



The University of the State of New York

The State Education Department

State Review Officer

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No. 22-129

Application of the BOARD OF EDUCATION OF THE HEWLETT-WOODMERE 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:

Volz & Vigliotta, PLLC, attorneys for petitioner, by Michael G. Vigliotta, Esq., and Sarah A. Gyimah, Esq.

Thivierge & Rothberg, PC, attorneys for respondent, by Christina D. Thivierge, 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) which found that it failed to offer an appropriate educational program to respondent's (the parent's) son and ordered it to reimburse the parent for the costs of the student's tuition at the Fusion Academy (Fusion) for the 2021-22 school year.¹ The appeal must be sustained.

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];

¹ Throughout this decision, the term parent refers solely to the student's father.

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[a]). The opposing party is entitled to respond to an appeal or cross-appeal in an answer (8 NYCRR 279.5). The SRO conducts an impartial review of the IHO's findings, conclusions, and decision and is required to examine the entire hearing record; ensure that the procedures at the hearing were consistent with the requirements of due process; seek additional evidence if necessary; and render an independent decision based upon the hearing record (34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]). The SRO must ensure that a final decision is reached in the review and that a copy of the decision is mailed to each of the parties not later than 30 days after the receipt of a request for a review, except that a party may seek a specific extension of time of the 30-day timeline, which the SRO may grant in accordance with State and federal regulations (34 CFR 300.515[b], [c]; 8 NYCRR 200.5[k][2]).

III. Facts and Procedural History

The student in this case began attending the district high school for ninth grade in the 2018-19 school year (see Parent Ex. D at p. 2).² Prior to his enrollment in the district, the student's mother passed away in April 2016 (2015-16 school year) when the student was attending middle school in another district (id.). At that time, the student was described as an "honors student" who "had friends, and was a competitive athlete" (id.).³ Both the student and his sibling received grief counseling for approximately three to four months, and as a result, the student "was determined to be reasonably well-adjusted" thereafter (id.). In August 2016, the student's sibling left for college (id.).

When the student returned to middle school in September 2016 (2016-17 school year), he "lost interest in school" and his "grades declined," but the student "remained mostly functional" (Parent Ex. D at p. 2). At this time, the parent relocated to the district that is the subject of this administrative proceeding to "start a blended family"; however, the student "resisted the move with every fiber and desperately wanted to stay with his friends" (id.). The parent enabled the student to complete middle school within the other school district prior to transitioning the student to the district for ninth grade (id.).

In ninth grade at the district high school (2018-19 school year), the student began "missing classes and psychiatrists working with [him] attributed his absenteeism to oppositional behavior" (Parent Ex. D at p. 2).⁴ Evidence in the hearing record reflects that, after relocating to the district, the student "attended therapy sessions with a psychologist . . . and developed a positive alliance" with this therapist; in addition, the student "connected with a psychiatrist, . . . , who perceived his resistance to attending [the district h]igh [s]chool as more behavioral (oppositional) than psychiatric" (id. at p. 4). The student began receiving medication to treat his "acute school anxiety," as well as trialing other medications for depression (id.). However, "[a]t one point during the [school] year, [the student] did not get out of bed and remained in the same clothes for several days" (id. at p. 2). The student was hospitalized for approximately six days in or around January 2019, where he was diagnosed as having a "Major Depressive Disorder, Recurrent, Severe Without Psychotic Features" (id.; see Tr. pp. 411, 527; Parent Ex. N at p. 5).⁵ According to the evidence, the student's "school attendance became problematic as the spring continued," and "[d]espite

² As will be discussed, the parent privately obtained a neuropsychological evaluation of the student in May 2021; accordingly, information about the student's history prior his enrollment in the district for ninth grade has been gleaned primarily from the May 2021 neuropsychological evaluation report (Parent Ex. D at pp. 1-4).

³ Evidence in the hearing record reflects that, "after puberty," the student's "psychiatric status declined significantly . . . and severely complicated his ability to function" (Parent Ex. D at p. 2). However, the student's "emotional deterioration ha[d] not appeared connected with [his mother's] death" (id.).

⁴ The hearing record reflects that the student was absent a total of 73.5 days during the 2018-19 school year: first quarter, 2 absences; second quarter, 12 absences; third quarter, 21.5 absences; and fourth quarter, 38 absences (see Parent Ex. N at p. 4).

⁵ The evidence reflects that the student had also been diagnosed as having an "oppositional defiance disorder" (ODD) (Parent Ex. N at p. 5).

catch-up instruction being given, meetings with school personnel, a plan for a truncated day, and modified classwork [and] exam requirements, [the student] had great difficulty resuming attendance" (Parent Ex. N at p. 5).

During summer 2019, the student was referred to the CSE (see Tr. p. 189). Finding the student eligible to receive special education as a student with an other health impairment, the CSE recommended that the student attend a therapeutic day program for the 2019-20 school year (10th grade) (see Dist. Ex. 14 at p. 1; see also Tr. pp. 420-22; Parent Exs. N at pp. 4-5; O at p. 1).⁶ In late September 2019, the student was hospitalized for the second time for "significant depressive symptoms," which included self-harm behaviors (Parent Ex. N at p. 5; see Tr. pp. 411-12; Parent Ex. D at p. 2). By the end of October 2019, the student had been accepted to attend a therapeutic day program, which he had participated in selecting with his parent and which he began attending in or around January 2020 when the "semester started" (see Tr. pp. 420-25; Dist. Ex. 14 at p. 1).⁷ The evidence reflects that, while attending the therapeutic day program, the student "socialized with peers but was 'mentally checked out'" (Parent Ex. D at p. 2). At a meeting held on February 24, 2020, the CSE subcommittee changed the student's eligibility category from other health impairment to emotional disability "to more accurately reflect the student's current areas of disability" and agreed to "explore residential programs" (Parent Exs. N at p. 1; O at p. 1). In addition, the February 2020 IEP documented that, to date, the student had "attended [the therapeutic day program] only a few days thus far," but the student's "homeroom teacher had reported that when [the student] did attend, he felt that that he would fit in nicely to the classroom" (Parent Ex. N at p. 4). The February 2020 IEP also documented the parent's concern about the student "not attending instruction" and that he "would speak with the outside medical doctor regarding the possibility of home instruction" (id.). Additionally, the February 2020 IEP noted that staff from the therapeutic day program reported that the student and his parent "participated in a meeting to try to get [the student] to attend school," but the student was not attending (id. at p. 5). Staff from the therapeutic day program "agree[d] that [the student wa]s in need of more support through a residential program" and the parent "agreed to explore residential placements" for the student (id.).⁸

On December 14, 2020, a CSE subcommittee convened for a requested review (see Parent Ex. P at p. 1). According to the December 2020 IEP, the student began attending a residential program in July 2020 (see Parent Ex. P at p. 4). As reflected in a December 2020 IEP, although the student "appeared to adjust positively, he continued to experience significant psychiatric

⁶ The student's testing results obtained in July 2019 appear in all of the IEPs developed prior to June 2021 (see, e.g., Parent Ex. N at pp. 2-3).

⁷ Evidence in the hearing record reflects that, prior to attending the therapeutic day program, the student had been absent 14 out of 29 school days during the 2019-20 school year (see Parent Ex. N at p. 4).

⁸ At that time, the parent also reported that the student had been to the emergency room a "few times but [was] not admitted" (Parent Ex. N at p. 5). It was also noted in the February 2020 IEP that the student's "poor sleep patterns impact[ed] upon his mood," he began taking a new medication for depression, and he was "beginning with new outside treatment providers" (id.). As one of the strategies to address the student's management needs, the February 2020 IEP reflected that he required a "positive support plan with strategies to address school attendance," as well as school based counseling to "support his academic progress and success" (id. at p. 6).

symptoms which impacted his academic performance," and during "summer session, he earned 'no credit' grades in [his courses]" (*id.*). The student returned "home for August break, with the plan to return [to the residential program], but ha[d] not returned" (*id.*). According to the December 2020 IEP, the parent "acknowledged" that the residential program was the "right place" for the student and where he needed to be, but "cited concerns regarding COVID-19 and [had] chosen to keep him home as a fully remote student" (*id.*). As a fully remote student, he was enrolled in approximately seven courses, and at the start of the 2020-21 school year, the student "appeared to have some motivation towards school work"—and the parent reported seeing the student do more school work than "he had seen him do in quite some time" (*id.*). However, the student's motivation soon "faded" and, at the time of the December 2020 CSE subcommittee meeting, he had "not turned in the majority of his assignments in all classes," he was "not engaged with teachers for live instruction or for live one-on-one support," and he was "not responding to messages offering support or to attend office hours" (*id.*). As a result, the student had not received any "credit for his remote courses for the first quarter" at the residential program (*id.*). In addition, the December 2020 IEP reflected that the student had "inconsistent to no participation in distance learning, ha[d] missed tests and quizzes and failed to submit required assignments" (*id.*). The student had received fully remote instruction "since the end of summer session" at home (*id.*).

As reflected in the December 2020 IEP, the parent "expressed that [the student] need[ed] 1:1 instruction at th[at] time in order to learn as [his] anxiety [wa]s so severe he c[ould not] access learning in a school environment" (Parent Ex. P at p. 5). The parent also "shared that [the student wa]s very anxious about his future and being forced to go back to the residential program" (*id.*). The student's treating psychiatrist "stated that he w[ould] submit a letter requesting home instruction" for the student (*id.*).

According to the December 2020 IEP, the student—while attending the residential program—"quickly made friends with a few students and appeared engaged socially"; the student also "followed his program, and although he did little to no school work, he was nevertheless cooperative with staff" (Parent Ex. P at p. 5). In addition, the student attended counseling at the residential program and was "candid about his psychiatric symptoms" (*id.*). While attending the residential program, the student's "mood appeared depressed," and he "acknowledged generalized anxiety, self-harming ideation—cutting himself—and non-specific suicidal thoughts" (*id.*). As further noted in the December 2020 IEP, the student "described persistent auditory command hallucinations, voices of family and friends telling him to hurt himself," and "reported that hallucinations ha[d] been a constant presence in his life for a long time" (*id.*).⁹ The student had also reported "difficulty falling asleep and that at night he experienced an increase in anxiety, intrusive thoughts, suicidal ideation and command hallucinations" (*id.*).

According to the December 2020 IEP, the student "described a persistent social and academic anxiety, despite what appeared on the surface to be a satisfactory adjustment to [the residential program] by his own account" (Parent Ex. P at p. 5). In addition, the IEP reflected that the student "described experiencing uncomfortable levels of anxiety when staff would prompt him

⁹ The evidence reflects that although the student began experiencing hallucinations as early as age seven or eight years old, the parent only learned about the student's auditory hallucinations after the student reached puberty "(within the last year)" (Parent Ex. D at p. 2).

to go to school in the morning," and further described "moments of social anxiety around peers he identified as friends, especially when it came to maintaining conversation with them" (id.). When he experienced social anxiety around his peers, the student "would socially withdraw and make up a reason to leave" (id.). The December 2020 IEP noted that the student engaged in "one incident of self-harm—cutting with a chef's knife—while staying" at his parent's home during the summer; however, the student "denied suicidal plan/intent, insisting that he cut in an effort to dispel a feeling of numbness and to seek relief from his intrusive thoughts and hallucinations" (id.). Upon returning to the residential placement following this event, the student had the kitchen knife in his possession, which he explained was for the purpose of cutting himself "if he had the urge and that he did not have suicidal intentions" (id.).

As documented in the December 2020 IEP, the student had remained home from the residential placement since August break and had "strong reservations about returning" to the residential placement (Parent Ex. P at p. 5). According to the student, he could "better manage his psychiatric symptoms"—which he had been experiencing "but to a lesser degree"—while he was at home (id.). As reflected in the IEP, the student appeared to be "more comfortable at home with less social-emotional and academic demands, and therefore, [wa]s experiencing a decrease in psychiatric symptoms" (id.). With respect to counseling at the residential program, the student's sessions initially "focused on engagement, adjusting to [the program], and helping him to manage his psychiatric symptoms"—the student had attended these sessions regularly and spoke "candid[ly] about his symptoms" (id.). The student was reportedly "seen almost weekly during the summer" by the psychiatrist at the residential program (id.). While at home, the student's participation in "tele-therapy ha[d] been inconsistent," and his treating psychiatrist "revised his medication without consultation" with the residential program's psychiatrist (id.).

As reflected in the December 2020 IEP, the parent reported about the student's medication regimen, which was "showing some improvement," and cognitive behavioral therapy (see Parent Ex. P at p. 6). The parent also "shared that [the student] experience[d] paralyzing anxiety in social situations," and while he continued to feel that the "residential placement [wa]s appropriate," he was "not comfortable forcing [the student] to return to [the residential program] as this w[ould] only increase his anxiety" (id.). With respect to strategies to address the student's management needs, the December 2020 IEP indicated that the student "need[ed] to acquire strategies to manage his anxiety which significantly impact[ed] his ability to participate in learning in an academic environment" (id.).

In a December 14, 2020 prior written notice, the district indicated, among other things, that the student's treating psychiatrist would "provide a letter to the district requesting home instruction for a period of 6 weeks in order to start to 'bridge the gap' for [the student] to return to [the residential program]" (Parent Ex. Q at p. 1).¹⁰ The CSE would reconvene in the "first week in February to review progress" (id.).

