



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 22-153

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

**Appearances:**

Law Offices of Regina Skyer and Assoc., LLP, attorneys for petitioners, by Kerry McGrath, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Gail M. Eckstein, Esq.

### DECISION

#### I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioners (the parents) appeal from the decision of an impartial hearing officer (IHO) which denied their request to be reimbursed for their son's tuition costs at the Quad Preparatory School (Quad Prep) for the 2021-22 school year. 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]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[l]).

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

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

### **III. Facts and Procedural History**

The student attended a nonpublic school for pre-kindergarten (2018-19 school year) through first grade (2020-21 school year) (Parent Ex. D at p. 3). For first grade the student's class was described as a regular education class with 12 students and two teachers (Parent Ex. E at p. 2). In November 2020, the parents sought a neuropsychological evaluation of the student (Parent Ex. D). Although the student was perceived by his parents and teachers as a "bright" boy who encountered no problems with early learning acquisition, he displayed reduced verbal and physical self-control as well as impulsive, oppositional, and negative behaviors at both home and in school (*id.* at pp. 1-4). The neuropsychological evaluation yielded diagnoses of oppositional defiant disorder (ODD) and anxiety disorder, along with a provisional/rule-out diagnosis of attention deficit hyperactivity disorder, combined type (*id.* at p. 15). Notably, the evaluator recommended

that the student's family, school personnel, and a consulting behavioral specialist work collaboratively to develop a positive behavior program for the student designed to reinforce appropriate school behaviors while reducing the frequency of undesirable behaviors (*id.* at pp. 16, 18).

On June 24 and 25, 2021, the parents electronically executed a tuition contract with Quad Prep for the student's attendance for the 2021-22 school year (Parent Ex. K).<sup>1</sup>

By email dated June 28, 2021, the parents provided the CSE chairperson with a copy of the November 2020 neuropsychological evaluation report, and requested an "immediate" CSE review for the purposes of developing an IEP for the student and making a school program recommendation for the 2021-22 school year (Parent Ex. C at p. 1; see Parent Ex. D). The parents granted consent for the CSE to conduct any assessments deemed necessary as well as consent for the CSE to speak with the neuropsychologist who conducted the neuropsychological evaluation and the staff at the student's nonpublic school (*id.*).

On August 25, 2021, the parents notified the district via a letter through their attorney that they intended to place the student at Quad Prep for the 2021-22 school year, and seek funding from the district if it did not cure its procedural and substantive violations and offer an appropriate program and placement to the student within ten business days (Parent Ex. B). In the letter, the parents asserted that they had provided the CSE with the November 2020 neuropsychological evaluation report and requested an immediate CSE meeting; however, the CSE failed to conduct an evaluation of the student, failed to convene a CSE meeting, failed to identify the student as a student with a disability, and failed to recommend an IEP prior to the start of the school year (*id.* at p. 2). According to the parents, the CSE's actions deprived them of meaningful participation in the IEP process (*id.*).

On August 25, 2021 the neuropsychologist who conducted the November 2020 neuropsychology evaluation of the student authored an updated document described as a "[confidential summary of ongoing case consultation]" (updated report) (Parent Ex. E at pp. 1-3).<sup>2</sup> The evaluator noted that from January 2021 to May 2021, much effort was undertaken to develop effective behavior plans at the student's nonpublic school to reduce his oppositional and ADHD-related behaviors but due to problems with consistent implementation, "the classroom behavior plans did not meet with success" (*id.* at p. 2).<sup>3</sup> The evaluator concluded that the student's future educational needs could not be met in the regular classroom setting and opined that the student required placement in a specialized school setting that was designed to meet the special education needs of bright students with disabilities (*id.* at p. 3). The evaluator further opined that the student's

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<sup>1</sup> Parent Exhibits K and L were identified as a one-page affidavit and a six-page tuition contract, respectively, in the parents' exhibit list, the IHO decision and the hearing transcript (see IHO Decision at p. 9; Tr. p. 85), however the hearing record has them been marked in the reverse order with the contract as Exhibit K and the affidavit as Exhibit L.

<sup>2</sup> The date of the summary refers to the "date of last meeting" (Parent Ex. E at p. 1).

<sup>3</sup> The neuropsychologist reported that the provisional diagnosis of ADHD was subsequently confirmed (Parent Ex. E at p. 1).

"[c]lass size should be small," and the placement needed to have a psychologist who could work collaboratively with the student's classroom teachers to address his anxiety and behavior problems (id.). The neuropsychologist also stated that the student's school setting needed to offer counseling to help the student address his anxiety, group therapy to help the student develop social problem-solving skills, and occupational therapy (OT) to support the student's handwriting development (id.).

The student began attending Quad Prep on September 15, 2021 (Parent Ex. J).

In a letter dated October 8, 2021, the student's child psychologist, informed the CSE that he had worked with the student and his parents and consulted with the student's team of teachers at the private school from December 2020 through June 2021 in an effort to manage his disruptive, non-compliant, and aggressive behavior in the classroom (Parent Ex. F at p. 1). The child psychologist reported that the combination of the student's difficulties made it highly challenging for him to get through the school day (id.).<sup>4</sup> She noted that despite being in a 12:1 student to teacher ratio, and receiving a high level of treatment support, the student continued to struggle with his academic, behavioral, and social/emotional functioning (id.). The child psychologist opined that the student required a specialized school setting with a high degree of structure, small student to teacher ratio, specialized curriculum and a high level of academic rigor commensurate with the student's intellectual abilities (id.). She noted that such a setting needed to be capable of providing the student with classroom supports including a BIP and individual and group counseling (id.).

By email dated November 16, 2021, the parents provided the CSE with updated reports from the neuropsychologist who evaluated the student and consulted with the family and the student's child psychologist (Parent Ex. M).<sup>5</sup> The parents stated that they looked forward to hearing from the CSE chairperson (id.).

#### **A. Due Process Complaint Notice**

In a due process complaint notice dated December 9, 2021, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2021-22 school year (Parent Ex. A at pp. 1-3). Initially, the parents noted that the district failed to remedy the defects raised in their notice to the district of their intent to unilaterally place the student (id. at pp. 1-2). In addition, the parents alleged that the district failed to offer the student a FAPE by failing to identify the student as a student with a disability, failing to conduct an initial evaluation of the student within 60 days of the parents' request and consent for evaluation, and failing to convene a CSE within 60 days of the parents' request and consent in violation of State regulations

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<sup>4</sup> The child psychologist indicated that the student's ADHD symptoms made it difficult for him to pay attention during instruction, complete academic tasks, sit still, control impulsivity, and tolerate boredom in a general education setting; that the student's generalized anxiety disorder made it challenging for him to initiate school work for fear of failing and he reacted negatively when he received negative feedback; and that the student's ODD made it difficult for him to listen to authority figures and resulted in him defying rules, reacting emotionally to small triggers, and exhibiting resentment when he felt slighted by others (Parent Ex. F at p. 1).

<sup>5</sup> Parent Ex. M is dated November 16, 2021; however, it is noted in the Parent Exhibit list as being dated November 6, 2021.

(id. at pp. 2-3). The parents further asserted that the unilateral placement of the student at Quad Prep was appropriate, and that equitable considerations favored tuition reimbursement because the parents had fully cooperated with the district (id.). For relief, the parents requested tuition funding at Quad Prep for the 2021-22 school year and transportation to and from Quad Prep (id. at p. 3).

### **B. Events Post-Dating the Due Process Complaint Notice**

Shortly before the impartial hearing convened and the matter was pending before the IHO, the district began an initial evaluation of the student. On December 15, 2022, the district conducted a social history evaluation with the parents of the student (Dist. Ex. 1). On March 30, 2022, the district conducted a classroom observation of the student at Quad Prep (Dist. Ex. 2 at pp. 1-2).

On April 13, 2022, a CSE convened for an initial eligibility meeting and found that the student was not eligible for special education services and programs (Dist. Ex. 7 at p. 1). The results of the meeting were memorialized in a document, titled "Ineligible for Special Education Services" (id.). The district noted that as part of the initial evaluation process, the CSE conducted a social history, psychoeducational evaluation, classroom observation, and other appropriate assessments or evaluations as necessary to determine the student's educational needs and attached a summary of the student's present levels of performance and individual needs (id. at pp. 1, 4-8).<sup>6</sup> The document included results from the November 2020 neuropsychological assessment as well as then-current Quad Prep teacher reports presented at the meeting (id. at pp. 4-7). The April 13, 2022 CSE noted that the student presented with high average to superior cognitive abilities and academic abilities according to assessments, and that staff from the student's nonpublic school reported that he performed at or above grade level in reading, writing, and math; therefore, the CSE found that the student was able to access the general education curriculum (id. at p. 8).<sup>7</sup>

By prior written notice dated May 9, 2022, the district noted that the student was not eligible for special education and explained that at the meeting held in April 2022, the assessments and materials identified were reviewed and discussed and it was determined that the student did not meet the eligibility criteria for an educational disability (Dist. Ex. 8 at pp. 1-2).

