problem, moving from 50 percent mastery in November 2015 to 70 percent mastery in June 2016 (*id.* at pp. 11-12). The June 2016 progress note indicated that the student demonstrated approximately 70 percent accuracy for providing more than one appropriate solution to a given problem (*id.* at p. 11). According to the progress report, the student

¹² Although the 2015-16 IEP progress report was dated June 24, 2016, the progress information related to the first three marking periods would have been available to the May 2016 CSE (Parent Ex. M at pp. 1, 2-14). In addition, the entire report would have been available at the time of the August 2016 CSE meeting.

was making satisfactory progress and was expected to achieve the goal (id.). The 2015-16 progress report also included information on a social/emotional/behavioral goal that targeted the student's ability to initiate and maintain conversation with a peer (id. at p. 13). The progress report indicated that the student had achieved this goal and was able to maintain six verbal exchanges with a peer (id.). Lastly, the progress report indicated that the student achieved a career/vocational/transition goal that focused on the student exploring her preferences in working with people, information and/or things (id. at p. 14).

By letter dated August 18, 2016, the parents advised the district that they were rejecting the IEP and placement recommended by the May 17, 2016 CSE on the grounds that it was not appropriate to meet the student's needs (Parent Ex. N at p. 1). The parents opined that "[t]he ISP program, by its very nature as a school day program, [could not] address [the student]'s needs" related to ADLs nor could it meet the student's socialization needs due to the lack of other students with similar profiles (id. at p. 2). The parents asserted that due to her significant demonstrated difficulties, the student required a residential placement to address her ADL deficits and prepare her for transition to adulthood and adult services (id.). The parents advised the district that they had enrolled the student at Riverview for the 2016-17 school year and intended to seek tuition reimbursement from the district due to its failure to offer the student a FAPE (id.).

In response to the parents' August 18, 2016 letter, the CSE reconvened on August 31, 2016 to address the concerns raised by the parents (Dist. Ex. 4 at p. 1). Meeting participants included a special education teacher and general education teacher of the student, a psychologist from the school district, an attorney for the parents and for the school district, the CSE chairperson, and the student's mother (id.). According to the meeting information summary, the CSE reviewed the parents' letter and the proposed IEP point-by-point (id.). Upon review by the committee, the attorney for the parents indicated that the present levels of performance did not offer an accurate description of the student, specifically that they only described the student's progress and did not reflect the student's struggles as reported by the parents (id. at pp. 1-2). The parents' attorney noted that the IEP described the student as a reader even though she had significant reading challenges (id. at p. 2). The student's teacher reported that the student was able to read (id.). The CSE then reviewed the parents' private psychoeducational report which indicated that the student scored in the average range in three out of four subtests of the Gray Oral Reading Test – Fifth Edition (GORT-5) (id.). The parents' attorney asserted that the student's struggles with writing and editing were also not reflected in the present levels of performance (id.). The student's mother noted that when she received a letter from the student from summer camp it did not "incorporate correct capitalization or punctuation" (id.). The student's special education teacher acknowledged the concerns articulated by the parent and her attorney and explained that the student had difficulty with executive functioning and that the areas of concern were reflected as goals for the student (id.). The district agreed to update the present levels of performance to more explicitly describe the student's needs and the parents' concerns (id.).

Next, the attorney for the parents noted that the private psychoeducational evaluation highlighted concerns regarding the student's ADLs and social isolation that were not reflected in the IEP (Dist. Ex. 4 at p. 2). According to the meeting information summary, the attorney for the district explained that the private psychoeducational evaluation was viewed in conjunction with the reports of school officials (id.). In response to being asked if the student was socially isolated, both of the student's teachers said the student had been observed socializing in both structured and

unstructured settings and while she did not necessarily initiate conversations with unknown peers, the student had made notable progress in her social skills groups and appropriately initiated and maintained conversations with familiar people (id.). The student was described as having a great sense of humor and frequently sharing jokes and also as being caring and responsive to the needs of her peers (id.). The student's mother opined that the student's normal behavior in school had not generalized to settings outside of school and there was no way to support such progress without the school's help (id.). The student's mother further opined that there was no social cohort for the student at the district's high school; however, the special education teacher reported that the student would be participating in a peer mentorship program at the high school, which would offer her the opportunity to develop friendships (id.).

Turning to daily living skills, the attorney for the parents asserted that the IEP did not reflect the severity of the student's deficits (Dist. Ex. 4 at p. 2). The student's mother reported that at home the student had difficulty with showering and time management (id.). Although the parent acknowledged the home support provided by the student's special education teacher and the student's eligibility for home and community services through the Office for People with Developmental Disabilities (OPWDD), she characterized these efforts as "too little, too late" (id.). The parent asserted that the student needed the "gestalt," which was not possible within the school district and therefore the student required a residential placement (id.). The special education teacher opined that the student could be successful in the district with the home and community supports that were in place (id.).

The parent suggested that the district's academic classes were inappropriate for the student's level of functioning (Dist. Ex. 4 at p. 2). She stated that the student needed to focus on learning practical skills so that she could successfully transition to adulthood (id.). The parent pointed to the student's math skills as an example and explained that the student had difficulty with basic, functional math problems (id.). In response, the CSE chairperson explained that the student was placed in all modified classes taught by dually certified content area special education teachers, that she received ISP support in her classes, and that the high school curriculum was modified to meet the student's needs (id.). The CSE chairperson indicated that going forward the student's classes would focus more on functional and vocational skills, and further indicated that the student was on-track for the CDOS credential (id.). According to the meeting information summary, the CSE discussed the lab school at a local community college as a transition plan (id.).

Although the student's mother reported that the student's self-confidence decreased as she became more aware of her differences, the student's teachers reported that they observed the opposite; they noted that the student was an active participant in class, demonstrated an increase in her ability to self-advocate, and worked in groups with more typical students (Dist. Ex. 4 at p. 2). The student's mother reported that she had not seen similar progress in the home and community, that the student had difficulty with self-advocating and with self-regulating her tone and voice when in the community (id.). The parent further reported that the student had difficulty being flexible in response to changes in routine (id.). Based on the CSE's discussion, the committee agreed to add goals addressing functional math, self-advocacy in the community, self-regulation, and flexibility with regard to changes in routines (id.). The meeting information summary noted that the committee reviewed the student's speech-language goals and agreed on a "conversational" goal related to abstract and figurative language (id.).

The attorney for the parents stated that the student's goals needed to be implemented in a seamless environment, such as a residential setting, and asserted that the approach taken by the district was too piecemeal (Dist. Ex. 4 at p. 2). According to the meeting information summary, the student's special education teacher described the student's program and explained that the student would be participating in an internship and would receive social skills training three times per week – once as part of a vocational class, once as part of a pull-out group and once as part of a speech-language group (id.). In addition, social skills would be reinforced in the student's program throughout the day (id.). The student's mother opined that the district's program could not replicate the "24/7 work done in a residential placement" (id.). The meeting information summary indicated that the CSE chairperson explained that the district's program was appropriate, considering the student's needs and goals, and that residential placement would be too restrictive (id. at pp. 2-3). The CSE chairperson reiterated that the student was on the CDOS track, and a candidate for the lab school at the community college and that it would be beneficial for the student to remain in district and build relationships in the community (id. at p. 3). At the conclusion of the meeting, the CSE recommended that the student continue in the ISP at the district's high school and the student's mother and attorney voiced their disagreement with that recommendation (id.).