On February 8, 2021, a CSE subcommittee convened for a requested review (see Parent Ex. R at p. 1). At that time, the parent reported that the student was "attending in person, [two]

¹⁰ Following the December 2020 CSE subcommittee meeting, the district sent information packets to approximately six State-approved nonpublic schools (see Dist. Ex. 14 at pp. 1-2).

classes twice weekly at Fusion," and was maintaining averages of 87 and 100 in those classes (*id.* at p. 4).¹¹ The parent also reported that the student "look[ed] forward to the structure of attending class" (*id.*). According to the parent, the student "continue[d] to experience heightened anxiety that impact[ed] his ability to function daily" (*id.* at p. 5). The student also continued to receive his medication treatment reported at the December 2020 CSE subcommittee meeting, and "note[d] a pronounced difference" (*id.* at p. 6). In a prior written notice dated February 8, 2021, the district noted that the parent "requested a new consent to share information with placements . . . for [his] signature so that the district c[ould] continue to seek other therapeutic residential program options" for the student (Parent Ex. S at p. 1).¹²

In a letter dated April 15, 2021, the student's psychiatrist wrote to the district on behalf of both the student and the parent (*see* Parent Ex. C).¹³ The psychiatrist described the student as a "bright, creative young man who suffer[ed] from longstanding anxiety and depression," and who, as a result, had "participat[ed] in psychotherapy, [and was] receiving psychotropic medication" (*id.*). The psychiatrist also noted that the student had been attending Fusion for the 2020-21 school year (*id.*). According to the letter, the psychiatrist had become aware that the "family and their school district [we]re considering what placement would be most appropriate for [the student] for next year and specifically that the district [wa]s considering a residential placement" (*id.*). As the student's psychiatrist, he "wanted to offer an opinion in this matter," and he "advocate[d] that the student's] psychiatric problems [we]re certainly manageable in the community and d[id] not require residential psychiatric management" (*id.*). Moreover, the psychiatrist indicated that the student had been in a "residential educational placement in the past and did not succeed there," the student's experience had been "psychologically traumatic," and the student made "no academic progress" there (*id.*). However, since attending Fusion, the psychiatrist noted that the student made "substantial educational gains," "earning credits in every class," and receiving "outstanding" teacher reports (*id.*). According to the psychiatrist, "[m]ost promisingly, [the student wa]s amenable to increasing his academic load for next year"; therefore, he opined that "continuing at Fusion Academy [wa]s in [the student's] best interest and would be far preferable to the emotional toll and academic regression likely to be seen at another residential program" (*id.*).

Over the course of four days in May 2021, the parent privately obtained a neuropsychological evaluation of the student (May 2021 neuropsychological evaluation) to "acquire insights regarding [the student's] cognitive, behavioral, and social emotional functioning and to inform appropriate educational and/or therapeutic interventions" (Parent Ex. D at p. 1). As part of the evaluation process, the psychologist administered the following assessments: the Adaptive Behavior Assessment System—Third Edition (ABAS-3) Parent and Adult Self-Report; the Behavior Assessment System for Children—Third Edition (BASC-3): Parent and Teacher

¹¹ Fusion has not been approved by the Commissioner of Education as a school with which districts may contract to instruct students with disabilities (*see* 8 NYCRR 200.1[d], 200.7).

¹² Following the February 2021 CSE subcommittee meeting, the district sent information packets to approximately six State-approved nonpublic schools (*see* Dist. Ex. 14 at p. 2).

¹³ At the impartial hearing, the student's psychiatrist testified that he began treating the student in March 2021 (*see* Tr. pp. 667-68).

Rating Scale; the Behavior Rating Inventory of Executive Function—Second Edition (BRIEF-2): Parent and Teacher Report; the California Verbal Learning Test—Third Edition (CVLT-3); the Clinical Evaluation of Language Fundamentals—Fifth Edition (CELF-5): selected; the Connors Continuous Performance Test—Third Edition (CPT-3); the Delis-Kaplan Executive Function System (D-KEFS): selected; the Incomplete Sentences Blank—High School; the Millon Adolescent Personality Inventory; the Nelson-Denny Reading Test (NDRT); the Patient Health Questionnaire—Nine Item (PHQ-9); the Rey Complex Figure Test (RCFT); the Social Language Development Test—Adolescent: Normative Update (SLDT-A:NU): selected; the Wechsler Adult Intelligence Scale—Fourth Edition (WAIS-IV); the Wechsler Individual Achievement Test—Third Edition (WIAT-III): selected; the Wechsler Memory Scale—Fourth Edition (WMS-IV): selected; and the Wide Range Assessment of Memory and Learning—Second Edition (WRAML-2): selected (id. at p. 6). Based on the student's testing results, as well as the "negative impact of his mood and anxiety on his educational productivity," the psychologist found that it was "imperative that [the student] continue to be matriculated in an academic setting capabl[e] of addressing the needs of emotionally fragile youth" (id. at p. 18). More specifically, the psychologist noted that the student "clearly demonstrated that a given academic 'formula' [wa]s instrumental to his emotional wellbeing, which in turn, impact[ed] his scholastic engagement" (id.). The psychologist also noted the student's history of educational settings (both more and less restrictive) as "ineffective if not deleterious," and that, at Fusion for the past five or more months, his "present setting str[uck] the correct balance, not simply because of the flexibility of the program and the thoughtfulness and investment of those implementing it" (id.). According to the psychologist, the student's then-current setting at Fusion was "not simply working because [the student wa]s trending more positively from an emotional perspective" (id.). The psychologist noted that, "[i]nstead, the latter seem[ed] to be occurring because he [wa]s in a more productive educational setting," and therefore, "a transition to a conventional, more densely populated setting w[ould] constrain his educational development and elicit possible regression" (id.). In addition, the psychologist indicated that the student's then-current setting at Fusion was "fundamentally compatible given observed deficiencies in higher-order language comprehension that would invariably pose a greater liability in a traditional (lecture-style) environment" (id.). The psychologist further recommended that the student receive counseling to "address anxiety and depressive symptoms that occur[red] at school," as well as parent counseling and training for the student's caregivers "to discuss issues and conflicts that interfere[d] with familial functioning and school attendance" (id.). In addition, the psychologist identified recommended program and testing accommodations for the student, and provided strategies to address "specific executive functioning skills" and behavioral and social/emotional supports (id. at pp. 18-20).

On June 17, 2021, a CSE convened to conduct the student's annual review and to develop an IEP for the 2021-22 school year (see Dist. Ex. 1 at p. 1). As documented in the June 2021 IEP, the CSE relied upon the following to develop the student's IEP: a June 2021 attendance record, a June 2021 parent report and observations, a June 2021 progress report, a June 2021 psychiatric summary, a June 2021 teacher progress summary, a June 2021 transcript, and the May 2021 neuropsychological evaluation of the student (see id. at pp. 1-2). The June 2021 IEP also reported the testing results from the May 2021 neuropsychological evaluation (id. at pp. 2-5).

Finding that the student remained eligible for special education as a student with an emotional disability, the June 2021 CSE recommended that the student receive consultant teacher

services as "direct services provided to the student at the Twilight Program" for five hours per week, two 30-minute sessions per week of individual counseling services, and one 60-minute session per month of parent counseling and training services (Dist. Ex. 1 at p. 11).^{14, 15} In addition, the June 2021 CSE recommended the following as supplementary aids and services, program modifications, and accommodations: clearly provided directions and expectations; step-by-step outlines; check points for long-term assignments (scaffolding for larger assignments into smaller sections); hands-on activities, with opportunities to participate in multiple learning modalities activities; checks for understanding; preferential seating (near the teacher and away from ambient distractions); individual pacing prompts; additional time to complete assignments; and breaks (*id.* at pp. 11-12). The June 2021 CSE also created annual goals for the student in the areas of study skills and social, emotional, and behavioral skills, and recommended strategies to address the student's management needs (i.e., the student "require[d] specially designed instruction in a small, structured therapeutic setting," with "clearly provided directions and expectations, step-by-step outline, scaffolding of larger assignments into smaller sections, hands-on lessons, opportunities to participate in multiple learning modalities, individualized pacing, [and] frequent check-ins") (*id.* at pp. 8-10). In addition, the June 2021 IEP included measurable postsecondary goals and a coordinated set of transition activities (*id.* at pp. 9-10, 13-14). The June 2021 IEP also included the following testing accommodations: flexibility in setting and in scheduling, multiple day administration, extended time (1.5), on-task focusing prompts, and use of break periods (*id.* at pp. 12-13).^{16, 17}

In a prior written notice dated June 17, 2021, the district summarized the special education and related services recommended for the student—direct consultant teacher services (individually), counseling, and parent counseling and training—to be delivered in the district's Twilight program (*see* Dist. Ex. 18 at p. 1). In addition, the prior written notice indicated that the "CSE recommended exploring . . . out of district therapeutic day programs" and that the parent "requested information to be provided on the Twilight Program and out of district programs" (*id.*). The prior written notice reflected that the CSE recommended the program described therein because the student "exhibit[ed] significant needs in the area of emotional development that

¹⁴ The student's eligibility for special education and related services as a student with an emotional disability is not in dispute (*see* 34 CFR 300.8[c][4]; 8 NYCRR 200.1[zz][4]).

¹⁵ With respect to the "[e]ffect of [the] student's needs on [his] involvement in the general education curriculum," the June 2021 CSE documented in the IEP that the student had been diagnosed as having a "Major Depressive Disorder with psychotic features, Social Anxiety Disorder, [and] Generalized Anxiety Disorder which adversely impact[ed] his social/emotional skills and educational performance" (Dist. Ex. 1 at p. 9). The June 2021 IEP also noted that although the student needed "strategies, including positive behavioral interventions, supports and other strategies to address behaviors that impede[d] the student's learning or that of others," the student did not require a behavioral intervention plan (BIP) (*id.*).

¹⁶ The June 2021 CSE did not recommend a 12-month school year program for the student (*see* Dist. Ex. 1 at p. 12).

¹⁷ Within the section of the June 2021 IEP describing the student's participation with nondisabled students, the CSE noted that the student "require[d] a small therapeutic setting outside of the regular education classroom" and that he was exempt from the foreign language requirement needed for a diploma (Dist. Ex. 1 at p. 14).

impact[ed] his educational performance" and the student required a "small, structured setting with the support of the [c]onsultant [t]eacher for learning" (id.).

In an email to the parent dated June 22, 2021, the district identified, "[a]s per our discussion," six out-of-district programs the CSE would explore for the student to attend beginning in fall 2021; one of the six out-of-district programs included the Board of Cooperative Educational Services (BOCES) Twilight Program located within the district's high school (Dist. Ex. 13).

In a second prior written notice dated June 22, 2021, the district sought the parent's consent to send the student's "IEP, educational records, and private evaluations" (i.e., information packets) to the five listed out-of-district "therapeutic day school programs for immediate consideration," as well as a sixth option identified as "[o]ther New York State Approved Day Schools" (Dist. Ex. 3 at p. 1). To explain these actions, the prior written notice indicated that the student was "recommended for a therapeutic day school program" and that the student "currently demonstrate[d] the need for a more supportive educational environment that c[ould] better meet his academic, social and emotional needs" (id.). Similar to the first prior written notice, the second prior written notice indicated that the parent "requested information to be provided on the Twilight Program and out of district programs" (compare Dist. Ex. 3 at p. 1, with Dist. Ex. 18 at p. 1). The district enclosed a consent form for the parent's signature to permit the district to send information packets to the listed programs (see Dist. Ex. 3 at p. 3).

By letter dated June 23, 2021, the parent notified the district of his intentions to unilaterally place the student at Fusion for the 2021-22 school year, including summer 2021, and to seek reimbursement or direct funding for the costs of the student's tuition expenses (see Dist. Ex. 15 at pp. 1-2). In the letter, the parent noted that the district "refused to consider continuing [the student's] placement at Fusion, and instead, "indicated that it would send out applications packets to New York State Approved Non-Public School ('NPS') programs" (id. at p. 1). The parent also noted that, although it was not clear to him at the June 2021 CSE meeting "which NPS programs were being considered nor what class size recommendation the [d]istrict intended to make," he had not yet received the student's IEP or an "NPS recommendation" for the student (id.). The parent further noted, however, that it was clear that the student required a 12-month school year program (id. at pp. 1-2). In addition, the parent indicated that he would remain open-minded and would consider any programs the district recommended, and he had "recently received a list of NPS programs to which the [d]istrict intend[ed] to send application packets" (id. at p. 2).¹⁸ The parent also requested the provision of transportation for the student's attendance at Fusion for the 2021-22 school year, or reimbursement therefor if expended by the parent to provide the same (id.).

On or about July 5, 2021, the parent executed a registration form with Fusion for the student's attendance during the 2021-22 school year beginning on September 8, 2021 (see Parent Ex. E at p. 1). Thereafter on July 13, 2021, the parent executed an enrollment contract supplement with Fusion for the student's attendance beginning on July 12, 2021 (id. at pp. 2-4).

¹⁸ It appears that the programs the parent referred to as "nonpublic schools" were, instead, the out-of-district programs identified in the second prior written notice, dated June 22, 2021, and in the email sent to the parent, dated June 22, 2021 (compare Dist. Ex. 15 at p. 2, with Dist. Ex. 3 at p. 1, and Dist. Ex. 13).

A. Due Process Complaint Notice

By due process complaint notice dated July 22, 2021, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2021-22 school year (see Parent Ex. A at pp. 1-2). The parent indicated that the district had "been unable to find an appropriate program" for the student, which led to a "long period of regression and repeated transitions," including a residential placement that "compounded" the student's "regression and emotional distress" (id. at p. 1). The parent further noted that the district ignored the student's progress at Fusion and recommendations from professionals and recommended an "inappropriately large and unsupportive general education placement with Consultant Teacher Services" (id. at pp. 1-2). In addition, the parent indicated that the district intended to "send out application packets to New York State Approved Non-Public Schools ('NPS') programs" (id. at p. 4).

According to the parent, after he provided the district with a 10-day notice of unilateral placement letter, dated June 23, 2021, he received the student's IEP and prior written notice (see Parent Ex. A at pp. 4-5). The parent indicated that, while the June 2021 IEP reflected the recommended placement in a regular education setting with consultant teacher services, counseling, and parent counseling and training services—to begin on September 1, 2021—this program recommendation was "contrary to the recommendation made at the actual CSE meeting, which [wa]s reflected on the [prior written notice]," namely, that the district was "recommending considering several NPS programs" (id. at p. 5). The parent indicated that he was "confused by these contradictory recommendations and unsure what recommendation the [d]istrict intended to make" (id.).

With respect to the proposed program, the parent more specifically indicated that the June 2021 CSE failed to offer the student a program enabling him to receive 1:1 instruction, and instead, recommended a regular education setting with consultant teacher services, which would cause the student to regress and which was much less restrictive than previous recommendations (see Parent Ex. A at p. 5). The parent further indicated that the June 2021 CSE failed to recommend a 12-month school year program given the student's "severe regression" and that, to date, the student had "only earned two high school credits" (id.). Next, the parent noted that when the student last attended a "less individualized and supportive program," the student had expressed concerns about injuring himself, and the district failed to consider programs enabling the student to receive 1:1 instruction at home (id.). The parent also noted that, although the June 2021 CSE "copied and pasted information directly from" the May 2021 neuropsychological evaluation report into the student's IEP, the CSE failed to consider the recommendations in the evaluation report (id.). In addition, the parent alleged that the June 2021 CSE failed to "fully and accurately report" the student's present levels of performance because the CSE omitted conclusions drawn by the psychologist who conducted the May 2021 neuropsychological evaluation, which, for example, would have reflected that the student's academic setting at Fusion had been "'particularly instrumental'" in contributing to his "'improving circumstance'" (id.).