### **C. Impartial Hearing Officer Decision**

While the district's initial evaluation and CSE meeting procedures were ongoing, the impartial hearing process continued. On January 7, 2022, the parties proceeded to an impartial hearing, which concluded on September 25, 2022 after twelve days of proceedings (Tr. pp. 1-92).

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<sup>6</sup> The district school psychologist reported that the April 2022 CSE had the following materials available to it: the November 2000 neuropsychological evaluation, the December 2021 social history as well as her August 2021 updated report, the October 2021 letter from the student's child psychologist, and the March 2022 classroom observation (Dist. Ex. 9 at pp. 1-2). The prior written notice dated May 9, 2022 indicated that the April 2022 CSE considered the December 2021 social history, a March 2022 psychoeducational assessment, and the March 2022 classroom observation (Dist. Ex. 8 at p. 2). The hearing record does not contain a March 2022 psychoeducational evaluation nor is there any evidence of the district having conducted its own psychological evaluation of the student.

<sup>7</sup> An attendance page from the April 13, 2022, meeting bears the date April 21, 2022, and is included in the hearing record as a separate exhibit (Dist. Ex. 6 at p. 1).

In a decision dated October 8, 2022, the IHO found that the CSE had sufficient evaluative information to render a determination as to whether the student was eligible for special education, and further found that the CSE had correctly determined that the student was not eligible for special education because although the student was diagnosed with ADHD, ODD, and anxiety, the student's behaviors in the classroom did not negatively affect the student's ability to achieve grade-level performance (IHO Decision at pp. 3-5, 7). The IHO noted that although the district had admitted that it committed a procedural violation in failing to timely evaluate or hold a timely CSE meeting for the student, the procedural violation did not result in a denial of FAPE because there was no substantive denial of FAPE as the district had correctly determined that the student was not eligible for special education (id. at pp. 5-6). Therefore, the IHO dismissed the due process complaint notice and denied the parents' request for tuition reimbursement and transportation (id. at p. 6). The IHO did not discuss the adequacy of Quad Prep as a unilateral placement for the student, or whether equitable considerations favored reimbursement (id. at pp. 1-7).

#### **IV. Appeal for State-Level Review**

The parents appeal from the IHO's denial of their request for tuition reimbursement and transportation to and from Quad Prep during the 2021-22 school year. The parents contend that the IHO erred in admitting and relying upon evidence concerning the ineligibility determination and prior written notice from the district that occurred and was developed during the impartial hearing and after the parents submitted the due process complaint notice that commenced the matter. In the parents' view, the evidence constituted impermissible retrospective evidence that prejudiced the parents because it did not exist at the time the parents submitted their due process complaint notice and, therefore, they could not challenge the evaluative material or the ineligibility determination that the district and the IHO relied upon. Next, the parents contend that the IHO erred in failing to find that the district's failure to timely evaluate the student and convene a CSE significantly impeded the parents' ability to participate in the development of the student's program and impeded the student's right to a FAPE. Relatedly, the parents contend that the IHO erred in failing to rule on the parents' claim that the district had violated its child-find obligations.

The parents next contend that the IHO erred in finding that the district had correctly concluded that the student was ineligible for special education because the hearing record showed that the student's behaviors were not controlled within the classroom and the student had consistent struggles accessing the curriculum, commencing and completing work, and functioning in a regular education setting.

Lastly, the parents contend that the student's unilateral placement at Quad Prep was appropriate and that equitable considerations support an award of full tuition reimbursement.

In an answer, the district denies the parents' material allegations and argues that the IHO decision should be upheld in its entirety. More specifically the district argues that the IHO did not err in admitting and considering evidence concerning the initial evaluation and April 2022 CSE meeting because the timing of a due process complaint notice is not controlling as to admissibility of evidence, the parents participated in the CSE meeting and relied upon the admitted evidence in their post-hearing brief.

The district admits that it committed a procedural error in that it failed to timely evaluate the student and conduct a CSE meeting; however, the district contends that because the student was properly found to be ineligible for special education the procedural error did not result in a deprivation of educational benefits or a denial of a FAPE. The district asserts that the student was a high academic achiever, he did not require a behavior plan at Quad Prep, and his diagnoses did not interfere with academic performance or require special education.

With respect to the unilateral placement at Quad Prep, the district asserts that there is insufficient evidence regarding the individualization of the instruction at Quad Prep to reach a conclusion as to its appropriateness. The district also asserts that there is insufficient evidence to reach a conclusion with respect to equitable considerations and that the parents had contracted with Quad Prep for the 2021-22 school year before referring the student to the district for an initial evaluation.

## V. Applicable Standards

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

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP" (Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). The Supreme Court has indicated that "[t]he IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement" (Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. \_\_\_, 137 S. Ct. 988, 999 [2017]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ. of the Chappaqua Cent. Sch. Dist., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a

FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245).

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

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

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.

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<sup>8</sup> 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).



Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E., 694 F.3d at 184-85; T.P., 554 F.3d at 252). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo, 489 F.3d at 111; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

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

## **VI. Discussion**

### **A. CSE Process—Timeliness of the Initial Evaluation and CSE Meeting**

The parents appeal from the IHO's determination that the district's failure to conduct an initial evaluation and hold a CSE meeting within the applicable timelines did not result in a denial of FAPE because the student was not eligible for special education.

With respect to the issue of the timeliness of the district's initial evaluation and implementation of services, upon written request by a student's parent, a district must initiate an individual evaluation of a student (see Educ. Law § 4401-a[1], [3]; 8 NYCRR 200.4[a][1][i]; [a][2][ii]-[iv]; [b]; see also 20 U.S.C. § 1414[a][1][B]; 34 CFR 300.301[b]). Specifically, once a referral is received by the CSE chairperson, the chairperson must immediately provide the parents with prior written notice, including a description of the proposed evaluation or reevaluation and the uses to be made of the information (8 NYCRR 200.4[a][6]; 200.5[a][5]). In addition, the district must, within 10 days of receipt of the referral, request the parent's consent to initiate the evaluation of the student (see 8 NYCRR 200.4[a][2][iv][a]; see also 34 CFR 300.300[a]).<sup>9</sup> After parental consent has been obtained by a district, the "initial evaluation shall be completed within 60 days of receipt of consent" (8 NYCRR 200.4[b]; see also 8 NYCRR 200.4[b][7]). "Within 60 school days of the receipt of consent to evaluate for a student not previously identified as having a disability . . . the board of education shall arrange for appropriate special programs and services" (8 NYCRR 200.4[e][1]).<sup>10</sup>

In this matter, in a June 28, 2021 email to a CSE chairperson, the parents referred the student for an initial evaluation by requesting an immediate review by the CSE, which included a statement that "[t]his email is our consent for the [district] to conduct any assessment you deem

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

<sup>10</sup> A "school day" is defined as "any day, including a partial day, that students are in attendance at school for instructional purposes" (8 NYCRR 200.1[n][1]).

necessary" (Parent Ex. C). Assessments related to the student's initial evaluation were completed on December 23, 2021 and March 30, 2022 and the CSE convened to determine the student's eligibility for special education on April 13, 2022 roughly nine months after the initial referral (Dist. Exs. 1; 2; 7). Thus, the hearing record reflects that the district did not complete the student's initial evaluation within 60 days from receipt of the consent to evaluate (8 NYCRR 200.4[b]; see also 8 NYCRR 200.4[b][7]; [j][1]). Additionally, the district conceded both at the hearing and on appeal that it failed to comply with the timelines required for an initial evaluation and CSE review without offering an explanation as to how the failures occurred (Dist. Post Hr'g Br. at p. 5; Answer ¶¶ 3, 6).

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

Generally, when a CSE has appropriately determined that a student was not eligible for special education services under the IDEA, and the student's parents were able to participate in that determination, any alleged procedural violation by the district does not result in a denial of FAPE to the student (D.K. v. Abington Sch. Dist., 696 F.3d 233, 249-50 [3d Cir. 2012]; D.G. v. Flour Bluff Indep. Sch. Dist., 481 Fed. App'x 887, 891-93 [5th Cir. 2012] [holding that "IDEA does not penalize school districts for not timely evaluating students who do not need special education"]; A.P. v. Woodstock Bd. of Educ., 572 F. Supp. 2d 221, 225-26 [D. Conn. 2008], aff'd, 370 Fed. App'x 202 [2d Cir. Mar. 23, 2010]; Alvin Indep. Sch. Dist. v. A.D., 503 F.3d 378, 384 [5th Cir. 2007] [finding consideration of alleged procedural errors of IDEA unnecessary when student was not eligible for special education services]; D.H.H. v. Kirbyville Consol. Ind. Sch. Dist., 2019 WL 5390125, at \*6 [E.D. Tex. Jul. 12, 2019] [finding a school district does not violate the IDEA if it declines to provide special education to a student who does not need special education and does not qualify as a child with a disability under the IDEA]; see also Adam J. v. Keller Indep. Sch. Dist., 328 F.3d 804, 812 [5th Cir. 2003]).