The student's present levels of educational performance were updated on the August 2016 IEP to include excerpts from the parents' May 2016 private psychoeducational evaluation report and observations from the student's providers shared during the CSE meeting (compare Dist. Ex. 4 at pp. 9-12, with Dist. Ex. 5 at pp. 5-8).

With respect to the student's basic cognitive/daily living skills, the August 2016 IEP indicated that administration of the Wechsler Intelligence Scale for Children-Fifth Edition (WISC-V) in March 2016 as part of private testing yielded a full-scale IQ of 66 (1st percentile), which fell in the "[e]xtremely [l]ow" range (Dist. Ex. 4 at pp. 6, 10). Additionally, the IEP noted that the student performed in the low average range on tests of verbal comprehension and performed in the extremely low range on tests of fluid reasoning, visual spatial, and processing speed abilities (id.).

The student's August 2016 IEP was also updated to include information from the parent's private psychoeducational evaluation regarding the student's academic performance. With respect to reading, the August IEP indicated that administration of the GORT-5 as part of private testing yielded an oral reading index standard score of 89 (23rd percentile), which fell just below the average range (Dist. Ex. 4 at pp. 6, 9). The IEP further indicated that on the "Gray Silent Reading Test," the student attained a standard score of 90 (25th percentile), which fell in the average range (id.). The IEP noted that in class, the student was able to read most content-area text and answer basic questions about the text (id.). The IEP also noted that the student required support to make inferences and to answer more complex or abstract questions (id.).

The August 2016 IEP reflected the results of the parents' private testing with regard to the student's writing ability and indicated that the student attained the following standard score (SS) and percentile ranks on the Woodcock Johnson III Tests of Achievement (WJ III ACH): writing samples SS 93 (31st percentile), writing fluency SS 72 (3rd percentile), and written expression cluster SS 79 (8th percentile) (Dist. Ex. 4 at pp. 8, 9). The August 2016 IEP also reflected observations of the student's writing performance in the classroom where the student was noted to write at a slow pace but was able to independently generate multiple sentences in writing a paragraph and write her ideas in an outline by using a graphic organizer (id.). The IEP indicated

that the student required help in editing and reminders to use correct capitalization and punctuation (id.). The August 2016 IEP included additional details regarding the student's needs and parent concerns related to writing and specifically stated that the student required assistance in planning, revising, and editing written assignments, needed to work on incorporating correct capitalization and punctuation in her writing, and required teacher support and reminders to stay on task and complete writing assignments (compare Parent Ex. 5 at p. 7, with Parent Ex. 4 at p. 11).

The IEP indicated that according to the parents' private testing, the student's mathematical calculation skills were below the first percentile, (WJ III ACH standard score of 51) (Dist. Ex. 4 at pp. 8, 10). Further, the IEP stated that, in class, the student required practice and repetition in order to master math skills; and that she completed familiar basic functional word problems after repeated practice but required help if similar word problems were presented using different wording (id.). In addition, the IEP noted that the student continued to need support in solving novel math problems (id.). The August 2016 IEP was modified to note that the student required support in solving pre-algebraic and algebraic equations, where letters represent numbers, and in solving functional word problems using addition, subtraction, multiplication, and division (compare Parent Ex. 5 at p. 7, with Parent Ex. 4 at p. 11).

According to the August 2016 IEP, the parent stated that she was concerned because she had not seen improvement in the student's reading, writing, and math skills (Dist. Ex. 4 at p. 11). In addition, the parent indicated that she was also concerned about the student's adaptive living skills and she opined that her daughter required highly specialized interventions to develop ADLs (Dist. Ex. 4 at p. 11). As noted in the August 2016 IEP, the parent reported that the student required constant prompting and redirection to complete even the most basic tasks at home such as dressing, showering, and eating in a reasonable amount of time (compare Dist. Ex. 4 at p. 11, with Dist. Ex. 5 at p. 7). Additionally, the IEP indicated that according to the parent the student lacked flexibility and her routines at home could not be interrupted without significant upset (Dist. Ex. 4 at p. 11).

Next, the August 2016 IEP was updated to indicate that the student needed to increase her ability to self-regulate (especially the tone and volume of her voice) when in the community, at home, and at school (compare Dist. Ex. 4 at p. 11, with Dist. Ex. 5 at p. 7). The IEP was further updated to note that the student needed to advocate for herself and initiate interactions with appropriate individuals such as cashiers, store workers, or police officers (compare Dist. Ex. 4 at p. 11, with Dist. Ex. 5 at p. 7). The IEP reflected the parent's concern that the student did not have friends and was socially isolated (Dist. Ex. 4 at p. 11).

Additional changes were made to the August 2016 IEP (see Dist. Ex. 4 at p. 2). An annual math goal was added that required the student to solve functional math problems that incorporated basic mathematical operations (compare Dist. Ex. 4 at p. 14, with Dist. Ex. 5 at p. 9). An annual speech-language goal was also added that targeted the student's ability to identify and describe abstract and figurative language as it appeared within conversation (compare Dist. Ex. 4 at p. 14, with Dist. Ex. 5 at p. 9). In addition, two annual social/emotional/behavioral goals were added to the August 2016 IEP to specifically address parental concerns (Dist. Ex. 4 at p. 14). The first goal addressed the student's ability to self-regulate, especially the tone and volume of her voice when in the community, home, and school (id.). The second goal addressed the student's ability to self-advocate and initiate interactions with appropriate individuals (id.). The August 2016 also

included an additional ADL goal that addressed the parent's concern regarding the student's lack of flexibility in response to a change in activities and routines at home (id.).

i. Counseling Services

The parents alleged that the 2016-17 IEPs failed to provide direct counseling to address the student's significant social/emotional needs (District Ex. 1 at p. 14).

While the May 2016 and August 2016 IEP's did not include a recommendation for direct counseling, they did include supports to address the student's social/emotional needs and to support the student in the school environment. For example, the student was recommended to receive speech-language therapy, family training, and a social skills group (Dist. Exs. 4 at pp. 15-16; 5 at pp. 10-11). In addition, the IEP indicated the school staff would have been supported by two weekly counseling consultations and a psychiatric consultation, as needed (Dist. Ex. 4 at p. 17; 5 at p. 12). The district school psychologist testified that the recommendation for a social skills group was the same as a recommendation for counseling services, with the service directed at addressing the student's social needs (Tr. pp. 933-35).

The parents argued that "[t]he IEP did not include direct counseling as a special education service for [the student] although she had a counseling goal and social emotional needs" (Parent Post Hr'g Br. at p. 11). However, on appeal, the parents assert that the IEPs for the 2016-17 school year "failed to mandate direct counseling despite [the student's] anxiety" (Answer and Cross-Appeal ¶8). This later argument fits in more directly with the parents' allegation that the district did not address the student's anxiety (Parent Post Hr'g Br. at pp. 33-34).