Next, the parent indicated that the student's June 2021 IEP failed to note that he required "individual pacing of instruction to ensure comprehension and engagement with instruction," notwithstanding that Fusion staff and the psychologist who conducted the May 2021

neuropsychological evaluation "both not[ed] this [wa]s a crucial component" of his "program and success" (Parent Ex. A at p. 6). The parent alleged that the June 2021 CSE failed to conduct a functional behavioral assessment (FBA) and failed to develop a behavioral intervention plan (BIP), and relatedly, that the June 2021 IEP did not include "strategies, interventions, or supports" to address the student's behavior issues (id.). In addition, the parent indicated that the June 2021 IEP failed to include appropriate annual goals for the student, as well as "specific, individualized" postsecondary goals or transition supports (id.). With respect to the annual goals, the parent noted that the June 2021 CSE failed to address the student's needs in the areas of attention and focus, and failed to include any academic goals; overall, the parent described the annual goals included in the IEP as "inappropriate, vague, and/or insufficiently target[ing] his needs," and without short-term objectives to measure progress or an "appropriate schedule" to report his progress (id.). Next, the parent alleged that the June 2021 CSE failed to meaningfully consider "expert opinions" from the student's psychiatrist and the psychologist who conducted the May 2021 neuropsychological evaluation, and similarly failed to "treat" the parent as a "full and equal" participant by not meaningfully considering his "requests and concerns" (id.). The parent also alleged that the June 2021 IEP failed to include sufficient supplementary aids, services, and program modifications to enable the student to make progress (id.). Finally, the parent indicated that the June 2021 CSE failed to consider the "full continuum of placements" for the student and improperly engaged in predetermination of his program (id. at pp. 6-7).

Next, the parent indicated that, to date, he had not been "contacted by any NPS programs" (see Parent Ex. A at p. 7).¹⁹

As relief for the alleged violations, the parent requested reimbursement for the costs of the student's unilateral placement at Fusion for the 2021-22 school year, as well as the provision of round-trip, special transportation (see Parent Ex. A at p. 7).

B. Events Post-Dating the Due Process Complaint Notice

On July 29, 2021, the parent executed the consent form the district sent with the June 22, 2021 prior written notice seeking to send information packets to the programs listed (Dist. Ex. 4). According to the evidence in the hearing record, the district submitted the student's information packet on July 29, 2021 to the five out-of-district programs listed in the consent form (see Dist. Ex. 14 at pp. 2-3). By August 10, 2021, two programs rejected the student's application as "[n]ot [a]ppropriate"; one program accepted the student's application on August 26, 2021; and one program "[r]equested [an i]nterview" (id.; see Dist. Ex. 9).²⁰

On September 26, 2021, the parent executed an enrollment contract with Fusion for the student's attendance during the 2021-22 school year beginning on September 22, 2021 (see Parent

¹⁹ To be clear, at the time the parent prepared the July 2021 due process complaint notice, he had not yet signed the consent form permitting the district to send information packets to any out-of-district programs (compare Parent Ex. A at p. 1, with Dist. Ex. 4).

²⁰ The BOCES program that accepted the student offered a 9:1+2 special class placement and counseling as a related service (see Dist. Ex. 9 at p. 2).

Ex. E at pp. 5-7). The parent also executed several additional documents on the same date related to the student's attendance at Fusion for the 2021-22 school year, including, in part, an agreement to the mastery learning model, a tutoring and mentoring contract, a permission to leave campus form, and a field trip waiver of liability and release form (id. at pp. 7-10).

On October 14, 2021, a CSE convened for a requested review (see Dist. Ex. 2 at p. 1). At the impartial hearing, the district chairperson of special education at the high school (chairperson) testified that the October 2021 CSE met for the "program review" and to "review [the student's] acceptance into the [BOCES] program," which had been "based on their screening of his application" (Tr. pp. 101-03, 144-45; see Dist. Exs. 13; 14 at p. 3). The chairperson also testified that, after discussing the BOCES program, the October 2021 CSE rejected it because it was not appropriate for the student, explaining that it could not "meet the counseling requirements" and the class size at the BOCES program had changed (Tr. p. 145). She further testified that the BOCES program "could not individualize their program to [the student's] needs," nor could the program "implement the IEP we wanted to put in place, with the flexibility and the supports that we felt and feel he need[ed]" (Tr. pp. 145-46).

Finding that the student remained eligible for special education as a student with an emotional disability, the October 2021 CSE updated the student's present levels of performance in the areas of academic and social development within the IEP based upon information drawn from the following: an October 2021 acceptance letter, an October 2021 counseling progress summary, an October 2021 parent report and observations, an October 2021 psychological summary, an October 2021 teacher progress summary, and an October 2021 transcript (compare Dist. Ex. 2 at pp. 2, 6, 8, with Dist. Ex. 1 at pp. 2, 6, 8). In addition, the October 2021 CSE recommended that the student receive consultant teacher services as "direct services provided to the student at the Twilight Program" for 10 hours per week, two 30-minute sessions per week of individual counseling services, and one 60-minute session per month of parent counseling and training services (Dist. Ex. 2 at p. 11). The October 2021 IEP included recommendations for the same supplemental aids and services, program modifications, and accommodations as recommended in the June 2021 IEP (compare Dist. Ex. 2 at pp. 11-12, with Dist. Ex. 1 at pp. 11-12).

As reflected in the October 2021 IEP, the student was then-currently enrolled in "English 10, Ancient Civilization, Recording Arts and Algebra 10" at Fusion and had "accumulated [three] high school credits" (Dist. Ex. 2 at p. 6). As reported by the Fusion teacher attending the CSE meeting, the student was "showing growth both socially and emotionally," with additional "[i]mprovements . . . noted in [the student's] level of interest and maturity" (id.). It was further noted that the student "pace[d] himself nicely when planning for completion of assignments and [wa]s doing well completing homework and outside assignments" (id.). In addition, the Fusion teacher reported that the student was "more capable than he believe[d] himself to be," and he completed the 2020-21 school year at Fusion with a "4.0 GPA" (id.).

In the October 2021 IEP, the CSE documented that the parent "requested additional information regarding the Twilight Credit Recovery Program" at the district high school and "agreed with the [CSE] discussion and recommendations" (Dist. Ex. 2 at pp. 6-7). The IEP also noted the input from the student's cognitive behavioral therapist, who reported that the student was "getting to a place that he c[ould] be successful" (id. at p. 7). The therapist also shared his concern

that a "new school placement w[ould] be detrimental to [the student's] current social/emotional position," and moreover, that the student was "'in a groove' and ha[d] 'built momentum' and a change in [his] routine would not be in his best interests" (*id.*). The October 2021 IEP also noted the private psychologist's input that the student required a "school day that [wa]s scheduled to meet his needs," and the student—at that time—was "currently attending school [two] days per week in the late afternoon and this [wa]s meeting his needs" (*id.*).

In a prior written notice dated October 14, 2021, the district summarized the CSE's decision to reject the out-of-district BOCES program discussed at the meeting (*see* Dist. Ex. 7 at p. 1). In addition, the prior written notice documented that the October 2021 CSE continued to recommend the direct consultant teacher services delivered in the Twilight Program at the district for the student, and the related decision to increase the direct consultant teacher services to 10 hours per week to be "equal to the number of weekly hours for which [the student wa]s [then-currently] in attendance [at Fusion], which [wa]s estimated to be for 10 hours weekly" (*id.*). The prior written notice also indicated that if the student's "workload" increased, the recommendation for direct consultant teacher services could be reviewed and revised based on the student's needs (*id.*). The prior written notice included that the parent had requested "additional information on the Twilight Credit Recovery Program" (*id.*).

By letter to the district dated November 10, 2021, the parent noted his participation in the October 2021 CSE meeting, and the CSE's decision to recommend a "general education placement with Consultant Teacher Services" for the student (Parent Ex. M at pp. 1-2). The parent indicated that the CSE's recommendation was "inappropriate and insufficiently supportive" for the student, as well as representing a "significant reduction in support" from earlier recommendations for the student (*id.*). As a result, the parent notified the district of his intentions to unilaterally place the student at Fusion for the 2021-22 school year, including summer 2021, and to seek reimbursement for the costs of the student's attendance at Fusion (*id.* at p. 2). The parent also requested that the district provide the student with round-trip transportation to Fusion and that he would seek reimbursement for any transportation costs he incurred for the student's attendance at Fusion (*id.*).

C. Amended Due Process Complaint Notice

In an amended due process complaint notice dated November 10, 2021, the parent reasserted that the district failed to offer the student a FAPE for the 2021-22 school year based, in part, on the same allegations as set forth in the July 2021 due process complaint notice with respect to the June 2021 IEP (*compare* Parent Ex. B at pp. 5-7, *with* Parent Ex. A at pp. 5-7). According to the parent, subsequent to his July 2021 due process complaint notice, he was "contacted by several NPS programs, although no timely recommendation ha[d] been made for a program" for the student to attend, and the district "suggested two incompatible inconsistent recommendations" by sending him "two different [p]rior [w]ritten [n]otices with two different placement recommendations" (Parent Ex. B at p. 1). As a result of the two placement recommendations, the parent alleged that the district "deprived [him] of clarity and meaningful participation in the IEP recommendation process" and, at a subsequent CSE meeting, recommended an "unsupportive, inappropriate in-[d]istrict program, despite consistently previously recommending that [the student] ultimately attend an out-of-[d]istrict day treatment program" (*id.*).

Within the November 2021 due process complaint notice the parent further elaborated on the prior written notices he received after the June 2021 CSE meeting—the first notice dated June 17, 2021 (which the parent described in the July 2021 due process complaint notice) and the second notice dated June 22, 2021—explaining that the first prior written notice reflected a "confusing double recommendation" for the consultant teacher services in the district's Twilight program, as well as noting that the district would explore "out of district therapeutic day programs,' [which was] contrary to the Twilight program recommendation" (compare Parent Ex. B at pp. 5, 7, with Parent Ex. A at p. 5). The parent also noted that the district did not provide him with "more information about the consultant teacher services program" to be delivered in the district high school, as indicated in the first prior written notice (see Parent Ex. B at p. 7).²¹

Next, with respect to the second prior written notice, dated June 22, 2021, the parent indicated that it reflected a "recommendation (as agreed at the CSE meeting) that the [d]istrict would send application packets to 'therapeutic day school programs' (i.e., NPS programs), as '[the student] currently demonstrate[d] the need for a more supportive educational environment'" (Parent Ex. B at p. 7). The parent noted that the district was required to make "'a recommendation' for [the student's] placement" for the 2021-22 school year in a timely manner prior to the start of the school year and failed to do so (id. [emphasis in original]). As a result, the district "suggested two incompatible inconsistent recommendations until October 2021," which deprived the parent of "clarity and meaningful participation" (id.). In addition, the parent noted that he "communicated with several NPS programs and cooperated" with the district's efforts to locate a placement for the student (id.).

Additionally, the parent indicated that a CSE reconvened on October 14, 2021 "to make a placement recommendation" for the 2021-22 school year (Parent Ex. B at p. 7). Notwithstanding the participation of the student's psychiatrist, the psychologist who completed the May 2021 neuropsychological evaluation of the student, and Fusion staff familiar with the student—who provided "additional information about [the student's] progress at Fusion"—the October 2021 CSE rejected the out-of-district BOCES placement that had accepted the student for the 2021-22 school year and recommended the Twilight program at the district high school (id.).²² The parent indicated, however, that the two prior written notices he received had noted that the student required a "day treatment program due to his severe and complex needs," and moreover, the October 2021 IEP reflected "serious concerns" expressed at the October 2021 CSE meeting by the student's psychiatrist about disrupting the "positive momentum" the student had gained at Fusion, which provided him with "individualized flexible scheduling" and which, according to the parent, "would not be available in the [d]istrict's Twilight program" (id. at pp. 7-8).

²¹ The June 17, 2021 prior written notice did not include any statement about providing the parent with more information about the consultant teacher services (compare Parent Ex. B at p. 7, with Dist. Ex. 18 at pp. 1-2). Rather, the June 17, 2021 prior written notice reflected that the parent had "requested information be provided on the Twilight Program and out of district programs" (Dist. Ex. 18 at p. 1).

²² The parent also noted that the student finished the 2020-21 school year at Fusion with a "4.0" grade point average and obtained his "first high school credits" (Parent Ex. B at p. 7). In addition, the parent noted that, for the 2021-22 school year at Fusion, the student was "taking more courses at once as a result of his academic, social, and emotional progress" (id.).

Next, the parent turned to the October 2021 IEP and realleged the same violations as he had asserted regarding the inappropriateness of the June 2021 IEP (compare Parent Ex. B at pp. 8-9, with Parent Ex. B at pp. 5-7, and Parent Ex. A at pp. 5-7). Finally, the parent requested the same relief for these alleged violations as requested in the July 2021 due process complaint notice: reimbursement for the costs of the student's unilateral placement at Fusion for the 2021-22 school year, as well as the provision of round-trip, special transportation (compare Parent Ex. B at pp. 9-10, with Parent Ex. A at p. 7).

D. Impartial Hearing Officer Decision

On April 25, 2022, the parties proceeded to an impartial hearing, which concluded on June 23, 2022, after six days of proceedings (see Tr. pp. 1-749). In a decision dated August 24, 2022, the IHO concluded that the district failed to offer the student a FAPE for the 2021-22 school year, that Fusion was an appropriate unilateral placement for the student, and that equitable considerations weighed in favor of the parent's requested relief (see IHO Decision at pp. 18-28). As relief, the IHO ordered the district to reimburse the parent for the costs of the student's tuition at Fusion for the 2021-22 school year and for the costs of transportation provided by the parent, upon presentation of proof of payment (id. at pp. 28-29).

The IHO first examined the procedural requirements and pointed to "some irregularities concerning" how the district "drafted documents in this case" (see IHO Decision at pp. 18-19). Initially, the IHO noted that, although a district witness testified that she "'visited' [the student] at Fusion twice and observed him in English class," she did not provide a written classroom observation for the CSE (id. at p. 19). In a footnote, however, the IHO noted that since it was not the student's initial evaluation, a classroom observation was not required (id. at p. 19, n.9). Next, the IHO indicated that, if the June 2021 CSE "decided to refer" the student to out-of-district placements, then the "IEP should have indicated that, and it should have been an 'interim' IEP awaiting placement" (id. at p. 19). Additionally, the IHO noted that the June 2021 IEP did not "mention a search for an out-of-district placements nor d[id] it explain how five hours of service one time per week would be provided in a program that me[t] only three hours per day" (id.).