In response to the IHO's reliance on the April 2022 CSE's determination that the student was not eligible for special education, the parents contend that the IHO erred in admitting and considering evidence of the initial evaluation conducted by the district and the April 2022 CSE meeting because they both occurred after the filing of the parents' due process complaint notice on December 9, 2021. The parents cite the cases R.E. v. New York City Dept. of Educ. (694 F.3d at 186-88) and Bd. of Educ. of Yorktown Cent Sch. Dist., v. C.S. (990 F.3d 152, 173 [2d Cir. 2021]) for the proposition that a district cannot rely on after the fact testimony to rehabilitate a deficient IEP and assert that it "would follow" that the district cannot rely on the CSE's ineligibility determination document to defend its case after the filing of the parents' due process complaint notice.

In grappling with the permissibility of retrospective evidence in R.E., the Second Circuit squarely held that the question of whether an IEP was reasonably calculated to enable the student to receive education benefits "must be evaluated prospectively as of the time [the IEP] was created" (R.E., 694 F. 3d at 184-88 [explaining that with the exception of amendments made during the resolution period, the adequacy of an IEP must be examined prospectively as of the time of its drafting and that "retrospective testimony" regarding services not listed in the IEP may not be considered]). The Second Circuit has made clear that parents are entitled to rely on an IEP "as written when they decide to [unliterally] place" their child before the beginning of a school year (Bd. of Educ. of Yorktown Cent. Sch. Dist. v. C.S., 990 F.3d 152, 173 [2d Cir. 2021]; see R.E., 694 F.3d at 187-88 ["At the time the parents must decide whether to make a unilateral placement . . . [t]he appropriate inquiry is into the nature of the program actually offered"]).

However, this matter does not involve consideration of whether a particular IEP for the student was appropriate at the time the parents decided whether to make a unilateral placement. Rather, the question in this matter concerns whether the student was eligible for special education as a student with a disability, and therefore eligible for receipt of a FAPE by the district. The need for special education services under the IDEA must be addressed before it can be determined if substantive relief is warranted in the form of special education, otherwise there would be significant risk of elevating form over substance by providing special education services to a child merely because of a timeline error in the evaluation process.

Therefore, in order to determine if this student should have been classified as a student with a disability, consideration of the evidence with respect to the district's eligibility determination is appropriate, even when that evidence comes to light during the impartial hearing. Based on a review of the hearing record, this is not a situation where the length of time between the referral and the CSE review impacted the parents' placement decision. For example, the parents executed an enrollment contract on June 24, 2021 for the student's attendance at Quad Prep for the 2021-22 school year; prior to the parents' referral of the student for an initial evaluation on June 28, 2021 (Parent Exs. C; K at pp. 2, 6). Additionally, just prior to the expiration of the 60-day window for conducting an initial evaluation, the parents sent an August 25, 2021 letter to the district, in which the parents notified the district of their intention to place the student at the nonpublic school for the 2021-22 school year and that they sought funding for this placement from the district (Parent Ex. B at p. 2). Accordingly, I decline to find that the IHO erred in admitting and considering the evidence with respect to the April 2022 eligibility determination.

Additionally, while it is possible for a parent of a student suspected of having a disability to be excluded from the CSE process such that it results in a denial of FAPE without a finding that a student is eligible for special education, those circumstances are not present in this matter. For example, in the past I have found that where a district failed to secure a parent's presence at the initial eligibility meeting and failed to obtain sufficient evaluative information to determine a student's level of achievement in the general education curriculum, such procedural errors resulted in a denial of a FAPE to a student who was not found eligible for special education (see Application of a Student Suspected of Having a Disability, Appeal No. 15-038 [noting specifically that the district significantly impeded the parent's participation in the process by excluding the parent from the eligibility determination]). However, in this instance, it appears that the parents participated in the (eventual) April 2022 CSE meeting and the district had sufficient evaluative information regarding the student's present levels of performance; accordingly, absent a finding that the CSE

erred in failing to classify the student as eligible under the IDEA and develop an IEP, there is no indication that the delay in evaluating the student and holding the initial eligibility meeting, alone, denied the parents the opportunity to participate in the eligibility determination, thus the crux of the dispute in this matter is the question of the student's eligibility for special education as a student with a disability (see Dist. Exs. 1; 2; 6; 9 at pp. 1-4).

### **C. Eligibility for Special Education**

Turning to the parent's appeal from the IHO's determination that the student was not eligible for special education, the IDEA defines a "child with a disability" as a child with specific physical, mental, or emotional conditions, including a learning disability, "who, by reason thereof, needs special education and related services" (20 U.S.C. § 1401[3][A]; Educ. Law § 4401[1]; see 34 CFR 300.308[a][1]; 8 NYCRR 200.1[zz]).

Notably, while the April 2022 CSE found that the student "d[id] not need special education services and programs"; there was no indication of the criteria used in making this determination or of a specific classification category considered for the student (Dist. Ex. 7 at p. 1). Similarly, the IHO did not conduct an analysis as to which specific disability classification category that the student could have potentially been identified with, rather the IHO determined that because the student's behaviors did not negatively affect his "ability to achieve grade-level performance," the student was not eligible for special education (IHO Decision at pp. 3-6). Further, the parents also have not specified which of the thirteen possible classification categories they believe the student should be identified with either in their post-hearing brief to the IHO or in their request for review on appeal (see Req. for Rev.; Parent Post-Hr'g Br.).

State regulations define the "terms used" in the definition of a student with a disability as (1) Autism; (2) Deafness; (3) Deaf-blindness; (4) Emotional disability; (5) Hearing impairment; (6) Learning disability; (7) Intellectual disability; (8) Multiple disabilities; (9) Orthopedic impairment; (10) Other health-impairment; (11) Speech or language impairment; (12) Traumatic brain injury; and (13) Visual Impairment including blindness (8 NYCRR 200.1 [zz] [1-13]; see 34 CFR 300.8 [c] [1-13]).

#### **1. Other Health-Impairment**

Because the student has received several diagnoses, including a diagnosis of ADHD, it appears that the most relevant disability category for the student would be the "other health-impairment" classification.<sup>11</sup>

Under State and federal regulation, other health-impairment is defined as "having limited strength, vitality, or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment, that . . . [i]s due to chronic

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<sup>11</sup> The neuropsychological evaluation obtained by the parents indicated that "[a]cademic testing results revealed no evidence of any specific learning disorder" for the student (Parent Ex. D at p. 14). With the exception of the other health-impairment category, the evidence is less well developed regarding other disability categories such as an emotional disability, but the student's anxiety disorder diagnosis could be relevant to certain criteria within that category.

or acute health problems such as . . . attention deficit hyperactivity disorder [ADHD]" (34 CFR 300.8[c][9]; 8 NYCRR 200.1[zz][10]).<sup>12</sup>

State regulations further provide that "[i]n interpreting evaluation data for the purpose of determining if a student is a student with a disability . . . and determining the educational needs of the student, the [CSE] and other qualified individuals must draw upon information from a variety of sources, including aptitude and achievement tests, parent input, and teacher recommendations, as well as information about the student's physical condition, social or cultural background, and adaptive behavior; and ensure that information obtained from all these sources is documented and carefully considered" (8 NYCRR 200.4[c][1]; see 34 CFR 300.306[c]).

In this matter, the district school psychologist, who participated at the April 2022 CSE meeting, stated that the evaluations, assessments, and reports relied on by the CSE were sufficient to determine the student's academic and related services needs (Dist. Ex. 9 at pp. 1-2).<sup>13</sup> As noted above, she indicated that the CSE had the following materials for the April 2022 CSE meeting: the November 2020 neuropsychological evaluation as well as her August 25, 2021 updated report, the October 8, 2021 letter from the student's child psychologist, the December 15, 2021 district social history, and the March 30, 2022 classroom observation (*id.*). The school psychologist indicated that in addition to the reports, the parents and teachers provided verbal reports at the April 2022 CSE meeting about the student's present levels of performance and needs, and the district special education teacher on the CSE team asked a series of questions to obtain then-current information about the student (*id.* at p. 2).

The November 2020 neuropsychological evaluation report noted that concerns were expressed about some challenging behaviors displayed both at home and in school, and the student displayed "reduced verbal and physical self-control and he can be very impulsive" (Parent Ex. D at pp. 1, 14). In addition, the student could be "oppositional and negative, and his behaviors h[ad] begun to affect his interpersonal relationships" (*id.* at p. 14). The report noted that the student demonstrated a "high energy level . . . , his sustained attention was variable . . . , he was avoidant and resistant to engaging in some activities . . . , and his parents and teachers questioned if anxiety might underlie some of these behaviors" (*id.*). The student presented with a "history of weakness in handwriting for which he ha[d] received occupational therapy (OT) services in the past" (*id.*).