The district's assistant superintendent of educational services (assistant superintendent) who chaired the May 2016 and August 2016 CSE meetings testified that had there been reports of pervasive anxiety, the district would have provided interventions to address it and she questioned the parents' private psychologist during the May 2016 CSE meeting because his evaluation was not consistent with the student's demonstrated behavior in school (Tr. pp. 73, 82, 132-33). The assistant superintendent further testified that the parents' private psychologist was unable to tell her where in his projective testing he found evidence of anxiety and that "[i]t sounded like there was a lot of reports from home that she was experiencing anxiety" and no discussion of other possible remediation beyond a residential placement, which the assistant superintendent characterized as "a huge leap" (Tr. p. 133). The assistant superintendent also testified that she first learned the student had been diagnosed with a generalized anxiety disorder when the district received the evaluation report from the parents' private psychologist (Tr. p. 173). The assistant superintendent acknowledged that the district had previously administered the Vineland Adaptive Behavior Scales rating forms in 2014 (Tr. p. 177-78; see Parent Ex. A at pp. 11-13). The assistant superintendent agreed that based on parent and teacher ratings, the student's coping skills were in the "[l]ow" range as measured by the Vineland scales (Tr. p. 178; Parent Ex. A at pp. 11-13).¹³ She testified that the district would have conducted further testing if the student's social/emotional

¹³ The district's June 2014 psychological evaluation report stated that with regard to coping skills the student sometimes benefitted from support transitioning between activities and with managing emotions such as frustration or disappointment (Parent Ex. A at p. 13).

functioning had been identified as an area of concern (Tr. p. 178). The assistant superintendent also testified that she was aware of the student taking "a very long time at home to get prepared for school; that showering and dressing because of the executive function of the time management was taking a tremendously long period of time" (Tr. pp. 194-95). When asked if the length of time could be a manifestation of the student's anxiety, the assistant superintendent testified that it could be, however it was more likely to be related to the student's history of slow processing and poor executive functioning (Tr. pp. 195-96). The assistant superintendent further testified that the student had always "been slow at getting things ready at home" and that "it [wa]s a big leap to say that this all of a sudden started happening in sophomore year in January" because a lot of the student's goals had been related to time management and executive functioning and if the student's slow pace had developed "out of the blue," it could be hypothesized to be related to anxiety (Tr. p. 196). The assistant superintendent testified that if a student has a longstanding issue of slow processing, poor executive functioning, low initiation skills, she would not "automatically jump" to anxiety (*id.*). She could not recall anyone requesting a social/emotional evaluation of the student between January and May 2016 (Tr. pp. 196-97). When asked if she would agree that it was not appropriate to hypothesize about the student without doing additional assessments, the assistant superintendent disagreed stating that a student with this neurocognitive profile "oftentimes stays fairly consistent" and in the absence of "a marked change in that student's behavior... you would normally try strategies to try to address what you already know about the kid rather than going in and say[ing it] must be [] an emotional problem" (Tr. pp. 197-98; *see* Tr. pp. 685-86). When asked about the parents' private psychologist's finding that the student internalized anxiety, the assistant superintendent testified that a student with severe anxiety over time would become symptomatic in some way in school, particularly if the anxiety was related to school, stating "you would see an exacerbation of some kind of behavior in school" (Tr. pp. 656-58).

The district's director of special education (director), who was a district school psychologist at the time of the August 2016 CSE meeting, testified that she began working with the student during the 2014-15 school year providing group counseling (Tr. pp. 288, 295, 297). The director testified that she participated in a discussion regarding the student's social presentation at school during the August 2016 CSE meeting (Tr. pp. 328, 331-32). The director further testified that the parents' private psychologist's characterization of the student as "falling apart" due to the academic demands of the ISP "was inconsistent with what we were seeing in school with [the student] with regard to her social functioning" (Tr. pp. 342-43). When asked about the lack of direct counseling on the May and August 2016 IEPs, the director testified that the student's need in the social/emotional domain was related to social development (Tr pp. 444, 445). With regard to the parents' private psychologist's report of anxiety, the director again testified that "his reports were inconsistent with what we were seeing in school" (Tr. p. 445; *see* Tr. pp. 529-31).

The district's school psychologist who provided direct services to the student during the 2015-16 school year testified that he worked with the student on conversational skills (Tr. pp. 827-28, 833, 835). The school psychologist testified that he disagreed with the private psychologist's conclusion that the student experienced pervasive anxiety (Tr. p. 848; *see* Dist. Ex. 9 at p. 19). He further testified that the student did not present as "sullen and depressed," rather she presented as "fairly euthymic the entire time [he] knew her except for one instance," which involved the student expressing appropriate grief in school after the loss of a family member (Tr. pp. 849, 906; *see* Dist. Ex. 9 at p. 19). The school psychologist further expressed disagreement with the private psychologist's conclusion that the student's "atypical presentation ha[d] obscured her diagnosis and

ha[d] at times caused school staff to underestimate her level of need" (Tr. p. 850; see Dist. Ex. 9 at p. 13).¹⁴ When asked about the student's difficulty attending school on time, the school psychologist disagreed that it was related to anxiety and stated that his understanding was that the student's "morning sequence was very slow, labored, she would stop, maybe she was getting up late, she was taking her time doing a lot of the steps that would result eventually in her getting to school" (Tr. pp. 904, 905). On further cross-examination, the school psychologist denied seeing low level anxiety from the student or paralysis of thought and action, stating, "I never saw paralysis, I saw her pause, stop, need redirection, muse, I saw her imagine" (Tr. pp. 919-20; see Dist. Ex. 9 at p. 17).

The district's special education teacher testified that she first met the student during the 2013-14 school year and got to know the student and her parents very well during the 2014-15 school year when the student began attending the high school (Tr. pp. 1012, 1014, 1026). The special education teacher testified that she was one of the student's teachers for the 2014-15 and 2015-16 school years (Tr. pp. 1026, 1030). The special education teacher described the student as having a neurocognitive disability, as well as a diagnosis of ADHD and classification of autism, and explained that "she present[ed] with similar issues and similar difficulties as students with autism and with ADHD, particularly her executive functioning area is a great challenge" (Tr. p. 1015). The special education teacher also testified that the student had "close to average" verbal skills, which were a relative strength, and that she had great difficulty in math (id.). The special education teacher stated that the student's deficits in executive functioning "create[d] a lot of difficulty for her, especially getting work done, doing things in a timely way" (id.). Socially, the special education teacher described the student as "very sweet, likes to interact with people, she has a good sense of humor, sarcastic at times and overall really -- seemed to get along well with other students and with teachers" (Tr. pp. 1015-16). The special education teacher further testified that after working with the student for "[c]lose to two years," she "did not feel she presented with anxiety" (Tr. p. 1402). On cross-examination, the special education teacher testified that she did not have any significant concerns about the student's social/emotional functioning during the 2014-15 school year (Tr. p. 1450). The special education teacher stated that the student had goals related to social/emotional functioning during the 2015-16 school year that the student was working on, but she did not have significant concerns about the student's social/emotional functioning (Tr. pp. 1450-51). When asked about the student's lateness and slowness getting ready in the morning, the special education teacher acknowledged that the district did not conduct a further social/emotional assessment but disagreed that the student's lateness and being slow in the morning was related to social/emotional issues (Tr. pp. 1451-52). The special education teacher further testified that the student's difficulty with executive functioning had caused similar issues at school that had been successfully addressed and, based on conversations with the student's parent, the special education

¹⁴ The assistant superintendent, who was a neuropsychologist, and the district school psychologist were critical of the projective testing conducted by the parents' private psychologist (Tr. pp. 127-32, 843-51). The school psychologist testified that projective testing should have included samples, which were not provided to the CSE; that no objective testing supported the private psychologist's anxiety-related findings; and the recommendation for a residential placement was not correlated to the private psychologist's objective testing (Tr. pp. 843-49, 850-52, 853-61). The assistant superintendent testified that to her knowledge, the projective assessments utilized by the parents' private psychologist were not standardized for students with significant cognitive deficits and further stated, "I don't think he really talked about how her neurocognitive profile would impede interpretation or impact interpretation of those social-emotional measures" (Tr. p. 128).

teacher stated that "I did have a sense of it being a similar issue at home" (Tr. p. 1452; see Tr. pp. 1022-24). When asked by the IHO how the student's emotional needs were addressed, the special education teacher testified that the student's needs were related to social skills, interactions with other students, building relationships and stated that she "did not see a need... to support anxiety... I did not see anxiety in her" (Tr. p. 1487).