Furthermore, the IHO explained that, if the CSE had not decided to place the student in an "out-of-district therapeutic day program and was just exploring options," then the district's prior written notice was "inaccurate" (IHO Decision at p. 19). The IHO indicated that, based on testimonial evidence, the district "suggest[ed] that the placement was Twilight, but the CSE was 'canvassing' to 'see what other opportunities may [have] be[en] more appropriate" (id., citing Tr. p. 62). Regardless, the IHO found that the district "created inconsistent and confusing paperwork" (IHO Decision at p. 19).

Next, the IHO noted that the district's "three-page combined 'Prior Written Notice' and 'Request for Parent Consent to Share Student Information' in one document" was "highly unusual" (IHO Decision at p. 20). According to the IHO, a prior written notice "memorialize[d] the results of a CSE meeting, . . . , and it [wa]s never returned to the school district" (id., citing 8 NYRR 200.5[a]). According to the IHO, the district's "'Request for Parental Consent to Share Student Information' [wa]s a separate consent form that request[ed] a parent's signature, and it [wa]s always returned to the school district if consent [wa]s given" (IHO Decision at p. 20, citing 8 NYCRR

200.5[b]). The IHO further noted that the request for consent form was the "third page of this combined notice document assuming that the recipient would even read a notice that far to see the [c]onsent form" (IHO Decision at p. 20). The IHO indicated that the parent executed the consent form on July 29, 2021, and the district "used [his] slow response to this unusual document as an issue" regarding equitable considerations (*id.*).²³

Notwithstanding these procedural irregularities noted by the IHO, she ultimately concluded that the "procedural errors in this case [we]re not cumulatively sufficient to constitute a procedural denial of a FAPE because they did not impede [the student's] educational rights or benefits" (IHO Decision at p. 20). The IHO also found that the procedural irregularities did not "'significantly impede' the [parent's] opportunity to participate in the decision-making process because they were drafted after the CSE meetings" (*id.*).

Turning to the substantive appropriateness of the student's June and October 2021 IEPs, the IHO initially described the student's "unique circumstances," which included the "severity of his rare mental illness, his repeated need for in-patient psychiatric hospitalizations, and the fluctuations in his mental status based upon his mental health and the continued search for a viable medication or treatment for him," as well as his "intense" social anxiety and his "'vulnerability to waxing and waning episodes' of psychosis-related symptoms" that severely impacted his ability to engage academically and socially on a sustained basis (IHO Decision at pp. 21-22).

With this as a backdrop, the IHO examined the parent's allegation that the district failed to conduct an FBA and develop a BIP (*see* IHO Decision at p. 22). Here, the IHO found that the district's previous attempts to "desensitize" the student to the high school building were unsuccessful but that neither the student's psychiatrist nor the psychologist who conducted the May 2021 neuropsychological evaluation of the student had recommended an FBA or a BIP (*id.*). As a result, the IHO found that, contrary to the parent's assertion, the district was not required to conduct an FBA or develop a BIP for the student (*id.*).

Next, the IHO turned to the parent's allegation that the district failed to recommend a 12-month school year program for the student (*see* IHO Decision at p. 22). After noting that a student must exhibit "'substantial regression'" in order to qualify for a 12-month school year program, the IHO determined that the hearing record lacked evidence that the student experienced substantial regression (*id.*). As a result, the IHO concluded that, contrary to the parent's assertion, the district was not required to recommend a 12-month school year program for the student (*id.*).

With respect to the Twilight program recommended for the student, the IHO found that, contrary to the district's claim that it was "similar to the Fusion Program," "there [we]re important

²³ The IHO's analysis, opinions, and conclusions concerning the district's three-page, prior written notice and consent form are legally inaccurate. State regulation defines prior written notice as "written statements developed in accordance with section 200.5(a) of this Part, and provided to the parents of a student with a disability a reasonable time before the school district proposes to or refuses to initiate or change the identification, evaluation, or educational placement of the student or the provision of a [FAPE]" (8 NYCRR 200.1[oo]). Pursuant to Part 200.5(a) of the State regulations: "If the prior written notice relates to an action proposed by the school district that also requires parental consent under subdivision (b) of this section, the district must give notice at the same time it requests consent" (9 NYCRR 200.5[a][2] [emphasis added]).

differences" (IHO Decision at p. 22). Thereafter, the IHO identified six differences between the district's Twilight program and Fusion (*id.* at pp. 22-23). First, the IHO found that the number of students in the Twilight program "varie[d] considerably between one and five students up to one class that ha[d] nine students th[at] year," whereas Fusion classes were all 1:1 (*id.* at p. 22). Second, the IHO determined that the evidence did not clearly establish whether the direct consultant teacher services recommended for the student would be provided by a teacher assigned solely to this student, or to others as well (*id.* at pp. 22-23). Third, if the direct consultant teacher was assigned to this student, the IHO found that providing 1:1 instruction to the student in front of other students was "inappropriate" given the student's "severe anxiety"—and Fusion provided 1:1 instruction in a "private classroom" (*id.*). Fourth, the IHO found that the evidence failed to establish that the Twilight program could "'pause' for one student and then have him pick up later where he left off as Fusion d[id]" (*id.*). Fifth, because the district could not successfully desensitize the student so that he could enter the district high school building after a previous hospitalization, the IHO found that the hearing record lacked evidence to establish how the district would accomplish this now (*id.*). And sixth, the IHO indicated that the Twilight program hours were 3:00 p.m. to 6:00 p.m., and Fusion's program operated from 8:00 a.m. to 8:00 p.m. (*id.*).

In light of the foregoing, the IHO concluded that the Twilight program was "not similar to the Fusion Program as a matter of fact" (IHO Decision at p. 23).

As a final point, the IHO noted that neither the June 2021 CSE nor the October 2021 CSE "discussed a transition plan for [the student] despite his age and need for one" (IHO Decision at p. 23).

Overall, the IHO concluded that the district failed to offer the student a FAPE under both IEPs created for the student, as they were not reasonably calculated to enable the student to make educational progress in light of his unique circumstances (*see* IHO Decision at p. 23, citing Andrew F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. 386, 137 S. Ct. 988, 1001 [2017]).

Next, the IHO analyzed the appropriateness of the parent's unilateral placement of the student at Fusion for the 2021-22 school year (*see* IHO Decision at pp. 23-26). Initially, the IHO noted that, at Fusion, the student received "individual instruction" in a "private classroom where he c[ould] participate in his education without experiencing severe anxiety" (*id.* at p. 24). The IHO also noted that the student had "opportunities to socialize with peers" at Fusion and, because Fusion operated between 8:00 a.m. and 8:00 p.m., the student could "schedule his classes at times that [we]re optimal for him based on his mental health and medications" (*id.*). Additionally, the IHO noted that Fusion could "'pause' his instruction when [the student's] mental health, hospitalization, medications, or treatment prevent[ed] his instruction and [could] start it up again where he left off when he [wa]s medically available again" (*id.* at pp. 24-25).

After reciting the regulatory definitions of special education and specially designed instruction, the IHO found that Fusion provided the student with "'specially designed instruction' because teachers adapt[ed] the 'content, methodology, or delivery of instruction' to address his unique needs that result[ed] from his disability; and to ensure his access to the general curriculum in accordance" with federal regulation (IHO Decision at p. 25, citing 34 CFR 300.39[a][1][3]). The IHO noted that the student's English teacher helped the student "select novels on mental health

which [wa]s of special interest to him" and further noted that, "although the assignments follow[ed] the New York State Standards" in his biology class, the teacher controlled the pace of the instruction for the student—either slowing down or speeding up—based on whether the student found the material challenging (IHO Decision at p. 25). Despite cross-examination concerning the class hours Fusion provided for the biology course compared to those provided at a public school, the IHO found that "Fusion's one-to-one instruction [wa]s far more intensive than that in a public school class" (id.).

Additionally, the IHO indicated that "Fusion permitted [the student] to receive passing marks in high school level courses, and progress from grade to grade" (IHO Decision at p. 25). On this point, the IHO noted the existence of "mixed case law on the significance of passing marks and progressing from grade to grade in public and private schools" (id. at pp. 25-26). In this matter, the IHO found that the "fact that [the student] attend[ed] Fusion, participate[d] in his own education, and he [wa]s earning passing marks and high school credits, . . . demonstrate[d]" that Fusion was an appropriate unilateral placement, noting that the hearing record contained "ample additional evidence to support his conclusion" (id. at p. 26). On this basis, the IHO concluded that the parent sustained his burden of proof to establish that Fusion was an appropriate unilateral placement for the student for the 2021-22 school year (id.).

Next, the IHO examined equitable considerations (see IHO Decision at pp. 26-28). First, the IHO determined that the parent properly and timely provided the district with a 10-day notice after both the June 2021 CSE meeting and the October 2021 CSE meeting, informing the district of the problems with the student's IEPs, his intentions to unilaterally place the student at Fusion, and his intention to seek reimbursement for the costs of the student's attendance at Fusion for the 2021-22 school year (id. at pp. 26-27). Second, the IHO examined whether the parent cooperated with the district (id. at pp. 27-28). Here, the IHO determined that, contrary to the district's contention, the parent's failure to visit an out-of-district program that he had already visited in 2019 did not interfere with district's obligation to offer the student a FAPE (id. at p. 27). In addition, the IHO determined that, contrary to the district's assertion that the parent's delayed execution of the consent form to send information packets "slowed the search for a placement," the hearing record lacked evidence demonstrating that the student "lost a potentially appropriate placement due to any delay" and the parent had already provided notice to the district of his intention to unilaterally place the student at Fusion (id.). Therefore, overall, the IHO concluded that equitable considerations weighed in favor of the parent's request to be reimbursed for the costs of the student's tuition at Fusion for the 2021-22 school year (id. at p. 28).

Next, the IHO addressed the parent's request to be reimbursed for the transportation costs he expended with respect to the student's attendance at Fusion (see IHO Decision at p. 28). While finding that it was unreasonable to expect the district to provide transportation to the student given the "unique circumstances" of his "mental health condition and medical treatment," the IHO determined that the district must reimburse the parent for his expenditures upon proof of payment (id.).

Therefore, as relief, the IHO ordered the district to reimburse the parent for the costs of the student's tuition at Fusion for the 2021-22 school year, as well as for the costs of transportation expenses (see IHO Decision at pp. 28-29).

IV. Appeal for State-Level Review

The district appeals, initially arguing that the IHO erred by applying an improper legal standard to conclude that the district failed to offer the student a FAPE for the 2021-22 school year. More specifically, the district asserts that the IHO compared the district's recommended program to the program at Fusion and relied on issues not raised in the parent's November 2021 due process complaint notice to draw her conclusions. For example, the district contends that the IHO erred by comparing the class sizes in the district's recommended program to the one-to-one setting at Fusion, implying that the student required one-to-one instruction, which, contrary to the IHO's finding, was refuted by the evidence in the hearing record. Next, the district asserts that the IHO misunderstood testimony explaining direct consultant teacher services and argues that it was improperly speculative—and unsupported by citation to any evidence in the hearing record—for the IHO to find that direct consultant teacher services were not appropriate for the student in light of his anxiety. The district argues that the IHO's finding that the student required a program that could "pause" instruction was not based on any issue raised by the parent in the due process complaint notices and was not based on a recommendation in the May 2021 neuropsychological evaluation report or an issue raised at the June 2021 or October 2021 CSE meetings. Next, the district contends that the IHO erred by finding that the Twilight program was not appropriate for the student because it was located in the district's high school, and the IHO's finding ignored evidence that the student had been successfully attending Fusion and actively engaging in the social homework café. The district also asserts that the IHO improperly relied on the Twilight program hours of operation to find that it would not be appropriate for the student. Finally, the district asserts that the IHO erred by finding that the CSEs did not discuss a transition plan for the student, which ignored evidence in the student's IEPs of a transition plan and the development of related postsecondary goals.

The district also argues that the IHO erred by finding that Fusion was an appropriate unilateral placement for the student for the 2021-22 school year, and moreover, that equitable considerations did not weigh in favor of the parent's requested relief. As relief, the district seeks to reverse the IHO's findings and to reverse the IHO's order to reimburse the parent for the costs of the student's attendance at Fusion.

In an answer, the parent responds to the district's allegations and generally argues to uphold the IHO's decision in its entirety. More specifically, the parent asserts that the IHO applied the correct legal standard and properly concluded that the Twilight program and direct consultant teacher services failed to offer the student a FAPE. Similarly, the parent argues that the IHO properly concluded that the district failed to develop an appropriate transition plan for the student. Next, the parent asserts that, although the IHO did not address this issue in the decision, the district failed to recommend a 12-month school year program for the student, which contributed to the district's failure to offer the student a FAPE. In addition, the parent argues that the district improperly predetermined the student's program for the 2021-22 school year and failed to have a program—namely, a therapeutic day school program as set forth in the district's prior written notice—in place at the start of the 2021-22 school year. The district prepared, served, and filed a reply to the parent's answer in this case.

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., 580 U.S. 386, 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]).²⁴

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).

²⁴ The Supreme Court has stated that even if it is unreasonable to expect a student to attend a regular education setting and achieve on grade level, the educational program set forth in the student's IEP "must be appropriately ambitious in light of his [or her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives" (Endrew F., 137 S. Ct. at 1000).

VI. Discussion

A. Scope of the Impartial Hearing and of Review

I first turn to address the district's argument that the IHO ruled on issues that the parent did not raise in the due process complaint notices. In particular, the district argues that the IHO erred in finding that the student could not participate in consultant teacher services due to his anxiety and that the student required a program that could pause as the parent did not allege that the district denied the student a FAPE on these grounds.

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, the due process complaint notice alleges that consultant teacher services were not appropriate to meet the student needs (see Parent Ex. B at pp. 5, 8). As there is no dispute that the student experienced anxiety, the IHO's rationale that the consultant teacher services were not appropriate given the student's anxiety (IHO Decision at p. 23) was not a finding on an issue outside the scope of the impartial hearing. In addition, the parent's allegation that the student required individual pacing of instruction could be read to include an allegation about the student's need for a pause to instruction (see Parent Ex. B at p. 6). Whether the IHO's rationales were supported by the evidence in the hearing record is discussed further below.