The neuropsychological report noted that the results of the evaluation revealed three presenting problems that were acting in concert to influence the student's behavioral and emotional functioning in multiple settings and that they were also affecting aspects of the student's schoolwork (Parent Ex. D at p. 15). The presenting problems included an anxiety disorder, ODD,

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<sup>12</sup> The full definition reads as follows: "Other health-impairment means having limited strength, vitality or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment, that is due to chronic or acute health problems, including but not limited to a heart condition, tuberculosis, rheumatic fever, nephritis, asthma, sickle cell anemia, hemophilia, epilepsy, lead poisoning, leukemia, diabetes, attention deficit disorder or attention deficit hyperactivity disorder or tourette syndrome, which adversely affects a student's educational performance" (8 NYCRR 200.1[zz][10]).

<sup>13</sup> The district school psychologist reported that she participated in the April 2022 CSE meeting as both district representative and school psychologist (Dist. Ex. 9 at p. 1; see Dist. Ex. 6).

and ADHD; however, the report noted that ADHD was initially assigned as a provisional/rule-out diagnosis for the student in November 2020 (id.).

With respect to the student's anxiety, the neuropsychological report noted that the student could experience high levels of anxiety both in school and at home and that his anxiety greatly affected engagement in learning (Parent Ex. D at p. 15). One of the more prominent manifestations of the student's anxiety was performance anxiety and his worries and concerns about how others perceived or appraised him (id.). Additionally, the student "appear[ed] to have some perfectionistic tendencies and he ha[d] developed very high self-standards for his work and accomplishments" (id.). The report noted that the student's teacher observed that the student appeared "to have a strong need to be 'the best' when with his peers, which likely is also related to his performance and social appraisal concerns" (id.). Further, the student "experience[d] anticipatory anxiety when new tasks [we]re introduced, likely over concern that he may not achieve well on them"; and when engaged in tasks, the student was "premature in perceiving he ha[d] reached a point where he may not succeed" and he sought to "avoid and/or discontinue such activities" (id.). The report indicated that, for the student, "[t]he thought that he might not be able to do a task well and up to his high self-standards, and/or that others may not perceive him to be highly skilled and competent, [we]re triggers to [his] anxiety" (id.). According to the neuropsychological report, the student did not demonstrate "adaptive strategies or coping mechanisms to help him when he bec[ame] anxious, and default[ed] to avoidance behaviors" (id.). "Once [the student] bec[ame] emotionally aroused, [his] behaviors [could become increasingly problematic, and it [wa]s hard for him to settle back down" (id.).

The November 2020 neuropsychological evaluation report noted that the student's behavioral profile was also "significant for a high level of oppositional and defiant behaviors" which, at times, appeared to be triggered by his anxiety, but, at other times, the triggers were less apparent (Parent Ex. D at p. 15). "By parent report, [the student] w[as] more prone to anger and irritability than his peers, he easily los[t] his temper, [wa]s easily annoyed, actively refuse[d] to follow through on requests, and [he] argue[d] with adults and authority figures . . . and sometimes blame[d] others" (id.). The neuropsychological report indicated that all of these oppositional and defiant behaviors were observed in the student for many years and they occurred more than once a week, adversely affected the student in social contexts and in his relationships with others, and placed functional limits on his engagement in the learning/school environment (id.).<sup>14</sup>

According to the neuropsychological report, the student presented with a high level of behavioral disinhibition, was very impulsive, in near constant motion throughout testing, demonstrated challenges with sustained attention, concentration, and focus, and performed below age expectation on formal measures of sustained attention (Parent Ex. D at p. 15). The report indicated that the student demonstrated emerging weaknesses in some early executive functioning skills, notably organization, planning, and attention to details (id.). The student was not diagnosed with ADHD at the time of the November 2020 evaluation due to the teacher assessing the student's

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<sup>14</sup> The neuropsychologist was not always entirely clear when describing what information she obtained through direct observation and assessment versus the information which she obtained from others, such as the parents. By November 2020, she had not worked with the student for "many years."

sustained attention at subclinical levels; however, it was the evaluator's opinion the ADHD diagnosis would be appropriately assigned to the student in time (id. at pp. 15-16).

The August 2021 updated report of the neurophysiologist, reviewed by the CSE, provided information regarding the student's performance following the November 2020 neuropsychological evaluation (Parent Ex. E). The updated report indicated that she had attended a school meeting to discuss the results of the November 2020 evaluation on January 19, 2021 and that she also communicated with the child psychologist/behaviorist as well as a child psychiatrist who subsequently worked with the student (id. at pp. 1-2).

The neuropsychologist's updated report stated that from January 2021 to May 2021 much effort was undertaken to develop effective behavior plans in the student's first grade classroom, which was comprised of 12 students and two teachers (Parent Ex. E at p. 2). Although the student had the support of his two teachers, a learning specialist, and a school psychologist at the nonpublic school, and his child psychologist consulted with school staff, the implementation of the behavior plans was unsuccessful, the student's behaviors remained problematic in school, and he was avoidant about engaging in some school activities (id.). The student and his parent explained that he was bored in class which exacerbated some of his behavioral challenges, and that the student's attention and behavior remained problematic in school for the remainder of the academic school year (id.). The updated report noted that the student attended an intensive, structured program for children with ADHD during summer 2021 that was led by a professional staff of psychologists and psychiatrists with assistants, who also worked with the children (id.). During the August 2021 meeting with the evaluator, the student described that he liked the summer program, that he knew what he had to do, what was expected of him, and that he made some new friends; and the updated report noted that the student responded well to the program's structure and close adherence to its behavior plans (id. at pp. 2-3). Based on multiple meetings with the parents since the time of the student's initial evaluation, and a consultation appointment with the student and his parent on August 25, 2021, the evaluator opined that she was able to render a professional opinion about the student's current educational needs (id. at p. 2). The neuropsychologist's updated report noted that improvements had occurred in the parent-child relationships with the implementation of structure in the home setting and clear expectations and consequences for the student's behavior which resulted in increased positive student behaviors at home (id.).

As noted above, the neuropsychologist's updated report stated that the student's future educational needs could not be met in the general education setting; and that even with a skilled behavioral psychologist working with the student's regular education teachers at the nonpublic school from January 2021 to May 2021 to implement behavior plans targeted at reducing the student's behavioral and psychological issues in school, the student's anxiety, ODD, and ADHD-related challenges continued to pose substantial barriers to his ability to function and to access the school curriculum in a general education setting (Parent Ex. E at p. 3).

As described above, by letter to the CSE dated October 8, 2021, the student's child psychologist indicated that she had provided weekly parent-child interaction therapy to the student and his parents from December 2020 through June 2021 in an effort to address the student's behavioral challenges, impulsivity, non-compliance, and emotional outbursts (Parent Ex. F at p. 1).

As another component of the initial evaluation, the district conducted a social history assessment of the student on December 12, 2021, which included an interview with the student's parents (Dist. Ex. 1 at p. 1). According to the parents, the student attained most developmental milestones on time, demonstrated no speech delays, and in terms of activities of daily living, the student demonstrated age-appropriate skills (*id.* at p. 2). With regard to the student's medical background, the parents noted that the student was on ADHD medication for about two months in the fall of 2021, that the medication was discontinued due to "decreased appetite and emotional swings such as anger," and the student's treating psychiatrist recommended that the student stop medications to establish a new baseline (*id.*). The social history noted that the parents found the child's behavior to be extremely variable, that he was strong willed and difficult to manage at times but also that he was funny, smart, athletic, and caring (*id.*).<sup>15</sup> With regard to their referral to the CSE, the parents reported that the student demonstrated some challenges with writing and reading comprehension and demonstrated some strengths in math (*id.*). The parents further reported that they requested an evaluation to determine if the student was eligible for any special education services and noted that the student demonstrated some academic and behavioral concerns; they provided the neuropsychologist's updated report and the district requested the November 2020 neuropsychological evaluation for consideration (*id.*). With regard to the student's school performance, the parents noted that at Quad Prep the student was in a class with 10 to 11 students and four teachers who were academic teachers and behavioral specialists (*id.*). The parents reported that the school provided enriched academics, was highly structured with many supports, and that they felt that the student needed a degree of specialized support (*id.*). The social history noted that "due process rights and consents were thoroughly reviewed with the parents" (*id.* at p. 3).