A thorough review of the hearing record demonstrates that contrary to the parents' claims, the information available to the May 2016 CSE and the August 2016 CSE did not show a student who was struggling with pervasive anxiety. Rather, the student's needs related to counseling, at the time of the meetings, were more in the social realm, and the CSEs provided an appropriate program to address those needs. That is, the student's social/emotional needs were addressed through the recommendation for a social skills group, and group speech-language therapy (Tr. pp. 346-64, 409-11, 864-67; Dist. 4 at pp. 14, 15, 17). The student's IEP further provided for as needed psychiatric consultation every two weeks and two weekly counseling consultations were provided to district staff wherein any changes to the student's needs could be immediately addressed (Dist. Ex. 4 at p. 17).

ii. Program Recommendation

Next, the parents' claim that the recommended consultant teacher services were inappropriate and not supportive enough for the student because she could not function or absorb the material in the general education class (Dist. Ex. 1 at p. 15).

State regulations define "consultant teacher services" as

direct and/or indirect services, as defined in this subdivision, provided to a student with a disability in the student's regular education classes and/or to such student's regular education teachers.

(1) Direct consultant teacher services means specially designed individualized or group instruction provided by a certified special education teacher . . . to a student with a disability to aid such student to benefit from the student's regular education classes.

(2) Indirect consultant teacher services means consultation provided by a certified special education teacher...to regular education teachers to assist them in adjusting the learning environment and/or modifying their instructional methods to meet the individual needs of a student with a disability who attends their classes.

(8 NYCRR 200.1[m]).

State guidance indicates that direct consultant teacher services "support a student while he or she is participating in instruction in the general education class" and the "location where services will be provided needs to be stated specifically enough so the CSE's recommendations regarding location of services is clear ("Continuum of Special Education Services for School-Age Students with Disabilities," at pp. 3, 7, Office of Special Educ. [Nov. 2013], [available at http://www.p12.nysed.gov/specialed/publications/policy/continuum-schoolage-revNov13.pdf](http://www.p12.nysed.gov/specialed/publications/policy/continuum-schoolage-revNov13.pdf)).

For the 2016-17 school year, both the May and August 2016 CSE's recommended that the student be placed in a 15:1 special class for English and social studies, a 12:1+3:1 special class for study skills, and that she receive consultant teacher services for math, science, physical education, and vocational skills (Dist. Exs. 4 at p. 15; 5 at p. 10). The May and August 2016 IEPs also included, among other things, supplementary aids and services, such as a shared (3:1) teaching assistant and a shared (3:1) aide, as well as access to assistive technology devices, and a coordinated set of transition activities (Dist. Exs. 4 at pp. 16, 18-21; 5 at pp. 11-14).

The assistant superintendent testified that in addition to a dually certified special education/content area teacher, an individual support special education teacher, and teaching assistant, both direct and indirect consultant teacher services were available to the student by the ISP teacher (Tr. pp. 103-05; see Tr. pp. 631, 674-75). The assistant superintendent reported that because the student required more support in general education elective classes such as art and physical education, the consultant teacher would provide appropriate accommodations for the student in those classes and, additionally, the consultant teacher would provide education to the student's elective area teacher regarding the student's specific deficits (Tr. pp. 119-21). The assistant superintendent further testified that the recommended ISP exposed the student to the high school curriculum required for achieving a local diploma and that the student's academic skills were "far too high" for the student to be alternately assessed (Tr. p. 632). The assistant superintendent also stated that the ISP acknowledged the student's developmental disabilities that precluded her from being able to consistently access the regular education curriculum and provided the supports to address the student's attentional and executive dysregulation (id.). The assistant superintendent further explained that the district provided direct consultant teacher services in special education classrooms and to the extent the student participated in a regular education class due to the presence of non-disabled students, the student-to-teacher ratio never exceeded 15:1 (Tr. pp. 674-77).

The district special education teacher testified that the student had received direct and indirect consultant teacher services during ninth grade (2014-15) and during tenth grade (2015-16) and that the parent was familiar with how the services were provided to the student (Tr. pp. 1912-13).¹⁵

The director of special education testified that the student's supports included her class taught by a dually certified special education teacher, push-in support from teaching assistants in the classroom, the support of a consultant teacher, and her ISP teacher who was also a certified special education teacher and a Board Certified Behavior Analyst (BCBA) (Tr. pp. 338, 555).¹⁶

¹⁵ The district's special education teacher also testified similarly to the assistant superintendent describing how consultant teacher services were utilized in the ISP and what instruction would look like for the student (Tr. pp. 1406-31).

¹⁶ The director of special education was asked if she recalled the parent asserting that the student's high school program was too confusing for the student during the August 31, 2016 CSE meeting (Tr. pp. 498-99). She testified that she did not recall the parent raising that as a concern, rather, she recalled the parent claiming the program was too piecemeal (Tr. pp. 499). The director of special education further testified that the student had a similar program the prior school year in ninth grade, "so if there was any confusion or if we were uncertain or there were any questions about the program, we certainly would have answered them even before" (id.).

The director testified that for the 2016-17 school year, to address the student's needs, consultant teacher services were recommended for the "daily double period vocational block" to work on daily living skills in the community as well as functional academics, social skills and vocational skills (Tr. pp. 364-65). The director noted that consultant teacher services were also recommended for elective science class which was taught by a dual certified special education teacher as well as a math class; and that the student was supported by teaching assistants (Tr. pp. 365, 367, 387-88, 391; see Tr. pp. 500-01). In the student's physical education class, and daily study skills class (which on some days occurred twice a day), the director reported that in addition to the teacher, the ratio was three students to one adult and every other day the student received consultant teacher services in that class (Tr. pp. 368-69). The director noted that consultant teacher services occurred on a weekly basis in the modified self-contained social studies and English class, and that the service was a consultation by the ISP teacher to the English and social studies teachers (Tr. pp. 369, 386-87).

Contrary to the IHO's findings, the district developed a comprehensive, flexible program to address the student's complex needs, which appropriately included direct and indirect consultant teacher services. The IHO erred in finding that the district did not provide the student with a FAPE for the 2016-17 school year because of his belief that the student's programming and services were too ambitious and unintentionally competitive. The hearing record reflects that the May 2016 CSE developed a program that addressed the student's needs. Further, the CSE reconvened in August 2016 and continued to consider the concerns of the parents and altered its recommendations based on the available information in developing the August 2016 IEP. Based on the foregoing, the August 2016 IEP provided the student with targeted supports and programming to enable the student to make progress.

2. 2017-18 School Year

The parents further allege that the district's recommendations of consultant teacher services for the 2017-18 school year were similarly inappropriate and not supportive enough for the student.

A CSE convened on May 31, 2017 to review the results of the student's triennial evaluation and to conduct the student's annual review (Dist. Ex. 6 at p. 1). The May 2017 CSE recommended that the student continue in the district's ISP (id. at p. 18-19). For the 2017-18 school year, the May 2017 CSE recommended that the student be placed in a 12:1+(3:1) special class for math, study skills, and vocational skills, and receive consultant teacher services for English, social studies, science, and physical education (id.). In addition, the CSE recommended a 5:1 resource room service one time daily for 40 minutes (id.). The CSE also recommended related services, including small group speech-language therapy, small group counseling, individual counseling, and family training (id.). The May 2017 CSE further recommended that the student receive supplementary aids and services, including a shared (3:1) teaching assistant and a shared (3:1) aide, as well as access to assistive technology devices and a coordinated set of transition activities (id. at pp. 18-22).