However, to the extent the parent raises an issue in his answer about the Twilight program's art and music offerings, this issue was not raised in the due process complaint notice and was not ruled upon by the IHO. In particular, the parent responds to an allegation by the district "that the Twilight setting, which include[d] small, structured classes with some opportunities for social interactions [wa]s consistent with the . . . private [psychiatrist's] recommendations that the Student required 'expanded opportunities for social interactions'" (Req. for Rev. at p. 2, ¶ 8). In his answer, the parent argues that the psychiatrist recommended that the student participate in extracurriculars in order to expand his social interactions and then goes on to allege that the Twilight program did "not offer extracurriculars such as music or art" (Answer ¶ 5). While the student's inclination towards art and music may have motivated his ability to attend school at Fusion (see Tr. p. 334), the parent did not allege in the amended due process complaint notice that the student required art and music classes or opportunities for participation in extracurricular activities in order to receive

a FAPE or that the June or October 2021 IEPs were, therefore, deficient (see generally Parent Ex. B).²⁵ In addition, on appeal, the parent has not alleged that the IHO failed to address this issue, which as discussed further below is necessary in order to preserve the issue for review on appeal. Accordingly, I will not further discuss the extracurricular opportunities or the art or music offerings available as part of the Twilight program.

In addition to the foregoing, it is necessary to examine whether the parent has raised additional issues for review in his answer. The regulations governing practice before the Office of State Review require that "[a] respondent who wishes to seek review of an impartial hearing officer's decision may cross-appeal from all or a portion of the decision by setting forth the cross-appeal in an answer served" (8 NYCRR 279.4[f]). A cross-appeal shall clearly specify the reasons for challenging the impartial hearing officer's decision, identify the findings, conclusions, and orders to which exceptions are taken, or the failure or refusal to make a finding, and shall indicate the relief sought by the respondent" (8 NYCRR 279.4[f] [emphasis added]). Furthermore, the practice regulations require that parties set forth in their pleadings "a clear and concise statement of the issues presented for review and the grounds for reversal or modification to be advanced, with each issue numbered and set forth separately," and further specify that "any issue not identified in a party's request for review, answer, or answer with cross-appeal shall be deemed abandoned and will not be addressed by a State Review Officer" (8 NYCRR 279.8[c][2], [4]; see Davis v. Carranza, 2021 WL 964820, at *12 [S.D.N.Y. Mar. 15, 2021] [upholding an SRO's conclusions that several claims had been abandoned by the petitioner]; M.C. v. Mamaroneck Union Free Sch. Dist., 2018 WL 4997516, at *23 [S.D.N.Y. Sept. 28, 2018] [upholding dismissal of allegations set forth in an appeal to an SRO for "failure to identify the precise rulings presented for review and [failure] to cite to the pertinent portions of the record on appeal, as required in order to raise an issue" for review on appeal]; J.S. v. New York City Dep't of Educ., 2017 WL 744590, at *4 [S.D.N.Y. Feb. 24, 2017] [agreeing with an SRO that the parents' "failure to advance specific arguments in support of their conclusory challenge constituted waiver of those issues"]).²⁶

²⁵ On this issue the evidence in the hearing record is equivocal. For example, the district school psychologist testified that students in the program had "[t]remendous access" to extracurriculars and were involved in "athletic programs" as well as clubs that could potentially give the student access to music and art (Tr. pp. 20, 71-72). On cross-examination, she also testified however that the Twilight program did not offer music or art (i.e., nonacademics), but was instead "focused primarily on academics" (Tr. p. 82). Another district witness—the chairperson of special education—testified that the Twilight program could offer a music or art class "if we wanted to create a class like that" (Tr. p. 163). The same witness could not confirm whether the Twilight program then-currently offered such a class, because she did not "oversee the entire program" (Tr. p. 163).

²⁶ To be sure, the parent was not aggrieved by the IHO's ultimate decision granting him the relief sought. However, when State regulations governing appeals before the Office of State Review were last amended, it was specifically contemplated that a prevailing party would be chargeable with the knowledge that they may have to defend themselves in an appeal and that might require an appeal of any underlying determinations made by the IHO (or failures to rule) that were unfavorable to the prevailing party (see N.Y. State Register Vol. 38, Issue 26, at p. 49 [June 29, 2016]; Application of a Student with a Disability, Appeal No. 18-131). Here, through the district's service of the notice of intention to appeal and case information statement, the parent was on notice that the district intended to appeal from the IHO's determinations that the district failed to offer the student a FAPE and that the parent was entitled to tuition reimbursement (see Dist. Notice of Intention to Appeal; see also 8 NYCRR 279.2[d]). Therefore, it was incumbent upon the parent to assert in a cross-appeal, any alternative bases

In his answer, the parent alleges that the CSEs predetermined the IEP recommendations and denied the parent meaningful participation by providing inconsistent prior written notices and that the IEPs developed for the student were not appropriate for the student because they did not include extended school year services. However, the IHO ruled on the parent's allegations in this regard, finding that any procedural violations including any violation arising from different prior written notices did not contribute to a finding that the district denied the student a FAPE and that the student did not demonstrate regression such that he required extended school year services (IHO Decision at pp. 20, 22). The parent has not interposed a cross-appeal challenging these determinations that were adverse to the parent (see 8 NYCRR 279.4[f]; 279.8[c][4]). Further, the parent has not alleged that the IHO erred in her determinations in this regard and has not grappled with the IHO's rationales.

In any event, I have reviewed the parent's arguments on these points and find that the evidence in the hearing record supports the IHO's determinations. First, as to predetermination, the evidence in the hearing record, which is summarized in detail below, amply supports that the district had an open mind with respect to the programming recommendations and considered the recommended consultant teacher services in the Twilight program, as well as a therapeutic day program, and home instruction, and that the parent, along with the private evaluators and staff from Fusion, had a meaningful opportunity to participate in the development of the IEPs (see B.K. v. New York City Dep't of Educ., 12 F. Supp. 3d 343, 358-59 [E.D.N.Y. 2014] [holding that "active and meaningful" parent participation undermines a claim of predetermination]). Moreover, while the parent may have been confused about the recommendations as set forth in the prior written notices, the recommended programming was set forth in the IEPs and the parent was not unaware of the recommendations (Mr. P v. W. Hartford Bd. of Educ., 885 F.3d 735, 754-55 [2d Cir. 2018] [finding no denial of a FAPE where the parents attended every meeting "and did not allege that they were unaware of any programming selected" for the student]).²⁷

Next, in alleging that the district denied the student a FAPE by not recommending extended school year services, the parent does not dispute the IHO's finding that the evidence did not show

in support of the allegation that the district failed to offer the student a FAPE.

²⁷ At the impartial hearing, the parent testified that the Twilight program came up at the June 2021 CSE "meeting or maybe the subsequent meeting," and he had indicated that he did not "know anything about Twilight" (Tr. p. 472; see Tr. p. 502). He also testified that the Twilight program was "explained just briefly that it[wa]s some sort of credit recovery—afternoon credit recovery program for the high school students," but it was not therapeutic (Tr. p. 472). The parent further noted that the district chairperson of special education at the high school "told [him] that she would walk [him] through it," and he thereafter received a "link to the program . . . on a website" sent by the district chairperson of special education (i.e., sent via the district's June 2021 email) (Tr. pp. 472-73, 503). He accessed the website through the link provided and found a "one paragraph description" of information about the Twilight program, which indicated that it was a "credit recovery program for local students"—that is, essentially the same information he had already known about the program (Tr. p. 473). On cross-examination, the parent clarified that, with respect to the Twilight program, he had not asked the district chairperson of special education to explain the program to him, it was that she "told [him that] she would do" it (Tr. pp. 502-03). The parent also testified that, after receiving the June 2021 email, he did not respond to the email "asking any questions about the Twilight [p]rogram," nor did he ask any district staff to tour the Twilight program (Tr. p. 504). The parent indicated, however, that he was told by the district chairperson of special education that she was going to "show [him] the program," and he "just waited for her to do whatever she wanted to do" (id.).

that the student experienced substantial regression such that he required extended school year services; instead, the parent focuses on evidence that the district had offered the student extended school year services in years prior—a factor which is not relevant to examining the appropriateness of the June and October 2021 IEPs (IHO Decision at p. 22; 8 NYCRR 200.1[eee], 200.6[k][1]; see 8 NYCRR 200.1[aaa]).

Finally, the parent does not cross-appeal from or otherwise allege error in the IHO's finding that the student did not require either an FBA or a BIP to address behaviors that impeded his learning, a determination that was adverse to the parent. Therefore, this determination has become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]).

Based on the foregoing, I will not further discuss the parent's allegations pertaining to the availability of extracurriculars at the Twilight program, predetermination, parent participation, or extended school year services, or the IHO's determinations on the same or on the issue of the student's need for an FBA or a BIP.

B. The IHO's Decision and Legal Standards Applied

Overall, the crux of the district's appeal focuses on the argument that the IHO erred by applying an improper legal standard to conclude that the district failed to offer the student a FAPE for the 2021-22 school year. In the decision, the IHO summarized the legal standard to be applied in this case as whether the "two IEPs"—that is, the June 2021 and the October 2021 IEPs—were "developed according to the IDEA's procedural requirements and whether the educational plans were reasonably calculated to confer educational benefits on the student," and further noting that the "adequacy of a given IEP turn[ed] on the 'unique circumstances' of the student for whom it was created" (IHO Decision at p. 18, citing Walczak, 142 F.3d at 129, and Endrew F., 580 U.S. 386, 137 S. Ct. at 1001). However, when the IHO turned to the analysis of whether the student's IEPs were substantively appropriate, the IHO did not apply even this abbreviated legal standard and instead, compared the district's recommended program with the Fusion program because the district claimed that its recommended program was similar to that offered at Fusion (id. at pp. 21-23).

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, it must be determined 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 AR v. Katonah Lewisboro Union Free Sch. Dist., 2019 WL 6251196, at *13 [S.D.N.Y. Nov. 21, 2019] [noting that "simply comparing the program at a private, unilateral placement to a school district's IEPs does not establish that the IEP failed to comply with the IDEA"]; 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 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]).

Thus, the IHO's analysis of the district's recommended program—and her conclusion that the district failed to offer the student a FAPE—was based on the application of an erroneous legal standard and, as such, is reversible error.

C. June 2021 IEP—Twilight Program and Direct Consultant Teacher Services

1. Present Levels of Performance

In this instance, although the sufficiency of the present levels of performance and individual needs section of the June 2021 IEP are not at issue, a review thereof facilitates the discussion of the issue to be resolved—namely, whether the educational program recommended in the June 2021 IEP (and thereafter, in the October 2021 IEP) was reasonably calculated to enable the student to make progress appropriate in light of his circumstances.

As previously noted, the June 2021 IEP reflected that the CSE relied upon the following to develop the student's IEP: a June 2021 attendance record, a June 2021 parent report and observations, a June 2021 progress report, a June 2021 psychiatric summary, a June 2021 teacher progress summary, a June 2021 transcript, and the May 2021 neuropsychological evaluation of the student (*see* Dist. Exs. 1 at pp. 1-2; 8; 10; 12; *see also* Tr. pp. 194-97).^{28, 29} The June 2021 IEP

²⁸ At the impartial hearing, the chairperson testified that the district sent the parent copies of "any reports that [we]re being reviewed at the meeting," as well as a copy of a draft IEP with "updated information," prior to the meeting (Tr. pp. 191-92). Prior to a CSE meeting, the chairperson, herself, would review "any new or updated testing, any reports" from providers—such as a special education teacher, a regular education teacher, or related services providers—or from outside providers (Tr. p. 190). The chairperson testified that she also reviewed the draft IEP, the student's attendance records, progress reports, and report cards, and she would visit the student's classroom (Tr. pp. 190-91). When a student who is the subject of a CSE meeting attends an out-of-district school, that student's case manager would typically visit the student's classroom (Tr. p. 191).

²⁹ Each party entered a copy of the student's May 2021 neuropsychological evaluation report: the district entered the document as exhibit 8 and the parent entered the document as exhibit D. While the district chairperson confirmed that the June 2021 CSE reviewed and relied upon the district's copy of the evaluation report—that is, exhibit 8—the decision herein will cite to parent's exhibit D within this portion of the discussion when referring to the May 2021 neuropsychological evaluation report.

also included a report of the testing results from the May 2021 neuropsychological evaluation (id. at pp. 2-5). At the impartial hearing, the district chairperson testified that the parent was "always a very active participant in our meetings, keeping the [CSE] up to date on [the student's] progress" (Tr. pp. 195, 197-98). At the June 2021 meeting, the parent updated the CSE about how the student was "doing academically in regard to school," whether the student was engaging and how he responded to that, as well as informing the CSE about the student socially and emotionally, and regarding any updates about medications (Tr. pp. 197-98). She also recalled a discussion about the student's attendance at Fusion, noting that he "attended two days a week in the afternoons, and that he was engaging, and that he was participating" (Tr. p. 198). The chairperson also testified that the student's treating psychiatrist and the psychologist who completed the May 2021 neuropsychological evaluation of the student both participated at the meeting, as well as staff from Fusion (see Tr. p. 195). According to the chairperson, the psychologist led the discussion about the student's testing results and he also spoke about the student's progress (Tr. pp. 198-99).

In developing the present levels of academic achievement, functional performance, and learning characteristics, the district chairperson testified that "information [was] taken verbatim from the [written] report from Fusion," which "contained much more information than the . . . oral report at the meeting" (Tr. p. 199; see Dist. Ex. 1 at p. 6).³⁰ Generally, the chairperson would "write verbatim" the information obtained from written reports provided by an "outside school" and would then take notes at the CSE meeting in order to make any changes based upon the information obtained at the meeting (Tr. pp. 199-200). Consistent with this testimony and consistent with the written report submitted by Fusion, the June 2021 IEP indicated that, in his English 9 course, the student had "shown confidence and social growth" although he "began classes shy and seemed apprehensive to participate" (compare Dist. Ex. 1 at p. 6, with Dist. 10 at p. 1). The June 2021 IEP also documented that the student had "shown growth in his confidence by sharing his ideas and making real world connections unprompted" (compare Dist. Ex. 1 at p. 6, with Dist. Ex. 10 at p. 1). At Fusion, the student "participate[d] in smaller social activities in homework café, such as participating in the group games" offered (compare Dist. Ex. 1 at p. 6, with Dist. Ex. 10 at p. 1). In addition, the June 2021 IEP noted that, in English 9 at Fusion, the student was "on grade level regarding his reading, writing, comprehension, and analysis" (compare Dist. Ex. 1 at p. 6, with Dist. Ex. 10 at p. 1). The IEP also noted that on "[s]ome days [the student] w[ould] demonstrate anxiety and it [wa]s helpful for [him] to discuss his feelings before continuing class, so that he m[ight] be focused on the task at hand" (compare Dist. Ex. 1 at p. 6, with Dist. Ex. 10 at p. 1). The June 2021 IEP reflected that the student "tended to not need extended time" "[i]f directions and expectations [we]re clearly spelled out before the assignment" (compare Dist. Ex. 1 at p. 6, with Dist. Ex. 10 at p. 1). Consistent with the written report from Fusion, the June 2021 IEP described the student's "main academic struggle" as "his (not so obvious) want for perfection" (compare Dist. Ex. 1 at p. 6, with Dist. Ex. 10 at p. 1). For example, the student "would ask what the teacher wanted rather than [attempt] an unprompted analysis," but the student could "overcome this when given clear and direct instructions" (compare Dist. Ex. 1 at p. 6, with Dist.