The district conducted a classroom observation of the student on March 30, 2022 at Quad Prep, where he attended second grade (Dist. Ex. 2 at p. 1). The observation took place in the student's main classroom where there was "one main teacher," two associate teachers and 10 students in attendance (*id.*). The observer reported that the 10 students had finished phonics work and were reading and preparing for choice time (*id.*). The student was seated at his desk with a small group, composed of three other students and one associate teacher (*id.*). He had a book in his hand and appeared to be reading for a few minutes, then he looked up and stared for a few minutes, quietly distracted, and then he began talking to another student (*id.*). According to the observer, the teacher told the student that he had three more minutes if he wanted to pick another book, to which he responded "no," and the teacher then said that he could "sit there quietly" (*id.*). The student spoke to the student next to him with his water bottle near his face, and the teacher told him that if he was no longer using the water bottle to put it away, which he did (*id.*). The observer reported that the teacher announced to the class that it was time pause in order to choose a transitional material, and that she would call on students when they were ready; the student called out and the teacher told him that she did not see that he was ready (*id.* at p. 2). The teacher called on the student after he was seated quietly, and he chose his items announcing to his small group that he was making a weapon toy (*id.*). The teacher reminded the student that the expectation was for students not to create weapons and she told him to make a different choice, but he continued

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<sup>15</sup> The social history contained the student's educational background, which has already been noted herein (Parent Ex. 1 at p. 2).



to play with what he had made, and the teacher took it away (id.). The student remained near the other students, sitting quietly in the corner (id.).

According to the observer, during her observation the student followed some directions but often required redirection from his teacher or associate teacher, and he socialized with other students and needed reminders to stay on task (Parent Ex. 2 at p. 3). The student participated in group play and often initiated conversations with his peers; he was engaged for some of the time and also distracted and talkative at other points (id.). The observer noted that compared to his peers the student required more redirection and he required some intervention by the teacher or associate teacher (id.).

As part of the CSE process, the district provided a document in April 2022 that described the student's present levels of performance and individual needs (District Ex. 7). With respect to social development, the district indicated that as reported orally at the CSE meeting, the student enjoyed interacting with others (Dist. Ex. 7 at p. 7). His parents reported that in his past school he had difficulty and called out and pushed or grabbed others (id.). The student, at times, became overstimulated at recess, and his teacher reported that he enjoyed being "silly" with peers but needed more reminders than his peers to calm or stop (id.). The student benefitted from using sensory tools such as putty to stay focused (id.). The document noted that the student was responsive to opportunities to take breaks and use his sensory tools, needed reminders to stay focused and refrain from calling out, demonstrated a low frustration tolerance, could behave silly or shut down and refuse to do a task presented, and benefitted from structured classroom routines and clear rules and expectations (id.).

The document indicated that the student was physically healthy, his motor skills were within normal limits, and no physical needs were reported (Dist. Ex. 7 at p. 7). As per oral report at the April 2022 CSE meeting, the student carried diagnoses of ADHD, ODD, and anxiety and was taking a different medication for ADHD than the one identified in fall 2021 (id.). Behavior scales completed by the student's parents and teachers resulted in elevated scores for hyperactivity, externalizing behaviors, defiance and aggression (Parent Ex. D at pp. 3, 6, 24-25).

In light of the above, I find the evidence indicates that the student has a health condition that would fall within the those identified in the other health-impairment category. As noted above, an other health-impairment is defined as "having limited . . . alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment, that . . . [i]s due to chronic or acute health problems such as . . . attention deficit hyperactivity disorder [ADHD]" (34 CFR 300.8[c][9]; 8 NYCRR 200.1[zz][10]). The student's child psychologist, as well as the neuropsychologist who evaluated the student, agreed that the student met the criteria for ADHD (Parent Exs. E at pp. 1, 3; F; see Ex. D at pp. 6, 12, 23), and the district provided no evidence or argument to the contrary. Moreover, oral reports by the student's parents and teachers at the CSE meeting indicated that that the student required prompts to stay focused and refrain from calling out, reminders to calm down or stop when being "silly," and redirection to follow class rules and procedures. Having found that the student met the above mentioned portion of the definition of other-health imparirment, I will next consider whether the student's other health-impairment "adversely affect[ed] [the] student's educational performance" (8 NYCRR 200.1[zz][10]).

## 2. Adversely Affects Educational Performance

The other health-impairment definition also requires an examination of whether the student's condition or deficits adversely affected his or her educational performance (see 34 CFR 300.8[c][9][ii]; 8 NYCRR 200.1[zz][10]). This portion of the definition is contained in a number of the disability categories in the IDEA, not just the other health impairment definition (see, e.g., 34 CFR 300.8[c][1][i]; 8 NYCRR 200.1[zz][1]). Whether a student's condition adversely affects his or her educational performance such that the student needs special education within the meaning of the IDEA, is an issue that has been left for each state to resolve (J.D. v. Pawlet Sch. Dist., 224 F.3d 60, 66 [2d Cir. 2000]; S.B. v. Goshen Cent. Sch. Dist., 2022 WL 4134457, at \*12 [S.D.N.Y. Sept. 12, 2022]; M.N. v. Katonah-Lewisboro Sch. Dist., 2016 WL 4939559, at \*10 [S.D.N.Y. Sept. 14, 2016]). Although some states elect to establish further, more explicit definitions for these terms, often through regulation or special education policy (see, e.g., Mr. I. v. Maine Sch. Admin. Dist. No. 55, 480 F.3d 1, 11 [1st Cir. 2007]; J.D., 224 F.3d at 66-67; Johnson v. Metro Davidson County Sch. Sys., 108 F. Supp. 2d 906, 918 [M.D. Tenn. 2000]), others do not and instead resolve the issue on a "case-by-case" basis (R.B. v. Napa Valley Unified Sch. Dist., 496 F.3d 932, 944 [9th Cir. 2007]; see, e.g., Yankton Sch. Dist. v. Schramm, 93 F.3d 1369, 1375-76 [8th Cir. 1996]; Greenland Sch. Dist. v. Amy N., 2003 WL 1343023, at \*8 [D.N.H. Mar. 19, 2003]).

A disabling condition such as an ADHD combined with a bipolar disorder has not been sufficient to confer eligibility for special education when a psycho educational assessment showed that the student tested above grade level and the student's grades and test results demonstrate that she continuously performed well in public school (C.B. v. Dep't of Educ. of City of New York, 322 F. App'x 20, 22 [2d Cir. 2009]). The courts in this circuit have found that academics are a primary focus of the term educational performance (see A.J. v. Bd. of Educ., E. Islip Union Free Sch. Dist., 679 F. Supp. 2d 299, 308-11 [E.D.N.Y. 2010] [noting the difficulty of interpreting the phrase "educational performance" and indicating that it must be "assessed by reference to academic performance which appears to be the principal, if not only, guiding factor"]; see also S.B., 2022 WL 4134457, at \*12 ["Courts in this Circuit, however, have consistently referred to academic performance in determining whether an emotional disturbance adversely affects a student's educational performance"]; M.N., 2016 WL 4939559, at \*11 ["as noted above, 'proof of an adverse impact on academic performance is a prerequisite for eligibility for special education services under [the] IDEA and New York's implementing regulations'"]); Maus v. Wappingers Cent. Sch. Dist., 688 F. Supp. 2d 282, 294, 297-98 [S.D.N.Y. 2010] [emphasizing that educational performance is focused on academic performance rather than social development or integration]; Muller v. E. Islip Union Free Sch. Dist., 145 F.3d 95, 103-04 [2d Cir. 1998]; W.G. v. New York City Dep't of Educ., 801 F. Supp. 2d 142, 170-75 [S.D.N.Y. 2011] [finding "academic problems—which manifested chiefly as truancy, defiance and refusal to learn—were the product of depression or any similar emotional condition"]; Eschenasy v. New York City Dep't of Educ., 604 F. Supp. 2d 639, 649-50 [S.D.N.Y. 2009]; N.C. v. Bedford Cent. Sch. Dist., 473 F. Supp. 2d 532, 543 [S.D.N.Y. 2007], aff'd, 300 Fed. App'x 11 [2d Cir. Nov. 12, 2008]; New Paltz Cent. Sch. Dist., 307 F. Supp. 2d at 399).

In this case, the evidence shows that the student is extremely intelligent. The November 2020 neuropsychological evaluation report noted that the student was a "very bright and intellectually capable boy whose measured intellect falls in the superior range for his age", (Parent

Ex. D at pp. 1, 14). The neuropsychological report stated that the student's performance on standardized academic measures revealed that his true academic skills were at much higher levels than the teacher observed on a day-to-day basis in the classroom setting, which indicated that other factors were serving as barriers to the student demonstrating his true and very well-developed academic abilities in school (Parent Ex. D at p. 14).