By letter dated August 9, 2017, the parents advised the district that they were rejecting the IEP and placement recommended by the May 31, 2017 CSE on the grounds that it was not appropriate to meet the student's needs (Parent Ex. V at p. 1). The parents opined that "[a]s with last year, the ISP program, by its very nature as a school day program, cannot address [the

student]'s needs" related to ADLs nor could it meet the student's socialization needs due to the lack of students with similar profiles (id. at p. 2). The parents asserted that the recommended program did not sufficiently address the student's continued low adaptive living skills and did not provide a seamless setting to promote the development of authentic friendships with similar peers (id. at p. 1). The parents advised the district that they had enrolled the student at Riverview for the 2017-18 school year and would seek tuition reimbursement from the district due to its failure to offer the student a FAPE (id. at p. 2).

On August 29, 2017, the CSE reconvened to review the student's May 2017 IEP; and the district's director of special education "explained that the intention of the meeting was to address the concerns that the parent outlined in her letter dated August 9, 2017 rejecting the IEP" (Tr. pp. 563, 2220; see Parent Ex. V; Dist. Ex. 7 at p. 1). The parent stated that she rejected the IEP because the district "could not provide her with 24-hour support for the student in the home to address functional and social/emotional needs" (Tr. p. 1911; Dist. Ex. 7 at p.1). Further, the parent discussed the social benefits of the boarding school in which she had placed the student; and stated that the district high school's special education program was not meeting those social needs based on her perception of the ISP student profiles from previous years (Dist. Ex. 7 at p. 2). The director stated that the student had an appropriate program in her home district "with community internships and peers, building functional skills that the student will need for adulthood"; and that the program continued to be "the least restrictive and most efficient" (id.).

The August 2017 CSE discussed the specific complaints raised in the parents' letter and asked the mother to clarify examples of "low" adaptive living skills that were referenced in the letter (Dist. Ex. 7 at p. 2). The director noted that the committee had recommended family training to address ADLs in the home, such as managing the morning routine, as well as internships and community supports to address community functioning (id.). The director "asked the mother if there was anything missing[,] and the mother did not identify anything further" (id.).

Next, the August 2017 CSE discussed related services and how the services met the student's current needs according to her present levels of performance, functional abilities and standardized scores and the director noted the "parent's complaint that there [wa]s insufficient counseling" (Tr. p. 2210; Dist. Ex. 7 at p. 2). The director noted that there was both individual as well as group counseling listed on the IEP and the CSE discussed that a full-time school psychologist was dedicated to the district's ISP (Dist. Ex. 7 at p. 2). The parent discussed the student's level of stress as it related to the CDOS mandate and the student's difficulty coping with the stress of taking State exams (id.). The CSE acknowledged the parent's concern, discussed the test anxiety workshops conducted by the school psychologists and counselors, and added a goal to address coping with stress (Tr. p. 982; Dist. Ex. 7 at p. 2; compare Dist. Ex. 7 at p. 18, with Dist. Ex. 6 at pp. 16-17). The parent "mentioned" that the district could not replace the time the student wasted sitting for State exams; and the director explained that the State exams were State mandated and noted that the student was not wasting time as indicated by her passing one of the State exams (Dist. Ex. 7 at p. 2). The mother opined that the student would never pass the algebra State exam and it was "inappropriate" for the student to attend algebra classes when she should be spending time learning functional math skills (id.). The district staff explained that the student would be working on functional academic skills, including reading, writing, and math, during the vocational block, ISP math class, and study skills class (id.).

The parent expressed concern that there was "only one," "confusing" speech-language goal, and the district speech therapist discussed the rationale for the goal and explained the assessment process (Dist. Ex. 7 at p. 2). The speech therapist explained that an area of need that was evident from testing conducted with the student was recalling information that was presented without context, and that the "student would always need a little help in the social domain" (pragmatic language) (*id.*). The director asked the Riverview staff if they had any input regarding the "student's speech abilities and needs," and they "stated that their speech-language goals addressed the student's executive functioning and listed benchmarks" (*id.*). The Riverview speech-language benchmarks included strategies on time management, transitions, and reducing behaviors that inhibited the completion of tasks and the Riverview staff noted that planning and time management were "important for the student's speech and language needs" (*id.*). The district staff explained that they addressed these skills through a daily living skills goal (*id.*). When the student's mother expressed that the student's pragmatic language skills had not generalized into the community, the committee added a speech and language consult so that the speech therapist could work with the student directly in the community to address that need (Tr. pp. 565-66; Dist. Ex. 7 at p. 2; compare Dist. Ex. 7 at p. 21, with Dist. Ex. 6 at p. 19). When the district special education teacher added that the student could practice and improve pragmatic skills in the community on field trips and community-based educational experiences such as internships, the parent stated, "it is too little, too late" (*id.*). The parent noted that the student had made progress while at Riverview and her community skills had "improved" (*id.*). The student's mother stated that the student's needs could only be addressed in a residential setting with 24-hour support, and that she felt it was not possible to generalize language pragmatics with typical students in the district ISP (Tr. pp. 565, 567, 2223; Dist. Ex. 7 at p. 2).

The district school psychologist discussed how the student managed time and planning in completing tasks and fulfilling obligations, as well as the student's shared self-perceptions during recent triennial testing (Dist. Ex. 7 at p. 2). Likewise, the special education teacher discussed the student's awareness of her need for external cues when she sought a battery for the timer in her locker to continue to self-manage her time (*id.*). The parent noted that "such progress [wa]s not generalized to adulthood but the CSE should 'not revisit that'" (*id.*). The parent spoke about the importance of the home-school connection in middle school and expressed that less attention was given to her when the student progressed to high school (*id.*). The director discussed that the high school ISP had family training available and the special education teacher noted that the parent did not attend the available family sessions with the BCBA (*id.*). The parent stated that she "stopped attending because nothing was changing" (*id.*). The special education teacher noted that the school's goal-based data indicated that the student was making progress at school, and further, from the school's perspective, because the parent did not attend the family training sessions, things were going well at home (*id.*).

Next, the parent expressed that she felt a disconnect from the ISP and thought the teachers did not have "high educational standards" for the student because the special education teacher suggested using spell-check and auto correct when the student composed writing on the computer (Dist. Ex. 7 at p. 3). The parent stated that in order for the student to get a job, which was the goal of the CDOS credential, the student would need to capitalize and punctuate (*id.*). The special education teacher noted that while the student was instructed in grammar and punctuation, she would also be taught to use strategies and tools such as spell-check (*id.*). The parent stated that she felt her expectations for the student were higher than the school district's expectations and

suggested that went as far back as early intervention when she was told to mitigate her expectations (id.).

An individual identified as a "guest of the parent" stated that the student had not met expectations and the district staff noted that the data taken indicated progress toward the student's goals (Dist. Ex. 7 at p. 3). According to the meeting summary, "the committee" stated that "a residential program would be too restrictive for the student" and that the district "special education program was appropriate for the student's current individual educational needs, home-community functioning and transition to adulthood" (id.).