³⁰ Initially in this section of the June 2021 IEP, the CSE documented that the student was "parentally placed at Fusion . . . on or about January, 2021"; that "Fusion . . . [wa]s a 1:1 alternative private school"; that the student had "flexible scheduling and individual instruction" at Fusion; that he had "earned two credits, one in English and one in recording arts" at the time of the June 2021 CSE meeting; and that the student was then-currently "enrolled in [physical education], Ancient Civilizations, Recording Arts part B, and English 9B (Dist. Ex. 1 at p. 6).

Ex. 10 at p. 1). In addition, the June 2021 IEP documented that he had "some difficulty planning his writing, as he [wa]s like most students who free write without planning" (compare Dist. Ex. 1 at p. 6, with Dist. Ex. 10 at p. 1). At Fusion, the student was "provided with 'safe space' time as needed on days in which he demonstrate[d] anxiety" (compare Dist. Ex. 1 at p. 6, with Dist. Ex. 10 at p. 1). The student was also "provided a step-by-step outline of what [wa]s expected for each assignment," and "[e]ach section [wa]s broken down so as not to overwhelm him and [to] remind him that he c[ould] come back with incomplete work if he struggle[d], so that teachers [could] support him and [he could] complete it together in class to overcome his obstacles" (compare Dist. Ex. 1 at p. 6, with Dist. Ex. 10 at p. 1).

With respect to the student's performance in his Ancient Civilizations class—and consistent with the written report from Fusion—the June 2021 IEP indicated that the student had become "more comfortable in class and school in general . . . [and] he [wa]s fairly talkative in class" (compare Dist. Ex. 1 at p. 6, with Dist. Ex. 10 at p. 1). At that time, it was reported that the student had completed "all grade level tasks [and] assignments" (compare Dist. Ex. 1 at p. 6, with Dist. Ex. 10 at p. 1). In addition, the June 2021 IEP reflected that while the student's anxiety, at times, "ma[d]e him apprehensive to answer open ended questions in class, . . . it ha[d] not seriously impeded his class participation at that point" (compare Dist. Ex. 1 at p. 6, with Dist. Ex. 10 at p. 1). Consistent with the written report from Fusion, the student did not appear "to be struggling in class, but he ha[d] struggled [with] balancing classes [and] assignments and his anxiety" (compare Dist. Ex. 1 at p. 6, with Dist. Ex. 10 at p. 1). As noted in the June 2021 IEP, the student had "only just recently beg[un] this class and seem[ed] to be handling the additional workload at th[at] time" (compare Dist. Ex. 1 at p. 6, with Dist. Ex. 10 at p. 1). Moreover, the "teacher ha[d] slowly built up the coursework to help ease [the student] into the course" (compare Dist. Ex. 1 at p. 6, with Dist. Ex. 10 at p. 1). Additionally, the "teacher also tried to work with him to give him more hands-on work so he c[ould] more easily engage in the content" (compare Dist. Ex. 1 at p. 6, with Dist. Ex. 10 at p. 1).

With respect to the recording arts and music production course at Fusion—and consistent with the Fusion's written report—the June 2021 IEP indicated that the student had demonstrated "incredible growth and progress . . . since he started" (compare Dist. Ex. 1 at p. 6, with Dist. Ex. 10 at p. 1). As further noted in the IEP, the parent was "very supportive," and had "purchased [the student] his own home recording setup" (compare Dist. Ex. 1 at p. 6, with Dist. Ex. 10 at p. 1). The student exhibited a "deep interest in songwriting and recording and show[ed] strong confidence and self-esteem in music class" (compare Dist. Ex. 1 at p. 6, with Dist. Ex. 10 at p. 1). As reflected in the June 2021 IEP, the student had "me[t] all objectives and expectations in class" (compare Dist. Ex. 1 at p. 6, with Dist. Ex. 10 at p. 1). In addition, the student's "[l]essons [we]re differentiated to reach [his] interest, which in turn le[d] him to overcome challenges and master the material in each class" (compare Dist. Ex. 1 at p. 6, with Dist. Ex. 10 at p. 1). The IEP also noted that the student "must continue to challenge himself in areas that might not be in his comfort zone" (compare Dist. Ex. 1 at p. 6, with Dist. Ex. 10 at p. 1). According to the IEP, "[w]hen [the student] seem[ed] a bit detached, he received slow pacing, so he c[ould] internalize the material more easily" (compare Dist. Ex. 1 at p. 6, with Dist. Ex. 10 at p. 1).

As for the student's performance in his art course at Fusion—and consistent with the written Fusion report—the June 2021 IEP indicated the student "benefit[ed] when given encouragement,

allowing him to confidently make independent decisions on his art" (compare Dist. Ex. 1 at p. 6, with Dist. Ex. 10 at p. 2). The student was described as "very creative, and he love[d] to make things up in class" (compare Dist. Ex. 1 at p. 6, with Dist. Ex. 10 at p. 2). The student was also described as "open to exploring different projects and [he wa]s working on advocating for himself if there [wa]s something that he d[id] not feel engaged in, allowing the teacher to accommodate to his interest" (compare Dist. Ex. 1 at p. 6, with Dist. Ex. 10 at p. 2). By the time of the June 2021 CSE meeting, the student had "tried spray painting, sketching and . . . w[ould] also possibly be doing hydro dipping" in his art class (compare Dist. Ex. 1 at p. 6, with Dist. Ex. 10 at p. 2). According to the IEP, the student "started the course with a sketching project where he created a scene in pencil and then used ink to go over it" (compare Dist. Ex. 1 at p. 6, with Dist. Ex. 10 at p. 2). It was also reported that the student "always participate[d] and consistently work[ed] through class" (compare Dist. Ex. 1 at p. 6, with Dist. Ex. 10 at p. 2).

At the impartial hearing, when asked how the "Basic Cognitive [and] Daily Living Skills" portion of the present levels of performance were developed, the district chairperson testified that it was "taken form the [May 2021] neuropsychological report"—again, similar to the method described above—by taking "verbatim what was stated in those reports" (Tr. pp. 200-02; see Dist. Ex. 1 at pp. 6-7). Consistent with this testimony and the information in the May 2021 neuropsychological evaluation report, the June 2021 IEP reflected that the student's testing results indicated that he "present[ed] with an uneven intellectual profile in which his integrative composite score m[ight] not provide a representative depiction of his abilities, broadly defined" (compare Dist. Ex. 1 at p. 6, with Parent Ex. 16). The June 2021 IEP also reflected that the student's "abilities [we]re better understood through inspection of underlying component processes," noting that the student's verbal comprehension, perceptual reasoning, and working memory all fell within the average range (compare Dist. Ex. 1 at p. 6, with D at p. 16). In addition, the June 2021 IEP reflected that the student's processing speed—"which represent[ed] the fourth and final profile element"—"emerged as an unequivocal weakness," falling within the borderline range, and demonstrating "weaknesses in both scanning and visual-motor efficiency" (compare Dist. Ex. 1 at p. 7, with Parent Ex. D at p. 16). Given the "above heterogeneity, an alternate metric (General Ability Index) was generated, which emphasize[d] ability independent of cognitive proficiency (Working Memory and Processing Speed)" (compare Dist. Ex. 1 at p. 7, with Parent Ex. D at p. 16). The alternate metric "yielded a statistically significant improvement in [the student's] overall abilities; this suggest[ed] that [the student wa]s endowed with solid intellectual acumen, but [that he might] be susceptible to factors (e.g., slower mental and physical speed) that detract[ed] from his cognitive proficiency" (compare Dist. Ex. 1 at p. 7, with Parent Ex. D at p. 16). Finally, the June 2021 IEP noted that, when compared to the student's previous testing in July 2019 (i.e., initial evaluation)—"while likely impacted by differences in instrumentation (shift from WISC-V to WAIS-IV)"—"revealed stability in [the student's] Verbal Comprehension, and decrements in both Working Memory (High Average to Average) and Processing Speed (Low Average to Borderline)" (compare Dist. Ex. 1 at p. 7, with Parent Ex. D at p. 16).

In addition, the June 2021 IEP indicated, consistent with the May 2021 neuropsychological evaluation, the student "evidenced Average silent reading speed, yet was unable to complete both vocabulary and reading comprehension assessments within the required time frame" (compare

Dist. Ex. 1 at p. 7, with Parent Ex. D at p. 16).³¹ As further reflected in the IEP, while "both skill sets fell solidly within the Average range via standardized (timed) administration, [the student's] vocabulary improved to High Average and [his] reading comprehension [improved] to Very Superior" (compare Dist. Ex. 1 at p. 7, with Parent Ex. D at p. 16). In the area of mathematics, the June 2021 IEP documented that the student "demonstrated Average calculation skills and computational fluency" (compare Dist. Ex. 1 at p. 7, with Parent Ex. D at p. 16). Finally, the student's performance in the "preparation of a written narrative about his favorite game with supporting justification was notable for Average detail, theme development, and adherence to rules of grammar" (compare Dist. Ex. 1 at p. 7, with Parent Ex. D at p. 16). When compared to the student's previous testing result from July 2019, the student's scores "revealed stable math calculation and computational fluency and improved reading comprehension, particularly with extended time" (compare Dist. Ex. 1 at p. 7, with Parent Ex. D at p. 16).

Also consistent with the May 2021 neuropsychological evaluation, the June 2021 IEP reported that the student performed within the average range "on measures of executive functioning (response inhibition/interference control), planning, verbal and nonverbal (visual) working memory, grasp of semantic relationships, complex visual-motor integration (duplication of figural details), list learning, and social language development"—all of which "support[ed] learning, behavior, and social-emotional functioning" (compare Dist. Ex. 1 at p. 7, with Parent Ex. D at p. 16). The June 2021 IEP also reflected that, when "[c]alled upon to learn newly presented verbal information over five (5) consecutive trials, [the student] demonstrated solid initial learning that plateaued over subsequent trials" (compare Dist. Ex. 1 at p. 7, with Parent Ex. D at p. 16). As a result, the student's "learning slope or magnitude of benefit from repetition, fell well below Average" (compare Dist. Ex. 1 at p. 7, with Parent Ex. D at p. 16). The June 2021 IEP further noted that, "[c]onsolidation of learned information for retrieval following short and long delays intervals fell within the Borderline and Low Average range, respectively" (compare Dist. Ex. 1 at p. 7, with Parent Ex. D at p. 16). In addition, the IEP reflected that the student had "some difficulty differentiating previously heard content from distractors, suggesting difficulty at the level of encoding" (compare Dist. Ex. 1 at p. 7, with Parent Ex. D at p. 16). As further reflected in the IEP, it was noted that "[d]espite the absence of repetition, immediate and delayed recall of narrative details was comparatively stronger and sp[oke] to the benefit conferred by having material presented in a more contextually rich manner" (compare Dist. Ex. 1 at p. 7, with Parent Ex. D at p. 16). Next, the IEP noted that, for the student, "both immediate and delayed recall of complex figural details fell well below Average" (compare Dist. Ex. 1 at p. 7, with Parent Ex. D at p. 16). It was further noted in the IEP that, "as was the case for the list learning task, the student struggled to differentiate previously viewed from novel figural elements" (compare Dist. Ex. 1 at p. 7, with Parent Ex. D at p. 16). As reported in the IEP, "[w]hile [it was] difficult to know for sure, the fact that [the student] initially reproduced the design with remarkable skill and accuracy suggest[ed] that organizational challenges complicated his ability to encode the various details" (compare Dist. Ex. 1 at p. 7, with Parent Ex. D at p. 16). Finally, the June 2021 IEP indicated that the student

³¹ This characterization was based upon the use of "grade (rather than age) as a reference point" due to the "discrepancy between [the student's] age and [his] academic standing" (compare Dist. Ex. 1 at p. 7, with Parent Ex. D at p. 16).

"exhibited particular difficulty with higher-order language reception (listening comprehension)" skills (compare Dist. Ex. 1 at p. 7, with Parent Ex. D at p. 16).

Turning to the student's present levels of social development—and consistent with the May 2021 neuropsychological evaluation—the June 2021 IEP reflected that, "[b]ehaviorally, parent reports indicated features of Depression along with moderate Conduct Problems, Anxiety, Somatization, and Withdrawal" (compare Dist. Ex. 1 at pp. 7-8, with Parent Ex. D at p. 17). Per student report, the June 2021 IEP noted that he "endorsed moderate levels of depressive symptoms" (compare Dist. Ex. 1 at pp. 7-8, with Parent Ex. D at p. 17). The IEP further noted that, "[c]orresponding reports from one of [the student's] classroom instructors indicated only moderate reports of anxiety" (compare Dist. Ex. 1 at p. 8, with Parent Ex. D at p. 17). Next, the IEP reflected that both "[p]arent and [student] self-report ratings of adaptive functioning indicated thematic consistency, but a perceived discrepancy in severity, with [the student's] ratings highlighting greater concern in areas of functional academics, participation in leisure activities, community use, home living, and self-care" (compare Dist. Ex. 1 at p. 8, with Parent Ex. D at p. 17).