The CSE set forth its view of the student's educational performance in the April 2022 present levels of performance and individual needs (Dist. Ex. 7 at pp. 1, 4-8). The document reflected the results of standardized testing administered as part of the November 2020 neuropsychological evaluation (compare Dist. Ex. 7 at p. 4, with Dist. Ex. 3 at pp. 20-25). According to the document, the student presented with overall cognitive abilities in the superior range, with very superior verbal comprehension and visual spatial skills and a full-scale IQ of 128 (97th percentile, in the superior range) (Dist. Ex. 7 at p. 4). His relative weaknesses included processing speed and working memory both fell in the high average range (id.). The document noted that on a measure of academic achievement the student scored between the 55th and 95th percentiles on tasks involving word reading, reading comprehension, and oral reading fluency and in the average range in written expression, mathematics, and math fluency (id. at pp. 4-5). On measures of language and memory the student also performed in the average to high average range (id. at p. 5). The parents responses on a behavior rating scale yielded elevated and very elevated scores for hyperactivity, executive functioning, peer relations, and defiance/aggression, while his teacher's responses yielded very elevated scores for defiance and aggression (id. at p. 5). On a second measure of behavior, the parents' responses resulted in elevated scores for externalizing behavior, aggression, opposition, and conduct problems and his teacher's responses resulted in clinically elevated scores for externalizing behaviors (id. at p. 5).

The document indicated that information reported orally at the April 2022 CSE meeting included that the student was in a class of 10 students at Quad Prep, with one head teacher, two associate special education certified teachers, and a psychosocial teacher who focused on social emotional learning (Dist. Ex. 7 at p. 5). The student's teacher reported that, in reading, the student progressed from Fountas and Pinnell level K to level O, which indicated that he was at a third-grade independent reading level (id.). The document noted that the student was a strong reader who could ask and answer explicit WH questions and apply critical thinking and inferential thinking strategies to increase reading comprehension (id.). The document indicated that the student received small group instruction weekly, benefited from reminders to expand his verbal responses, and was developing his ability to determine beginning, middle, and end of a story at his instructional reading level (id. at pp. 5-6). According to the document, the parents reported that the student benefited from refocusing prompts, that he did not look at the speaker, that he benefited from extra time, small group instruction, and breaks (id. at p. 6).

With respect to writing, the document noted that the student benefited from support to write a sentence with increased complexity, correct subject-verb agreement, with correct capitalization and punctuation skills to convey a complete thought and idea (Dist. Ex. 7 at p. 6). In addition, the student benefited from support to apply spelling strategies to spell multisyllabic words at his instructional reading level (id.). According to the document, the student preferred to write with a pen or smooth marker on a smooth surface because he did not like to write with a pencil due to sensory reasons (id.). The student wrote on the line with good letter formation and spacing (id.). The document noted that the student wrote two sentences in a 30-minute period, needed reminders

to organize sentences, encouragement to expand his answers, and that he benefited from teacher modeling, small group instruction, a whiteboard and marker, and graphic organizers (*id.*). The student could become "silly," loud, and required redirection to follow class rules and procedures (*id.*). The parents reported that the student struggled to write (*id.*). The document indicated the student needed to work on writing a structured paragraph that included a restating of the writing prompt, a clear response, at least one form of event text evidence with an explanation, an inference, an opening and/or closing sentence or summary statement with proper formatting, correct capitalization and punctuation, academic language, and correct application of transition words (*id.* at p. 7). According to the document, the student's academic needs included applying strategies to correctly spell familiar and unfamiliar words, writing a structured complete sentence with increased complexity, proper formatting, subject/verb agreement, details, transition words, and correct capitalization and punctuation (Dist. Ex. 7 at pp. 6-7).

The document indicated that with respect to mathematics, the student's teacher reported that the student was at a second-grade instructional level for math and that he benefited from individual teacher support to apply basic operations to solve computation problems and word problems at his instructional reading level (Dist. Ex. 7 at p. 6). Additionally, the student was inconsistent about checking his work, pretended to not know things he had learned in math class, needed visuals and manipulatives, and was developing fluency even though he tended to skip steps (*id.*). According to the document, the parents reported that the student needed support to go through all of the steps when solving a computation problem at his instructional math level, and the student showed low frustration tolerance if he thought something would be difficult, even when it was something that he knew how to do (*id.*). The parents reported that the student needed support to apply organizational skills and to keep track of possessions, struggled to get out of the door in the morning, was resistant to following instructions and rules in the house, and needed one person to monitor and help him to get ready (*id.*). The teacher reported that the student had average skills in math (*id.*). In addition, the document indicated that the student had academic needs in mathematics, such as applying fluency and basic operations to solve single and multi-step computation problems; and solving single and multi-step word problems by reading the problem, interpreting math vocabulary, identifying relevant and irrelevant information, using the correct order of operations, and setting up the problem appropriately (*id.* at p. 7).<sup>16</sup>

The August 2021 updated report written by the neuropsychologist indicated that the student's first grade general education classroom was comprised of 12 students and two teachers, and the student also had the support of a learning specialist and the school psychologist (Parent Ex. E at p. 2). According to the updated report, the student's child psychologist met multiple times and worked closely with school personnel and in the winter and spring of the 2020-21 school year developed three positive behavior plans for the student's teachers to implement (*id.*). However, the teachers had difficulty consistently implementing the plans, even with ongoing training, consultation, and supervision by the child psychologist (*id.*). The classroom behavior plans were unsuccessful, as was a medication trial aimed at improving the student's behavior (*id.*). According to the neuropsychologist, the student and his parent explained that the student was bored in class which exacerbated some of his behavioral challenges; the student's attention and behavior

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<sup>16</sup> "Improving Executive functioning" is stated in the document, but the sentence fragment is unclear (Dist. Ex 7 at p. 7).

remained problematic in school for the remainder of the academic school year (id. at p. 2). After evaluating the student and engaging in ongoing communication and meetings with the parents, the neuropsychologist concluded that it had become clear to her that the student's "future educational needs could not be met in the regular education setting" (id. at p. 3). The neuropsychologist noted that despite the attempted interventions, the student's "anxiety, ODD, and ADHD-related challenges continued to pose substantial barriers to his ability to function and to access a school curriculum in a regular classroom setting" (id. at p. 3).

In addition, the letter from the student's child psychologist who worked with the staff at the nonpublic school from December 2020 through May 2021 indicated that the student's ADHD symptoms made it difficult for him to pay attention during instruction, complete academic tasks, sit still, control impulsivity, and tolerate boredom in a general education classroom setting (Parent Ex. F at p. 1). The student's anxiety made it challenging for him to initiate schoolwork, due to his fears of failing and/or making mistakes throughout tasks, as well as caused him to react negatively when he received negative feedback from teachers and peers (id.). The letter noted that despite the student being in a class with a 12:1 student to teacher ratio and receiving a high level of treatment support in winter and spring 2021, he continued to struggle with his academic, behavioral, and social/emotional functioning leading the clinician to become "concerned about the prospect of [the student] continuing in a general education setting and the confounding damage that repeated failure w[ould] have on his educational and social/emotional growth" (id.).

The child psychologist reported that she had consulted with the student's teachers at the private school in an effort to manage his disruptive, non-compliant, and aggressive behavior in the classroom (Dist. Ex. F at p. 1). The child psychologist stated that the student required a specialized school setting with a high degree of structure, small student to teacher ratio, specialized curriculum, and high level of academic rigor that was commensurate with the student's intellectual abilities (id.). Further, the child psychologist noted that such a setting had to be capable of providing the student with classroom supports, such as scaffolds for his executive functioning deficits and behavioral modification strategies, such as a positive BIP to help improve his goal-oriented behavior (id.).

Furthermore, the district's classroom observation of the student at Quad Prep noted that in a group of ten students with a teacher and two associate teachers, the student required more redirection as compared to his peers and required some intervention by the teacher or associate teacher (Dist. Ex. 2 at p. 3).

The evidence in this case indicates that the student tended to need behavior intervention to appropriately attend to his classroom routines. It is not clear why his behavior plans could not be implemented in the classroom at his former nonpublic school (Parent Ex. E), but it also appears that he is academically at or above grade level in most academic areas with relative weaknesses in math and writing. As presented above, the student demonstrated need for sustaining attention to school work, and completing school work and he required a level of support in the classroom in order to achieve this. I do not agree with the opinion of the neuropsychologist that the student could not be educated in a regular classroom with nondisabled peers. Overall, the evidence above ever so slightly favors the view that the student's ADHD and behavior concerns adversely effects this very intelligent student's classroom performance. Accordingly, I find in favor of the parents on this element of the definition.