The parent stated that she was aware of "the supports, programs, services, and community accessibility in place for the student" in the district but did "not trust the school" (Dist. Ex. 7 at p. 3). The director noted that since the parent stated her concerns, the district had been trying to address them but the parent expressed that the student's needs could not be met in a non-residential placement (Tr. pp. 567-68; Dist. Ex. 7 at p. 3). The committee discussed plans for vocational training and internships on the IEP to include socialization and vocational and functional skills (Dist. Ex. 7 at p. 3). The director "offered that the CSE would amend the IEP if the parent or [the district] ISP or [Riverview] no longer felt these to be needs or the needs had changed" (id.). Further, the director compared the Riverview school program with the district ISP and stated that the ISP "ha[d] everything that [Riverview] ha[d]" and that the ISP "afford[ed] the student opportunities in her home district, her hometown, in her least restrictive environment, supporting her relationships and helping her succeed here" (id.). The director continued that "[Riverview]'s assessment of the student's strengths and needs w[as] aligned evenly with what the [district] special education program offer[ed]" (id.). When the district speech therapist indicated that she was looking forward to working with the student in the coming year because the emphasis was on functional skills, the parent stated "just so you know, she is not coming back" (id.). The parent verbalized her disagreement with the CSE's recommendation that the student receive special education services in the district ISP and noted that she would be exercising her due process rights (id.).

Turning to the August 2017 IEP, the present levels of performance included a May 2017 narrative report of the student's progress at Riverview (Dist. Ex. 7 at p. 14). According to the IEP, with respect to basic cognitive/daily living skills, the student was beginning to get her personal hygiene routine done in an appropriate amount of time (id.). Although the student was very rigid about completing her showering routine she showered without prompts, picked out her outfit without staff reminding her, and brushed her teeth in the morning before watching TV in the common room (id.). The IEP noted that the student needed a significant amount of support with reciting her mother's phone number, and that she was comfortable seeking out support staff and advocating for herself (id.). Based on the Riverview progress report, the IEP indicated that the student sometimes had difficulty talking about negative feelings that were bothering her during the day which made her upset as she was going to bed (id.). Further, the IEP noted that the student had been socializing more frequently with peers in her dorm and in other dorms during her free time, but that she needed to work on initiating socialization because typically she had been invited into these situations (id.). The IEP noted that "[g]iven the student's cognitive delays and challenges with functional daily living skills, she [wa]s not expected to master skills at the rate of same aged

peers" (*id.*).¹⁷ With respect to adaptive functioning, the IEP referenced the results of a March 2017 administration of the Vineland III, on which the student's adaptive functioning was rated as being slightly higher at home than at school (*id.* at pp. 7, 14). The IEP noted that the student's overall adaptive functioning at home and school was significantly below expected levels for her age and indicated limitations in the student's capacity to function appropriately and independently across settings (*id.* at pp. 14-15). The IEP noted that the student needed to work on utilizing strategies for time management in order to complete daily living tasks in an appropriate amount of time and to utilize checklists, timers, and visual cues (*id.* at p. 15).

With respect to study skills, the IEP indicated that the student continued to use strategies to stay focused more independently and that she created and used lists at home and at school, and at times, initiated the strategy to help herself stay focused (*Dist. Ex. 7* at p. 15). The IEP indicated the student needed to focus on the task at hand and utilize strategies to reduce distractions (*id.*).

With respect to reading skills, the August 2017 IEP indicated that the student scored in the average range on the total reading composite of the Wechsler Individual Achievement Test – Third Edition (WIAT-III) and demonstrated strengths in word reading and pseudoword decoding, which demonstrated her strong decoding skills (*Dist. Ex. 7* at pp. 8, 11). The IEP noted that the reading comprehension subtest was an area of relative challenge, as the student had difficulty answering questions that required inferential thinking (*id.* at p. 11). According to the IEP, the student's score on the oral reading fluency subtest was in the average range and highlighted her reading accuracy (*id.* at pp. 8, 11). The IEP stated that according to a May 2017 Riverview school progress report, the student continued to develop paragraph summaries that demonstrated comprehension of plot and exhibited proper sequencing of events using two-column notes and paragraph graphic organizers to map out her thoughts and ideas (*id.* at p. 11). Based on the Riverview progress report, the IEP noted that the student had found success using a Chromebook to type her work and manage her files and that her conclusion statements as predictions were consistently on point with respect to the current class novel (*id.*). The IEP stated that the student benefited from story mapping as part of whole group instruction to develop topic sentences that stated the main idea (*id.*). In addition, the IEP stated that the student had made noted gains in identifying cause and effect relationships both as individual statements and within the context of the current novel being read in class (*id.*). Further, the IEP noted that according to the Riverview report, the student continued to benefit from visual aids as a scaffolding technique and made cause and effect comparisons with this support (*id.*). In addition, the student was very motivated by the current novel and continued to be a reliable contributor to class discussion and activities in the classroom making logical predictions based on story evidence (*id.*). The IEP noted that the student used her lookback strategy consistently when completing homework which benefited the student when completing assignments involving summary writing, predictions, and comprehension (*id.*). With respect to reading, the IEP stated that the student needed to work on identifying textual evidence, both implicit and explicit, in answering questions (*Dist. Ex. 7* at p. 15). The IEP further indicated that the student needed to work on improving reading skills by stating the theme of content area text being read (*id.*).

¹⁷ In other parts of the present levels of performance, the IEP noted similar concerns regarding the student's executive functioning skills, ability in mathematics, and reading abilities (*Dist. Ex. 7* at pp. 11, 13, 15).

Turning to written expression, the August 2017 IEP indicated that on the WIAT-III written expression subtest, the student scored within the below average range; however, her spelling and sentence building were areas of relative strength as she correctly spelled a variety of words and wrote sentences using specific words (Dist. Ex. 7 at pp. 8, 12). According to the IEP, the sentence combining subtest was more challenging for the student and she left out important details when combining two or three sentences into one sentence (*id.*). The IEP noted that the student had difficulty with text organization and elaborating of details, reasons why, transitions and a conclusion in the essay composition subtest (*id.*). In addition, the IEP stated that in all of the writing tasks, the student demonstrated difficulty remembering to capitalize words in the beginning of sentences and refraining from capitalizing letters within sentences that were not proper nouns (*id.*). The IEP noted that given the student's cognitive delays and challenges with writing she was not expected to master skills at the rate of same aged peers (*id.*). The IEP indicated that according to the May 2017 Riverview progress report, the student wrote sentences that included a subject, predicate, and two expanders and she benefited from having picture prompts to help her initiate her writing (*id.*). The IEP stated that the student was able to identify nouns, predicates, and expanders within a sentence, sorting them as well, and her sentences ranged from four to 12 words depending on her focus (*id.*). Based on the Riverview progress report, the IEP noted that the student required much prompting to start her work, as well as continued prompting to complete her work (*id.*). According to the IEP, the progress report noted that the student benefited from having class time chunked into sections, so she was able to visually see how much time she had for a certain task (*id.*) In addition, the IEP noted that the student benefited from having sentence starters as well as utilizing a paragraph template to organize her thoughts (*id.*). The IEP indicated that the student required assistance in planning, revising, and editing written assignments, and that she needed to work on incorporating correct capitalization and punctuation in her writing (*id.* at p. 15).