Also consistent with the May 2021 neuropsychological evaluation, the June 2021 IEP described the student, overall, as a "young man with significant psychiatric complexity and a string of past stressors and unproductive therapeutic and educational experiences" (compare Dist. Ex. 1 at p. 8, with Parent Ex. D at p. 17). The IEP noted that, "[f]rom a diagnostic perspective, the recently promulgated diagnosis of Schizoaffective Disorder appear[ed] applicable, as [the student] present[ed] with a history (and the enduring presence) of visual and auditory hallucinations together with significant depressive features" (compare Dist. Ex. 1 at p. 8, with Parent Ex. D at p. 17). In addition, the June 2021 IEP indicated that, the student's "chronically negative self-image ha[d] engendered significant apprehension about himself, others, and his prospects for the future" (compare Dist. Ex. 1 at p. 8, with Parent Ex. D at p. 17). Additionally, the IEP indicated that while the student "remained unambiguously burdened on several levels, there [we]re signs that he [wa]s beginning to 'turn a corner'" (compare Dist. Ex. 1 at p. 8, with Parent Ex. D at p. 17). For example, the IEP noted that the student was "beginning to regain confidence and ha[d] been more forward (future) looking"; he was "engaging in positive habits, from exercise to creative (artistic, musical) pursuits, and for the first time in three years, [the student wa]s intrinsically motivated (as opposed to extrinsically compelled) to attend school and [was] earning academic credit for his effort" (compare Dist. Ex. 1 at p. 8, with Parent Ex. D at p. 17).

Further, consistent with the May 2021 neuropsychological evaluation report, the June 2021 IEP reflected that the student "wishe[d] to flatten his emotions and ha[d] a mistrust of others" based on his responses to a "structured personality assessment" (compare Dist. Ex. 1 at p. 8, with Parent Ex. D at p. 15). According to the IEP, "[t]here appeared to be an effort to keep relationships at a distance" (compare Dist. Ex. 1 at p. 8, with Parent Ex. D at p. 15). However, as noted in the IEP, while the student attempted to "damp-down his feeling and desire, he obsesse[d] about his social challenges and experience[d] recurrent anxieties and mood disharmony as a consequence" (compare Dist. Ex. 1 at p. 8, with Parent Ex. D at p. 15). As further noted in the IEP, while the student might "occasionally seek to distract himself, [he] remained concerned with the possibility of social rebuff and m[ight] anticipate rejection" (compare Dist. Ex. 1 at p. 8, with Parent Ex. D at p. 15). Additionally, it was reported that the student might "also get lost in daydreams to the point

where reality and fantasy beg[a]n to blur" (compare Dist. Ex. 1 at p. 8, with Parent Ex. D at p. 15). Furthermore, the IEP reflected that the student "m[ight] report being obsessed and distracted by ruminative inner thoughts that intrude[d] on his attentiveness to his surroundings" (compare Dist. Ex. 1 at p. 8, with Parent Ex. D at p. 15). According to the IEP, the student's responses to a "projective assessment (sentence completion test) indicate[d] that he felt burdened by his negative mindset, fatigue, emotional numbing and in turn, perceive[d] himself as an imposition on others" (compare Dist. Ex. 1 at p. 8, with Parent Ex. D at p. 15). In addition, the student reportedly "fe[lt] poorly understood by others, who at times act[ed] in a perceptibly unsympathetic manner" (compare Dist. Ex. 1 at p. 8, with Parent Ex. D at p. 15). As a final point, the IEP reflected that, "[o]wing to his physical and emotional burdens and the energy (and sacrifices) required to make progress, [the student] approach[ed] the future with significant anxiety and trepidation" (compare Dist. Ex. 1 at p. 8, with Parent Ex. D at p. 15).

With regard to the student's present levels of physical development, the June 2021 IEP indicated that his "physical development [wa]s within normal range for his age" (Dist. Ex. 1 at p. 8). The IEP also noted that the student had been diagnosed as having "Schizoaffective Disorder, a mood disorder, and anxiety" (id.). At that time, the IEP reflected that the student was "under the care of a psychiatrist who prescribe[d] medication," he received "private therapy outside of school," and he "experience[d] somatization and social withdrawal" (id.).

In addition to the foregoing, the June 2021 IEP identified the student's academic, social, and physical strengths, preferences, and interests (see Dist. Ex. 1 at pp. 7-8). With regard to his academic strengths, the June 2021 IEP indicated that, as reported by Fusion staff, the student "demonstrate[d] a strength in songwriting and recording," and he "enjoy[ed] being creative and the arts" (id. at p. 7). With regard to social strengths, the June 2021 IEP indicated the student had "demonstrated social growth and an increase in confidence," he could "share his feeling when experiencing anxiety," and he had "recently expressed an interest in design, fashion and drawing" (id. at p. 8). With regard to physical strengths, the June 2021 IEP indicated the student "enjoy[ed] engaging in exercise and taking walks" (id.).

The June 2021 IEP also identified the student's academic, social, and physical needs (see Dist. Ex. 1 at pp. 7-8). With regard to his academic needs, the June 2021 IEP indicated that the student "need[ed] to seek assistance when he was feeling overwhelmed and anxious," he "require[d] an outline of expectations provided by the special education teacher so that he d[id] not feel overwhelmed and anxious regarding his school work," and he "require[d] frequent check-ins from the special education teacher" (id. at p. 7). As reflected in the IEP, the parent reported that the "'school piece ha[d] much improved' for [the student]," and that the student had "more confidence with his academics and ha[d] energy and ha[d] show[n] follow-through on his course work" (id.). With regard to the student's social needs, the June 2021 IEP indicated that he "need[ed] to develop and utilize strategies to cope with feelings of anxiety and stress," and he "need[ed] to continue to engage socially" (id. at p. 8). As a concern to the parent, the IEP reported that the parent "shared that [the student] demonstrate[d] increased motivation and interest" (id.). And finally, with regard to the student's physical needs, the June 2021 IEP indicated that the parent shared that "medication trials continue[d] to support" the student, and there were "no physical needs to be addressed by special education" (id.).

At the impartial hearing, the district chairperson testified that, in developing the sections of the June 2021 IEP concerning the student's areas of strengths and needs, it was important to obtain such information because, in order to "ensure we're meeting needs we need to be able to identify needs," explaining further that "recommendations," as well as "program goals, [and] program services" were driven by identifying the student's needs (Tr. p. 202). She also testified that, at a CSE meeting, she would typically ask attendees to "talk to me about continued needs" (Tr. pp. 202-03). With respect to the June 2021 CSE's discussion about the student's academic needs, the chairperson testified that, rather than focusing on "increase[ing] decoding skills or improv[ing] reading comprehension"—because the student did not have "those specific needs"—the discussion focused on the student "feeling anxious" or feeling "overwhelmed" at school and his need to "be able to seek adult assistance, to help resolve that so he c[ould] continue to engage in the learning process" (Tr. p. 203). In addition, she testified that the student required "expectations of [an] assignment" to "quell some of the anxiety . . . that might result in disengagement" (Tr. p. 204). The chairperson also testified that the student needed "frequent check-ins with the adult, that he's completing each step[] of the assignment" (Tr. p. 204). Overall, the chairperson explained that the student's academic needs were "not specific needs for learning," but rather, the "impact on his academic needs c[ame] from when he might be feeling overwhelmed, not understanding the expectations of the assignment," and the CSE identified those needs (Tr. p. 204).

Similarly, the chairperson testified that, with respect to the student's social strengths and needs, the June 2021 CSE discussed his increased "confidence and that he was beginning to recognize when he was experiencing anxiety," as well as the fact that the student could "share those feelings" (Tr. pp. 204-05). However, she also testified that the student still needed to "implement strategies to cope with that, and also to continue to engage socially, like interactions with peers and not just adults" (Tr. p. 205). With respect to the student's physical strengths and needs, the chairperson testified that, in this case, the June 2021 CSE recorded the student's diagnoses and that he was "under the care of a psychiatrist" and received medication (Tr. pp. 205-06).

With regard to strategies to address the student's management needs, the June 2021 IEP reflected that the student "required specially designed instruction in a small, structured therapeutic setting" (Dist. Ex. 1 at pp. 8-9). Consistent with recommendations in the written report from Fusion, the June 2021 IEP also reflected that the student required "clearly provided directions and expectations, step by-step outline[s], scaffolding of larger assignments into smaller sections, hands-on lessons, opportunities to participate in multiple learning modalities, individualized pacing, [and] frequent check-ins" (compare Dist. Ex. 1 at p. 9, with Dist. Ex. 10 at p. 2). At the impartial hearing, the chairperson testified that the management needs in the June 2021 IEP represented "what the student need[ed] in order to be successful" (Tr. p. 206). She also testified about how the management needs and supports were derived from identifying the student's needs (see Tr. pp. 206-07).

2. Program Recommendation: Direct Consultant Teacher Services

Based on the information presented at the meeting, the June 2021 CSE recommended that the student receive direct consultant teacher services delivered in the district's Twilight program;

related services of counseling and parent counseling and training; annual goals to address the student's study skills and social/emotional and behavioral needs; supplementary aids and services, program modifications, and accommodations; and testing accommodations (see Dist. Ex. 1 at pp. 11-13).

State regulations define consultant teacher services as "direct or indirect services, . . . , provided to a student with a disability in the student's regular education classes and/or to such student's regular education teachers" (8 NYCRR 200.1[m]; see 8 NYCRR 200.6[d]). State regulation also defines direct consultant teacher services as "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" (8 NYCRR 200.1[m][1]).

At the impartial hearing, the district chairperson testified that comments from either the student's treating psychiatrist or the psychologist led the CSE to the conclusion that the student was "meeting with some success where he was [at Fusion] so [the CSE was] attempting to replicate that within the less restrictive setting, attending the Twilight Program and providing [direct] consulting teacher services" (Tr. pp. 212-13). In addition, counseling had been identified to address the student's "emotional needs," and the parent counseling and training would support the parent and "allow the connection between school and home to continue" (Tr. p. 213). The chairperson testified that the intention was for the consultant teacher to provide the parent counseling and training services to "bridge the gap between home and school" (id.).

The chairperson further explained the June 2021 CSE's attempt to strike a balance between the CSE's LRE requirements and the desire to recommend an appropriate program for the student that was similar to the Fusion program (see Tr. pp. 214-15). The chairperson testified that, for this student, the consultant teacher services was the LRE, as it "would provide [the student] with social emotional and academic support he need[ed], [while the student was] still participating and learning in a public school, in an educational setting that's less restrictive" (Tr. pp. 214-15). With respect to the Twilight program, the chairperson testified that, for this student—who was "bright" and presented without "any concerns with his learning"—the program offered high school classes, flexible scheduling, and afterschool hours; in addition, the student would not have to attend daily, he could access his counseling and special education teachers, and he could work towards achieving a Regents high school diploma (Tr. p. 215). The chairperson testified that the Twilight Program allowed the student to attend later in the day to accommodate concerns about the student "getting up in the morning and leaving the house," it offered small classes, and it allowed for "instruction between the teacher and student and not within the whole class" (Tr. p. 216).

When explaining the implementation of the recommended program, the district chairperson testified that the Twilight program would have two teachers in the room, including the consultant teacher (Tr. p. 265). She indicated that she was unsure whether the consultant teacher would be assigned to other students in the classroom (id.).³²

³² State regulation permits consultant teacher services to be provided on an individual or group basis provided that students be grouped based on similarity of need (8 NYCRR 200.6[a][3]; [d][1]; "Continuum of Special

To be sure, the student had adjusted well to the program offered at Fusion during the 2020-21 school year, such that it was characterized that he had begun to "turn a corner" (see Dist. Ex. 1 at p. 8). However, districts are not required to replicate the identical setting used in private schools (see, e.g., M.C., 2018 WL 4997516, at *28; Z.D. v. Niskayuna Cent. Sch. Dist., 2009 WL 1748794, at *6 [N.D.N.Y. June 19, 2009]; Watson v. Kingston City Sch. Dist., 325 F. Supp. 2d 141, 145 [N.D.N.Y. 2004]). Here, although the district characterized its program as an attempt to replicate Fusion, thereby inviting the comparison, ultimately, the district was not required to adopt the program components utilized at Fusion so long as the IEP was reasonably calculated to enable the student to receive educational benefit.

The May 2021 private neuropsychological evaluation reflected the psychologist's recommendation that the student attend a flexible setting and that he would not do well in "a conventional, more densely populated setting" (Parent Ex. D at p. 18). While the psychologist endorsed Fusion as an appropriate setting, he did not indicate that the student required 1:1 instruction per se (id.). In addition, consistent with the psychologist's recommendation, the Twilight program was not conventional or densely populated (see Tr. pp. 215-16; Parent Ex. D at p. 18). At the impartial hearing, the district chairperson of special education—who attended the June 2021 CSE meeting and who had observed the student in spring 2021 while he attended Fusion—described the Twilight program as an "alternative program that serve[d] both as credit recovery and as an alternative program" for the district (Tr. pp. 102, 108, 121-22; see Dist. Ex. 1 at p. 1). She also testified that the program offered a "lot of flexibility in terms of when classes c[ould] begin, how small classes c[ould] be," and the Regents-level classes "parallel[ed] the requirements for graduation for all high school students" (Tr. p. 122). In terms of class size, she testified that the student-to-teacher ratio varied, but it could be "three-to-one" or "five-to-one" (Tr. p. 161). In addition, the Twilight program met three days per week (see Tr. p. 162).

During the impartial hearing, the private psychiatrist opined that the 1:1 instruction provided at Fusion relieved the student's social anxiety pressure by offering a lot of positive reinforcement and removing the impression that the student was being judged (Tr. pp. 709-10). Relatedly, the parent, the private psychiatrist, and the private psychologist expressed concerns that the delivery of consultant teacher services to the student in front of other students would be inappropriate as it would be stigmatizing and exacerbate the student's "negative self doubts" (Tr.

Education Services for School-Age Students with Disabilities," Office of Special Education, at p. 8 [rev. Nov. 2013], available at <https://www.p12.nysed.gov/specialed/publications/policy/documents/continuum-schoolage-revNov13.pdf>).

pp. 341, 488, 710, 739-40; IHO Decision at p. 23).^{33, 34} However, as set forth above, at the time of the CSE meeting while the student continued to experience anxiety and negative self-image, he was reported to be improving in these areas and it was reasonable for the CSE to conclude that he would benefit from receiving instruction with his peers so he could develop and utilize strategies to cope with his feelings of anxiety and stress and work on social engagement (see Dist. Ex. 1 at p. 8). Thus, given information before the CSE that the student was benefitting from the instruction at Fusion, it was reasonable for the district to recommend a program with more access to nondisabled peers to move towards a less restrictive instructional format.

As to the student's ability to enter the school building, there is no dispute that the student experienced school refusal in the past. The parent testified that in ninth grade, "it became clear" that the student would not return to the physical building in which the district high school was located and that the efforts of district staff to get the student to come to school were unsuccessful (Tr. pp. 416-18, 533-34). Despite the parent's testimony, the hearing record in its entirety reflects that the student's school refusal was not specific to the district high school building as he also "ha[d] the same problems attending . . . the small class therapeutic environment" at Summit . . .