### 3. Need for Special Education

In addition to meeting criteria for a specific disability category, in order to be deemed eligible for special education, a student must by reason of such disability, "need special education and related services" (20 U.S.C. § 1401[3][A]; Educ. Law § 4401[1]; 34 CFR 300.8[a][1]; 8 NYCRR 200.1[zz]). State regulation defines "special education" as "specially designed individualized or group instruction or special services or programs" (8 NYCRR 200.1[ww]; see 20 U.S.C. § 1401[29]; Educ. Law § 4401[2]; 34 CFR 300.39[a][1]). "Specially-designed instruction," in turn, means "adapting, as appropriate, to the needs of an eligible student . . . , the content, methodology, or delivery of instruction to address the unique needs that result from the student's disability; and to ensure access of the student to the general curriculum, so that he or she can meet the educational standards that apply to all students" (8 NYCRR 200.1[vv]). In New York, the Education Law describes special education as including "special services or programs," which, in turn, includes, among other things, "[s]pecial classes, transitional support services, resource rooms, direct and indirect consultant teacher services, transition services . . . , assistive technology devices as defined under federal law, travel training, home instruction, and special [education] itinerant teacher[] [services] . . . ." (Educ. Law § 4401[1], [2][a]). In New York the definition of "special services or programs" (and therefore special education) also encompasses related services, such as counseling services, occupational therapy, physical therapy, and speech-language therapy, as well as "other appropriate developmental, corrective or other support services" (Educ. Law § 4401[2][k]).

In this case, in order for the student to meet with greater success in school, as well as in family and peer relationships, the November 2020 neuropsychological report indicated that all three aspects of the student's inter-related clinical features needed to be addressed and offered recommendations for supportive services and classroom accommodations (Parent Ex. D at p. 16). Specific recommendations for the family included individual and family counseling, a behavioral school consultation, and a medication consultation (id. at pp. 16-17).<sup>17</sup>

With regard to educational and learning recommendations, the neuropsychological evaluation report suggested several classroom accommodations to address the student's behaviors such as preferential seating near his teachers and away from environmental distractors and unobtrusive teacher monitoring and redirecting of the student's attention as needed (Parent Ex. D at p. 18). Additional classroom recommendations included discreet teacher check-ins with the student to ensure that the student heard and followed the directions provided to the group for class work and other activities, repetition of instructions and directions as needed, direct assistance initiating in-class tasks as needed, direct encouragement and assistance to sustain task involvement, and teacher assistance to develop an organized strategy for approaching assignments (id.). Other recommendations included that the student be allowed movement breaks during class, that his teachers be aware of his anxiety with respect to making mistakes in front of others and to not "cold call" on the student in class discussions, and that the student and parents be informed in advance of any school schedule changes as the student may be very sensitive to these (id. at p. 19).

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<sup>17</sup> Any decision making with regard to medication is not within the CSE's preview. School districts are limited to assisting with the administration of medications during school hours if necessary.

Additionally, the report noted that the student's hand writing remained immature and suggested that he should be considered for OT "when such services are again available"(id.).

The neuropsychologist's updated report that the student required placement in a specialized school setting that was designed to meet the special education needs of bright students with disabilities; and that he required a specialized school placement in which the other students were intellectually gifted and talented and had concomitant disabilities "'(twice exceptional' students)" (Parent Ex. E at p. 3). The updated report also recommended that the student attend a class that was small in size and staffed with teachers trained to meet the specialized educational needs of twice exceptional students; that the placement include a psychologist who could work with the classroom teachers to address the student's anxiety and behavior problems, that the school setting offer individual and group counseling, and that the program offer OT (id.).

The April 2022 CSE identified strategies to address the student's management needs such as the use of putty, breaks when needed, teacher check-ins, and prompts/reminders (Dist. Ex. 7 at p. 8).

While both parties suggested interventions that would benefit the student, some of them were in the form of accommodations that would not meet the definition of special education under IDEA. Special education is defined by federal and State law as "specially designed instruction" (20 U.S.C. § 1401[29]; 34 CFR 300.39[a][1]; Educ. Law § 4401[1]; 8 NYCRR 200.1[ww]) and specially designed instruction is, in turn, defined by regulation as "adapting, as appropriate to the needs of an eligible student . . . , the content, methodology, or delivery of instruction to address the unique needs that result from the student's disability; and to ensure access of the student to the general curriculum, so that he or she can meet the educational standards that apply to all students" (8 NYCRR 200.1[vv]; see 34 CFR 300.39[b][3]). In New York the definition of "special services or programs" (and therefore special education) also encompasses related services, such as counseling services, occupational therapy, physical therapy, and speech-language therapy, as well as "other appropriate developmental, corrective or other support services" (Educ. Law § 4401[2][k]), thus under state law, the related services such as counseling and OT, as well as the implementation of a behavior intervention plan that is individually tailored to the student are sufficient to hold that the student required some special education support.<sup>18, 19</sup>

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<sup>18</sup> Again however, I differ with the neuropsychologist if she was suggesting that the CSE was required to offer the student gifted programming in order to comply with special education laws. Guidance regarding what are sometimes referred to a "twice exceptional" or gifted students from the United States Department of Education's Office of Special Education Programs (OSEP) reiterates that the IDEA is silent on the topic of gifted students, and "gifted" is not a qualifying disability requiring special education and related services (see Letter to Anonymous, 55 IDELR 172 [OSEP 2010]). Thus, intellectually gifted students are not considered disabled solely on the basis of intellectual giftedness.

<sup>19</sup> In New York, policymakers have opted to use the term "gifted" and have not, to date, employed the term "twice exceptional" (see, e.g., 8 NYCRR Part 142). While twice-exceptional, or gifted students with a disability—such as the student in this case— can present a challenge when teachers have a range of student learning rates within the same classroom, there is no per se federal requirement for gifted education. The decisions regarding any gifted programming are made at the state and local level. New York State, unlike some other states, has not developed explicit standards for gifted programming in statute or regulation. Instead, the legislature made some funding available to "encourage the development of programs to ensure that gifted students reach their full potential, [but] it does not specify or mandate that any particular type of program be implemented. The decision as to the type of program to be

In view of the forgoing, I find that the evidence supports the parent's view that the student should have been found eligible for special education as a student with an other-health impairment.

Therefore, having found that the student should have been found eligible for special education as a student with an other health-impairment, the district's failure to develop an IEP for the student has caused a deprivation of educational benefits resulting in a denial of FAPE to the student (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]). In light of the above, this is an instance where the district's failure to adhere to the requisite timelines for evaluating a student and creating an educational program post-referral constitutes a procedural violation of the IDEA where relief for the violation is warranted because the violation affected the student's right to a FAPE (J.D. v. Pawlet Sch. Dist., 224 F.3d at 69; see A.H., 394 Fed. App'x at 720; Jusino, 2016 WL 9649880, at \*6, aff'd 700 Fed. App'x 25 [2d Cir. July 7, 2017]; A.M., 840 F. Supp. 2d at 688, aff'd, 513 Fed. App'x 95 [2d Cir. Mar. 12, 2013]; Maus v. Wappingers Cent. Sch. Dist., 688 F. Supp. 2d at 294, 300; M.M., 583 F. Supp. 2d at 501; Warton v. New Fairfield Bd. of Educ., 217 F. Supp. 2d at 279). The IHO's decision, which did not engage in a careful analysis of the eligibility criteria, must be reversed.

Because the relief sought by the parents is tuition reimbursement at the unilateral placement at Quad Prep during the 2021-22 school year, I now turn to the remaining considerations; whether the services selected by the parents were appropriate, and equitable considerations support the parents' claim.

#### **D. Unilateral Placement**

The IHO did not reach this issue in her decision. On appeal the district contends that there is insufficient evidence regarding the individualization of the instruction at Quad Prep to reach a conclusion as to its appropriateness, whereas the parents contend that the unilateral placement at Quad Prep was reasonably calculated to enable the child to receive educational benefits.

A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak, 142 F.3d at 129). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (Carter, 510 U.S. at 13-14). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ. of the City Sch. Dist. of Yonkers, 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the

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implemented (provided the program comports with the Commissioner's guidelines) and its operation and management, is vested in the discretion of the governing boards of local school districts" (Bennett v. City Sch. Dist. of New Rochelle, 114 A.D.2d 58, 63 [2nd Dep't 1985]). What is clear is that a student may not be excluded from eligibility for special education merely because the student also has academic strengths (see Letter to Anonymous, 55 IDELR 172 [OSEP 2010]). In this case, it is noted that the district would not be required to create or develop new programming to address twice exceptional/gifted students, but might be required to support the student's participation in a gifted program if it was available to the student in a public school program (see Application of a Bd. Of Educ., Appeal No. 21-219).



appropriateness of the parents' placement" (Gagliardo, 489 F.3d at 112, quoting Frank G. v. Bd. of Educ. of Hyde Park, 459 F.3d 356, 364 [2d Cir. 2006]; see Rowley, 458 U.S. at 207). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). When determining whether a unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether the placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see Gagliardo, 489 F.3d at 115; Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] ["evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]). A private placement is appropriate if it provides instruction specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; Educ. Law § 4401[1]; 34 CFR 300.39[a][1]; 8 NYCRR 200.1[ww]; Hardison v. Bd. of Educ. of the Oneonta City Sch. Dist., 773 F.3d 372, 386 [2d Cir. 2014]; C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 836 [2d Cir. 2014]; Gagliardo, 489 F.3d at 114-15; Frank G., 459 F.3d at 365).