With respect to mathematics, the August 2017 IEP indicated that the student's scores on the WIAT-III problem solving and numerical operations subtests in March 2017, fell in the low range (Dist. Ex. 7 at pp. 8, 13). According to the IEP, the student demonstrated challenges with problems targeting the application of skills related to money, place value, patterns, and interpreting graphs (*id.*). In addition, the IEP noted that the student demonstrated difficulty with multi-digit subtraction and multiplication and division problems, and the student's math fluency standard scores fell in the very low range (*id.*). Further, the IEP explained that the math fluency subtest was a timed test and due to the student's pace and accuracy, she did not correctly complete a large number of problems (*id.*). The IEP noted that according to the May 2017 Riverview progress report, the student was able to estimate the amount of change using a rounding up strategy and she completed a simulated debit card purchase independently after participating in a guided walkthrough of the process (*id.*). The IEP indicated that the student was able to use banking vocabulary when completing these purchases, and that the student was able to complete two-step word problems involving money independently (*id.*). The IEP stated that the student was "more comfortable using addition if there were two items," and she required support in the form of one verbal prompt to multiply using a calculator rather than adding multiple numbers (*id.*). In addition, based on the Riverview progress report, the IEP noted that the student was able to add her checkbook register each week and document purchases that she would like to make and was able to calculate her current balance with support in the form of a guided walkthrough of how to complete the process before she independently completed it (*id.*). The IEP indicated that the student needed to work on solving functional math problems related to money, purchasing and

budgeting, and needed to memorize basic addition, subtraction and multiplication facts (*id.* at p. 15). According to the August 2017 IEP, he parent expressed concerns about the student's understanding of functional academic topics, especially math (*id.*).

With respect to speech-language needs, the IEP indicated that in May 2017 the student was evaluated for the purposes of her triennial review and that during testing she needed consistent reminders to focus and attend and, further, that her fidgeting could have affected the outcome of testing especially during auditory tasks, which involved listening and following directions (Dist. Ex. 7 at pp. 6, 7, 13). The IEP noted that all voice parameters were considered within normal limits for the student's age and gender, and that she used appropriate greetings and was able to initiate and maintain conversation with the clinician (*id.* at p. 13). In addition, the IEP stated that the student's speech intelligibility was judged to be excellent at all levels but that she presented with receptive language deficits, which affected her ability to recall auditory information presented out of context (*id.*). The IEP indicated that it was unknown how much the student's fidgeting interfered with the results of auditory subtests, and she was encouraged to continue using compensatory strategies for listening and memory (*id.*). According to the IEP, the student's performance on all expressive language tasks fell within the average range, with a strength in the area of grammar and syntax and a weakness in the area of labeling synonyms (*id.*). The IEP noted that the student needed to work on using compensatory strategies for out of context auditory material such as verbal rehearsal, visualization, chunking, and associations and that practice with notetaking, specifically identifying salient details and using abbreviations, needed to be implemented (*id.* at p. 15). The IEP indicated that these strategies assisted the student in recalling what she heard within both academic and social situations, since recalling auditory material was challenging for her (*id.*). In addition, the IEP stated that the student needed to work on enhancing pragmatic language skills by increasing her independence within the community through initiating questions and appropriately commenting, such as asking for the location of a particular product in a store (*id.*).

Next, the IEP noted that the student performed in the below average range on the March 2017 administration of the WIAT-III oral language test (Dist. Ex. 7 at pp. 8,15). The IEP indicated that in the oral discourse comprehension subtest, the student had difficulty answering questions related to text that had been read aloud (*id.*). The IEP stated that in the receptive vocabulary subtest, the student was able to identify the meaning of many words out of context and scored in the average range in that area (*id.*). The IEP noted that on the oral expression section of the WIAT-III, the student scored in the average range on measures of expressive vocabulary and sentence repetition and in the low range on measures of oral word fluency as she demonstrated difficulty with quickly naming many colors and animals in one minute (*id.*).

With respect to social development, the August 2017 IEP described the student as polite, funny, and respectful, and well-liked by her peers and teachers (Dist. Ex. 7 at p. 15). The IEP noted that the student was available for peer and adult conversations, that her self-report scores were all average to above average, and that she enjoyed being with her family (*id.* at pp. 15-16). In addition, the IEP indicated that according to Riverview staff and the parents, the student had adjusted well to the boarding school, and the staff at Riverview highlighted the student's ability to accurately report events and to problem-solve in social situations (*id.* at p. 16). The IEP stated that according to Riverview staff, the student needed more practice in initiating her preferences in social activities and preferred peers in those activities (*id.*) The parent expressed concern regarding

the student's knowledge of social customs and concerns and her lack of social opportunities in diverse settings (id.).

With respect to physical development, the August 2017 IEP stated that there were no physical or motor needs that required special education at that time (Dist. Ex. 7 at p. 16).

In terms of transition needs, the IEP indicated that the student needed to increase functional academics and independence with life skills, and improve functional communication, receive individualized instruction to improve academics, and increase vocational skills by participating in internships related to postsecondary interests (Dist. Ex. 7 at p. 17).

According to the August 29, 2017 IEP, with respect to management needs, the CSE indicated that the student required a safe home base that was consistently available to her for times when she was unable to remain in her general classroom and that she required the oversight of a consultant teacher to support her academic performance as well as additional behavioral support on an as needed basis (Dist. Ex. 7 at p. 16). The IEP noted that in order to address off-task behavior in the classroom, the student benefited from participation in classes taught by dual certified special education/content area teachers with the extra support of a consultant teacher who was a board certified behavior analyst (BCBA) and had expertise in working with students with developmental disabilities and autism; teaching assistant/aid support in the ratio of three to one; refocusing and redirection; breaks; directions clarified; graphic organizers; and a copy of class notes (id.). In addition, the IEP stated that the student required a BIP to help her with attention and focus and stated that a reading specialist would work with the student in her resource room to help improve her reading and writing skills (id.). Further, the IEP indicated that the student would be exposed to internships in the community, to learn vocational skills, and foster connections in the community (id.). The IEP stated that the student would take a vocational class to work on vocational "soft skills," social skills, and functional math, reading, and writing skills used in the community (id.).

The August 2017 CSE continued to recommend that the student's program be provided in the district's ISP (Dist. Ex. 7 at pp. 1, 19-21). Notably, while the August 2016 CSE recommended that the student attend a 15:1 special class for both ELA and social studies, the August 2017 CSE, consistent with the recommendation made by the May 2017 CSE, recommended that the student receive direct and indirect consultant teacher services in these classes (compare Dist. Ex. 4 at p 15, with Dist. Exs. 6 at p. 18; 7 at p. 19). In addition, while the August 2016 CSE recommended that the student receive consultant teacher services for math and vocational skills, the May 2017 and August 2017 CSEs recommended that the student attend 12:1+(3:1) special classes for math and vocational instruction for the 2017-18 school year (compare Dist. Ex. 4 at p. 15, with Dist. Exs. 6 at p. 18; 7 at pp. 19-20). The May 2017 and August 2017 CSEs also replaced a recommendation for a daily 12:1:(3+1) special class for study skills with a recommendation for daily resource room services in a ratio of 5:1 (compare Dist. Ex. 4 at p. 15, with Dist. Exs. 6 at p. 18; 7 at p. 20). In terms of related services, the May 2017 and August 2017 CSEs continued the recommendation for speech-language therapy and family training from the prior IEP (compare Dist. Ex. 4 at p. 15, with Dist. Exs. 6 at p. 18; 7 at p. 20). The May and August 2017 CSEs removed a recommendation for small group social skills training and replaced it with a recommendation for individual and small group counseling (compare Dist. Ex. 4 at p. 15, with Dist. Exs. 6 at p. 18; 7 at p. 20).