³³ Generally, a consultant teacher would not deliver the student's primary instruction—that would be the role of the regular education teacher who would also be teaching the other students in the class; consultant teacher services contemplate that the special education teacher would work cooperatively with the regular education teacher and be responsible for adapting, as appropriate to the need of the student, "the content, methodology, or delivery of instruction to support the student to successfully participate and progress" during instruction ("Continuum of Special Education Services for School-Age Students with Disabilities," Office of Special Education, at pp. 7-8). Based on this format, it is not clear that the consultant teacher would be "attached to" the student or "following [him] around the room" in the manner envisioned by the parent and the private psychiatrist (Tr. pp. 488, 710).

³⁴ In addition, the private psychologist testified at the impartial hearing that he recalled attending the June 2021 CSE meeting for "about an hour," but could not "with complete accuracy, specify whether that represented the entirety of the meeting"—only that it represented the "entirety of [his] involvement in the meeting," when he "reviewed the results of the [May 2021 neuropsychological] assessment" (Tr. p. 335). He further testified that he could not recall—"at least during the portion [of the CSE meeting] that [he] was present for, any recommended placement that was presented" at the meeting for the student (Tr. p. 336). The private psychologist also testified that "[t]here may have been a recommendation to explore alternative programs, [S]tate approved programs" (Tr. p. 336). The district chairperson testified that she believed the private psychologist left the June 2021 CSE meeting "early" because he had an appointment (Tr. p. 233). Similarly, the private psychiatrist testified at the impartial hearing that, although he recalled attending the June 2021 CSE meeting, he did not "recall that they offered any specific program that they thought would be appropriate instead" of Fusion (Tr. p. 706). In addition, the private psychiatrist testified that he did not "recall" the June 2021 CSE mentioning the Twilight Program "at all" (Tr. pp. 706-07). He further testified that he did not recall whether he attended the June 2021 CSE for the "entire meeting" and that he did not attend the October 2021 CSE meeting (Tr. p. 713). The private psychiatrist testified that he could not recall "any discussion with regard to the consultant teacher services," even though he had reviewed his notes from that meeting prior to his testimony at the impartial hearing (Tr. pp. 713-14). He did, however, see the consultant teacher services on the student's IEP "when [he] looked at it," but he did not otherwise recall the services being "mentioned at the meeting at the time" (Tr. p. 714). Having testified about "some current concerns" with respect to the recommendation for consultant teacher services at the impartial hearing, the private psychiatrist clarified that he did "not raise any of those concerns at the June 2021 CSE meeting" (Tr. p. 714). The parent testified that although he did not "remember if [he] expressed any reservations at that meeting, . . . , [he] had some misgivings about, again, about ruining something that's already working and knowing [the student's history of not being able to attend]" (Tr. pp. 463-65). Nevertheless, the parent testified that he cooperated with "whatever the district asked me to do" (Tr. p. 466).

and participating in remote instruction (Tr. pp. 423, 438). The district school psychologist indicated that, at the time of the June 2021 CSE meeting the student had not entered the school to attend academics but had entered the school building "to meet with individuals . . . when appointments [we]re set up" (Tr. pp. 73, 97). At the time of the CSE meeting, the student was attending a school building at Fusion and, as such, it was reasonable for the CSE to believe that the student could generalize his progress in that regard and attend the school building during the afternoon hours as part of the Twilight program.

Relatedly, when asked at the impartial hearing whether the June 2021 CSE considered recommending home instruction for the student, the district chairperson testified that, "[a]ll of the information that I had presented at the CS[E] meeting was that he was leaving the house and attending classes at Fusion" (Tr. pp. 230-31). She clarified by stating: "why would I go backwards and recommend a program at home when he [wa]s now successfully able to leave the house, whether it was two days a week, three days a week, whether a truncated day, a full day? That was progress, being able to attend[] a program outside the home" (Tr. p. 231). On cross-examination, the chairperson further clarified her testimony, noting that the student's ability to leave his house was not the "only reason" the June 2021 CSE recommended the Twilight program—but it "was one of the considerations" and that "[p]rior to that he couldn't and he wasn't" (Tr. pp. 235-36).³⁵

Another aspect which the IHO found lacking in the district-recommended programming was the ability to "pause" instruction (IHO Decision at pp. 22-23). The private psychiatrist testified that the student could rapidly lose his ability to engage in meaningful social interactions or meaningful educational opportunities, and it was important that he then be able to kind of pause his education in order to get acute treatment (Tr. p. 702).³⁶ As reflected by the evidence in the hearing record, since the student began attending the district in ninth grade, his education has been interrupted by deteriorations in his mental health such that he required at least two hospitalizations, (see Parent Exs. D at p. 2; N at p. 5).³⁷ The private psychiatrist testified that, with respect to school attendance and engaging with peers, while the student's "social anxiety" contributed to some of his "history of difficulty with his school attendance," his "psychiatric treatment render[ed] him ineducable at times" (Tr. p. 720; see Tr. pp. 701-02). When asked to explain what he meant by the term "ineducable," the psychiatrist testified that the student's paranoia grew to such an extent that it was no longer tolerable for him and he was no longer able to function "at any level"—including the ability to be "in a classroom"—and required hospitalization (Tr. p. 737). However, on cross-examination, the private psychiatrist testified that he did not discuss the opportunity to "pause" the

³⁵ The evidence in the hearing record reflects that, prior to the June 2021 CSE meeting, the parent contemplated home instruction for the student and voiced this as an option at the December 2020 CSE meeting, not at the February 2021 CSE meeting, as reflected in the questioning at the impartial hearing (see Tr. pp. 236, 244; see generally Parent Exs. P-R).

³⁶ Evidence in the hearing record demonstrates that, at Fusion, the student's education could "pause" to accommodate his absences, meaning that the student could pick up where he left off whenever he returned for instruction (Tr. pp. 606, 623-24).

³⁷ When the student was attending Fusion, the student's mental health issues required a third hospitalization that precluded his attendance at Fusion in or around February 2022 and from attending thereafter for subsequent mental health treatments (Tr. pp. 457, 720-21).

student's instruction at the June 2021 CSE meeting, and that it was not until March 2022 that the student's education at Fusion had to pause for acute treatment (Tr. pp. 719-21). He also testified that, "in terms of managing his educational plan, the student's "psychotic symptoms" needed to be controlled in order for the student to be educable, noting further that changes in his mental status could "happen fairly abruptly, sometimes with an obvious trigger, [and] sometimes not" (Tr. p. 702). At the time of the June 2021 CSE meeting, the parent reported that the "'school piece ha[d] much improved,'" and the student was showing "more confidence with his academics and ha[d] energy" (Dist. Ex. 1 at p. 7). He also reported that the student was also showing more "follow-through on his course work" (*id.*). In addition, written reports from Fusion—as incorporated into the June 2021 IEP—reflected the student's growing confidence in all of his courses, his ability to complete tasks and assignments, and his improving ability to seek assistance for his anxiety (*id.* at pp. 7-8). Based on the evidence in the hearing record, it does not appear that the June 2021 CSE had information presented that the student required the ability to pause his educational program in order to receive a FAPE, nor does the hearing record contain any evidence as to how the June 2021 CSE could have planned for such, given the unpredictability of the student's mental health struggles.

As a final point, the IHO faulted the district's recommended program because it operated from 3:00 p.m. to 6:00 p.m., while Fusion operated from 8:00 a.m. to 8:00 p.m. (*see* IHO Decision at p. 23). At the impartial hearing, the parent testified that he understood that the Twilight program provided a late afternoon setting for students, and moreover, that the "late afternoon setting" at Fusion had been "helpful" to the student (*see* Tr. p. 513). The parent also testified that while it was "probably" or "possibly" a positive attribute of the Twilight program, it may not "necessarily [be the] best sort of timeframe," as the student was attending Fusion from approximately 11:30 a.m. to "about 5:30" p.m. (Tr. p. 513). But it was "definitely helpful" that the student did not have to arrive at school in the early morning (Tr. pp. 513-14). At the impartial hearing, the chairperson testified that, at the time of the June 2021 CSE meeting, the student had been attending Fusion for approximately two days a week in the afternoon (*see* Tr. p. 198). The student's lead teacher at Fusion testified at the impartial hearing that, at Fusion, students worked with staff to find a "schedule that work[ed] best" for them (Tr. pp. 602, 624-25). She also testified that the "flexible time" for scheduling courses "might be" important for the student, because he "did begin with afternoon courses," she had not seen the student "in the mornings," and he "mostly did courses in the afternoon" (Tr. p. 625). Based, on the foregoing, the Twilight program's afternoon schedule met the student's needs and there is no indication in the hearing record that the student needed a different schedule in order to receive educational benefit.

It is understandable given the long road that the parent and the student have traveled to identify an educational program that addressed the student's unique set of needs, they would be reluctant to change it. It is possible that the student would not receive the same benefit in the district recommended program as he did at Fusion, but this possibility alone does not "require the [d]istrict to offer the exact same class size or program to meet its duties under IDEA" (*AR*, 2019 WL 6251196, at *13). Fusion is not a State-approved placement, and the district was not obliged to recommend Fusion in order to offer the student a FAPE. Instead, the district responded to information that the student had not achieved success in a therapeutic day placement, a residential placement, or receiving home instruction, and required something more unique that allowed for a flexible program in terms of schedule and workload with support from a special education teacher

and counseling. The CSE crafted such a program. While the programs set forth in the June 2021 and October 2021 may not have set forth the ideal placement, they were reasonable, and that is what is required (Andrew F., 137 S.Ct. at 999 [noting that the issue is "whether the IEP is reasonable, not whether the court regards it as ideal"]).

3. Transition Plans

It is unclear the extent to which the IHO weighed her finding that the CSEs did not discuss the transition plans for the student in determining that the district denied the student a FAPE (see IHO Decision at p. 20). However, even assuming the CSEs did not discuss the student's post-secondary transition plans, this would not support a finding that the district denied the student a FAPE.

The IDEA—to the extent appropriate for each individual student—requires that an IEP must focus on providing instruction and experiences that enables the student to prepare for later post-school activities, including postsecondary education, employment, and independent living (20 U.S.C. § 1401[34][A]; see Educ. Law § 4401[9]; 34 CFR 300.43; 8 NYCRR 200.1[fff]). Accordingly, pursuant to federal law and State regulations, an IEP for a student who is at least 16 years of age (15 under State regulations), or younger if determined appropriate by the CSE, must include appropriate measurable postsecondary goals based upon age appropriate transition assessments related to training, education, employment, and, if appropriate, independent living skills, as well as transition services needed to assist the student in reaching those goals (20 U.S.C. § 1414[d][1][A][i][VIII]; 34 CFR 300.320[b]; 8 NYCRR 200.4[d][2][ix]). Transition services must be "based on the individual child's needs, taking into account the child's strengths, preferences, and interests" and must include "instruction, related services, community experiences, the development of employment and other post-school adult living objectives, and, when appropriate, acquisition of daily living skills and functional vocational evaluation" (20 U.S.C. § 1401[34][B]-[C]; 34 CFR 300.43[a][2]; 8 NYCRR 200.1[fff]).

Here, the district witnesses could not recall whether the CSEs discussed transition planning for the student (see Tr. pp. 88, 171). However, both the June 2021 and the October 2021 IEPs included a transition plan for the student (see Dist. Exs. 1 at pp. 9-10, 13-14; 2 at pp. 10, 13-14). As measurable postsecondary goals, the IEPs indicated that the student wanted to attend college after high school and had "expressed interest in music and the arts" (Dist. Exs. 1 at p. 9; 2 at p. 10). In addition, the postsecondary goals described the student's desired employment after high school, his intention to live independently, and his transition needs (i.e., improving his advocacy skills, developing his career interests, and using his coping strategies) (see Dist. Exs. 1 at pp. 9-10; 2 at p. 10). As a coordinated set of transition activities, the student's IEPs described the post-school activities, the services and activities, and the agency responsible for implementation of those activities and services (Dist. Exs. 1 at pp. 13-14; 2 at pp. 13-14).

Even if the transition plans could be characterized as generic or vague as the parent alleges, it has been found that "a deficient transition plan is a procedural flaw" that will only rise to a denial of a FAPE if it impeded the student's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or caused a deprivation of educational benefits (M.Z., 2013 WL 1314992, at *6, *9, citing

Klein Indep. Sch. Dist. v. Hovem, 690 F.3d 390, 398 [5th Cir. 2012] and Bd. of Educ. of Tp. High Sch. Dist. No. 211 v. Ross, 486 F.3d 267, 276 [7th Cir. 2007]; see F.L. v. New York City Dep't of Educ., 2016 WL 3211969, at *8-*9 [S.D.N.Y. June 8, 2016]; C.W. v City Sch. Dist. of the City of New York, 171 F. Supp. 3d 126, 134 [S.D.N.Y. 2016]; J.M. v New York City Dep't of Educ., 171 F. Supp. 3d 236, 247-48 [S.D.N.Y. 2016]; A.D. v. New York City Dep't of Educ., 2013 WL 1155570, at *11 [S.D.N.Y. Mar. 19, 2013]). Here, the transition plans sufficiently align with the student's needs relate to preparing for post-secondary life. Accordingly, the parent's allegations about the transition plans do not support a finding that the district denied the student a FAPE.

VII. Conclusion

In summary, having found that the IHO committed reversible error by applying an improper legal standard to determine whether the district offered the student a FAPE, and that, overall, the evidence in the hearing record establishes that the district offered the student a FAPE in the LRE for the 2021-22 school year, the necessary inquiry is at an end and there is no reason to reach the issue of whether Fusion was an appropriate unilateral placement for the student or whether equitable considerations support an award of tuition reimbursement (Burlington, 471 U.S. at 370; see M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 66 [2d Cir. 2000]).

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision, dated August 24, 2022, is modified by reversing that portion which found that the district failed to offer the student a FAPE for the 2021-22 school year; and

IT IS FURTHER ORDERED that the IHO's decision, dated August 24, 2022, is modified by reversing that portion which ordered the district to reimburse the parent for the costs of the student's attendance at Fusion for the 2021-22 school year and to reimburse the parent for the costs of round-trip transportation upon proof of payment.

Dated: **Albany, New York**
 November 16, 2022

SARAH L. HARRINGTON
STATE REVIEW OFFICER