The director of special education testified that the recommended English class, with the support of consultant teacher services, would have been taught by a certified special education teacher who was also certified in the content area and the student would have received push-in support from a "TA," as well as the support of the ISP teacher who was certified in special education and was also a BCBA (Tr. p. 386-87).¹⁸ The director noted that the academics in the class would have been modified to meet the student's needs (Tr. p. 387). Similarly, the student's social studies class would have been taught by a dual certified special education teacher and the student would have received push-in support from a "TA" and consultant teacher support from the ISP teacher (Tr. p. 387). The director noted that the student would have received multiple levels of support and the class content would have been modified to make it accessible to the student (Tr. p. 387). The director testified that the CSE recommended a 12:1+(3:1) special class for the student for math and explained that there was a discussion at the CSE meeting about the Regents curriculum and requirements for the CDOS being beyond the student's ability (Tr. p. 388). She recalled that when district staff spoke about how the student had demonstrated success and achievement in the Regents curriculum the parent asserted that the student was never going to pass the math Regents and that it would be an area of challenge for the student (Tr. pp. 388, 393). As a result, the CSE recommended a special class for math to help prepare the student for the Regents and to also work on functional math skills (Tr. p. 388). With regard to the student's science class, the director reported that it was an elective class that was taught by a dual certified special education teacher with the push-in support of a teaching assistant and the ISP teacher as the consultant teacher (Tr. p. 388). She noted that the student had already met her Regents requirement in science and therefore her class was an elective and more hands-on (Tr. p. 391). The director stated that the CSE also recommended that the student receive resource room service to work on her writing needs and reading comprehension, such as answering inferential questions (Tr. pp. 389, 553). The director further stated that consultant teacher services were recommended for physical education every other day, alternating with an ISP study skills class that focused on executive functioning skills (Tr. p. 387). In addition, the CSE recommended a daily double-period vocational block that would focus on the student's vocational skills, community-based instruction, daily living skills, and social skills (Tr. p. 389). According to the director, the resource room teacher who would be working with the student was a certified academic language therapist teacher (Tr. p. 390). She acknowledged that the recommendation for a social skills group was no longer on the student's IEP but explained that it had been replaced with a recommendation for small group counseling services in which social skills would be addressed (Tr. pp. 553-54).

The director reported that, for the student's 12th grade year, the district tried to move away from self-contained classes in English and social studies in order to begin the process of transitioning the student to a post-secondary world where there were no self-contained classes (Tr. pp. 391-92). She noted that the student's classes would have included some less-disabled students and some non-disabled students, similar to when the student transitioned out of high school (Tr. p. 392). The director reported that the CSE recommended a change in the student's vocational class from consultant teacher services to a special class to reflect that the class was only for students in the ISP program (Tr. pp. 393-94). With respect to related services, the director reported that the

¹⁸ The August 2017 IEP called for the support of a 3:1 teaching assistant and a 3:1 aide (Dist. Ex. 7 at p. 20). It is not clear from the IEP, whether the supplementary support personnel, , or which supplementary support personnel, would have been assigned to specific classes.

CSE recommended the addition of individual counseling services for the 2017-18 school year, based on the discussion at the CSE meeting (Tr. pp. 394, 553). She recalled that the parent emphasized the student's lack of opportunity for authentic friendships and romance in the district and her skill set in this area was lacking (Tr. p. 394). The director reported that the CSE added a goal to be worked on in counseling that targeted the student's ability to socialize outside of school (Tr. p. 395). She further indicated that the CSE added a goal to address the student's difficulty following social customs (Tr. p. 396).

The district special education teacher testified that, for the 2017-18 school year, the student would "continue[] to get the same type of support that she received all along with that 3:1 ratio," and noted that consultant teacher services were provided in classes that were not limited to special education students (Tr. p. 1428). She reported that the classes were taught by dual certified special education/content area teachers (Tr. p. 1428). The teacher noted the addition of the special class in math for the student during the 2017-18 school year and indicated that the purpose of the class would be two-fold, one to work on functional math skills given the student's deficits and difficulties in math, and two to help prepare the student if she wanted to retake the algebra Regents (Tr. pp. 1428, 1902-03). She opined that the recommendation for a special class for math was important because math was an area of great weakness for the student (Tr. p. 1428). The special education teacher noted that the district had experienced success with other students "in giving them a lot of daily repetition in reviewing [R]egents questions" and had students pass the Regents, even if they had significant deficits in math (Tr. pp. 1428-29). She opined that the combination of doing Regents "prep" as well as functional math was "a very appropriate class for the student" (Tr. p. 1429). The special education teacher testified that the resource room would be taught by a teacher trained in Orton-Gillingham (Tr. p. 1429). She explained that, in reviewing the results of academic testing, the district determined that it would be appropriate for the student to have more of an emphasis on reading and writing and the resource room teacher was an expert in that field (Tr. pp. 1430, 1904). She indicated that the student's study skills class from the previous school year was replaced with the recommendation for resource room services (Tr. p. 1905). The special education teacher opined that the vocational class remained appropriate for the student as it addressed vocational skills, ADLs, social skills, and community skills for adult living (Tr. pp. 1430-31). The teacher explained that the student needed to take physical education as it was a required class for graduation (Tr. p. 1431). She suggested that individual family training was appropriate as it was designed to address concerns at home with executive functioning and functional skills, including being able to complete tasks in a timely manner (Tr. p. 1432). She indicated that the recommended frequency was "a matter of how much the parents were able to access it" and, given that the family did not access the service the previous year, the CSE decided not to increase the frequency (Tr. p. 1906). The special education teacher noted that the student was also eligible for supports through OPWDD that in conjunction with the recommended family training on the IEP would have been more than one hour per week (Tr. pp. 1906-07).

The special education teacher testified that information shared by Riverview regarding the student's present levels of performance and progress was consistent with the district's observations (Tr. pp. 1900-01). The teacher opined that the student's 2017-18 IEP was reasonably calculated to afford the student meaningful benefit in light of her particular circumstances in that the district addressed the concerns raised by the parent, district assessments, and reports from Riverview (Tr. p. 1434).

Further, the August 2017 CSE added one reading goal, adjusted the student's mathematics goals to become more functional, modified the student's speech-language goals to include a goal related to the student's need for support in community interactions, recommended study skills goals targeting the student's time management skills and test anxiety, and an ADL goal that also targeted the student's time management skills (compare Dist. Ex. 4 at pp. 14-16, with Dist. Ex. 7 at pp. 17-19).

The hearing record demonstrates that the student's needs did not significantly change from the 2016-17 school year to the 2017-18 school year. However, as noted above, the district modified the recommended annual goals for the student as well as the recommended special education services to align with her present levels of performance and needs as identified by the staff of Riverview, district staff, and the parent. Overall, the CSE's recommendations for the student's program for the 2017-18 school year were comprehensive, flexible and appropriately supportive and targeted the student's complex and individual needs as presented at the time of the meeting. As reflected above, the program recommendations, including the recommendation for consultant teacher services, was appropriate for the student and the student was offered a FAPE for the 2017-18 school year. The IHO's finding to the contrary must be reversed.

VII. Conclusion

Having found that the district offered the student a FAPE for the 2016-17 and 2017-18 school years, the necessary inquiry is at an end.

I have considered the parties' remaining contentions and find them to be without merit.

THE APPEAL IS SUSTAINED.

THE CROSS-APPEAL IS DISMISSED.

IT IS ORDERED that the that the IHO's decision dated September 13, 2021 is modified by reversing those portions which determined that the district failed to offer the student a FAPE for the 2016-17 and 2017-18 school years and ordered the district to reimburse the parents for the costs of the student's attendance at the Riverview School for the 2016-17 and 2017-18 school years.

Dated: **Albany, New York**
 December 15, 2021

STEVEN KROLAK
STATE REVIEW OFFICER