The Second Circuit has set forth the standard for determining whether parents have carried their burden of demonstrating the appropriateness of their unilateral placement.

No one factor is necessarily dispositive in determining whether parents' unilateral placement is reasonably calculated to enable the child to receive educational benefits. Grades, test scores, and regular advancement may constitute evidence that a child is receiving educational benefit, but courts assessing the propriety of a unilateral placement consider the totality of the circumstances in determining whether that placement reasonably serves a child's individual needs. To qualify for reimbursement under the IDEA, parents need not show that a private placement furnishes every special service necessary to maximize their child's potential. They need only demonstrate that the placement provides educational instruction specially designed to meet the unique needs of a handicapped child, supported by such services as are necessary to permit the child to benefit from instruction.

(Gagliardo, 489 F.3d at 112, quoting Frank G., 459 F.3d at 364-65).

In this instance, the director of elementary programming (director) at Quad Prep testified by affidavit (Parent Ex. N). Her description of the student's diagnoses and related challenges echoed almost verbatim the description provided by the child psychologist in her October 2021 letter to the CSE (compare Parent Ex. N at p. 3, with Parent Ex. F at p. 1).

According to the director, Quad Prep is a New York State Association of Independent Schools (NYSAIS) accredited private school for children who are twice exceptional students such as gifted students with learning disabilities (Parent Ex. N at p. 2).<sup>20</sup> The director noted that Quad Prep provides services to children from kindergarten through twelfth grade, who have significant

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<sup>20</sup> Quad Prep is not a school approved by the New York State commissioner for the education of students with special needs.

intellectual gifts which is their first exception,<sup>21</sup> and typically an educational need or a clinical need of some sort which would be their second exception (*id.*). She further explained that Quad Prep offered students steady, expert support in areas such as executive functioning and social cognition so that they can develop the skills and tools they need to thrive in school and beyond (*id.*). In addition, she reported that Quad Prep purposefully and meaningfully integrates academic, social and emotional learning in its classrooms, curriculum, and collaborative cross-disciplinary teaching teams, and this allows the students to deepen their understanding and perspective in their academic work (*id.*).

The director testified that Quad Prep serves students with attention deficit disorder, executive function disorder, sensory processing disorder, dyslexia, autism spectrum disorder, social communication disorder, some mental health challenges, emotional regulation challenges, learning disabilities, dyscalculia, and other conditions (Parent Ex. N at p. 2). She stated that Quad provides academic and psychosocial learning for students in kindergarten through second grade, and that a Quad Prep classroom always includes a team of academic teachers and a clinically supervised psychosocial teacher whose job it is to act as a liaison with the clinicians working with each class (*id.*). The director explained that the collaborative, integrative, and flexible nature of clinical and psychosocial interventions at the program included occupational therapists and speech-language pathologists partaking in building classroom routines around the learning environment, and counselors joining psychosocial lessons or social learning groups to provide in-the-moment support in the development of problem solving or emotional regulation skills (*id.* at p. 3). She noted that many different clinicians and professionals are members of the Quad Prep staff including mental health counselors, social workers, psychologists, "people with school guidance counselor degrees," speech pathologists and occupational therapists as well as head teachers who all have master's degrees in either regular or special education or are dually certified (*id.*). The director indicated that the staff have numerous opportunities for staff development throughout the school year (*id.*).

Specific to the student, the director testified that the student attended Quad Prep for the 2021-22 school year, and she was involved with him from his first admissions interview through his last day of the school year (Parent Ex. N at p. 3).

The director reported that, for the 2021-22 school year, the student attended a class comprised of 10 students, four teachers, an intern, and two clinicians who both pushed in and pulled out of the student's class, and the student was never in a learning group with all ten students but rather learned either individually or in a group of two to five students (*id.* at p. 4). She indicated that the student had similar academic and social/emotional profiles as the other students in the class (*id.*).

The director noted that the beginning of the 2021-22 school year at Quad Prep was initially smooth for the student; however, the more comfortable the student became in the setting, the more challenging his behavior became (Parent Ex. N at p. 4). By early October 2021, the student was impulsive, inattentive, and verbally aggressive with the other students (*id.*). In addition, the student

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<sup>21</sup> Although I describe the evidence present in the hearing record, as noted above, the talented and gifted nature of the programming is not required for a FAPE, and is not a factor in my consideration of the programming at Quad Prep.

challenged authority, provoked classmates to join in mean spirited comments, and defied teacher directives (*id.*). The director stated that the student required significant one to one attention from teachers (*id.*). However, she opined that as he began to grow accustomed to the structure and the various supports that were put in place for him, such as social cognitive and social emotional lessons taught and practiced, and as learning groups were shuffled and broken down into even smaller groupings, the student made considerably more progress in the second half of the school year (*id.*). The director testified that within the academic realm, Quad Prep provided the student with the following supports, services, and strategies: a small learning group, a written structured plan with built-in breaks in between academic tasks, use of a reinforcement system that was co-created with input from the student, positive reinforcement and praise, large tasks broken down into smaller tasks, the provision of visual schedules, bite sized tasks, mentor examples, allowing for flexibility in how the student showed what he knew, use of visuals paired with verbal information, consistent teacher prompting and re-directing, opportunities for movement breaks, and integrated social cognitive, sensory, and emotional supports to help the student remain regulated during academic learning (*id.*). The hearing record also indicates that Quad Prep provided OT and counseling services to the student (Parent Ex. 12 at p. G at p. 12, 16, 17).

The district merely states in its answer that the parents did not meet their evidentiary burden; however, I find to the contrary that they have prevailed on the second Burlington/Carter criterion

### **E. Equitable Considerations**

The final criterion for a reimbursement award is that the parents' claim must be supported by equitable considerations. Equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; R.E., 694 F.3d at 185, 194; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 68 [2d Cir. 2000]; *see* Carter, 510 U.S. at 16 ["Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable"]; L.K. v. New York City Dep't of Educ., 674 Fed. App'x 100, 101 [2d Cir. Jan. 19, 2017]). With respect to equitable considerations, the IDEA also provides that reimbursement may be reduced or denied when parents fail to raise the appropriateness of an IEP in a timely manner, fail to make their child available for evaluation by the district, or upon a finding of unreasonableness with respect to the actions taken by the parents (20 U.S.C. § 1412[a][10][C][iii]; 34 CFR 300.148[d]; E.M. v. New York City Dep't of Educ., 758 F.3d 442, 461 [2d Cir. 2014] [identifying factors relevant to equitable considerations, including whether the withdrawal of the student from public school was justified, whether the parent provided adequate notice, whether the amount of the private school tuition was reasonable, possible scholarships or other financial aid from the private school, and any fraud or collusion on the part of the parent or private school]; C.L., 744 F.3d at 840 [noting that "[i]mportant to the equitable consideration is whether the parents obstructed or were uncooperative in the school district's efforts to meet its obligations under the IDEA"]).

Reimbursement may be reduced or denied if parents do not provide notice of the unilateral placement either at the most recent CSE meeting prior to their removal of the student from public school, or by written notice ten business days before such removal, "that they were rejecting the placement proposed by the public agency to provide a [FAPE] to their child, including stating their

concerns and their intent to enroll their child in a private school at public expense" (20 U.S.C. § 1412[a][10][C][iii][I]; see 34 CFR 300.148[d][1]). This statutory provision "serves the important purpose of giving the school system an opportunity, before the child is removed, to assemble a team, evaluate the child, devise an appropriate plan, and determine whether a [FAPE] can be provided in the public schools" (Greenland Sch. Dist. v. Amy N., 358 F.3d 150, 160 [1st Cir. 2004]). Although a reduction in reimbursement is discretionary, courts have upheld the denial of reimbursement in cases where it was shown that parents failed to comply with this statutory provision (Greenland, 358 F.3d at 160; Ms. M. v. Portland Sch. Comm., 360 F.3d 267 [1st Cir. 2004]; Berger v. Medina City Sch. Dist., 348 F.3d 513, 523-24 [6th Cir. 2003]; Rafferty v. Cranston Public Sch. Comm., 315 F.3d 21, 27 [1st Cir. 2002]); see Frank G., 459 F.3d at 376; Voluntown, 226 F.3d at 68).

Although the district asserts that there is insufficient evidence to reach a conclusion with respect to equitable considerations, I disagree and find that equitable considerations favor tuition reimbursement. The hearing record demonstrates that the parents referred the student to the CSE in writing, provided consent for the district to evaluate the student, provided the CSE with privately obtained evaluative information, cooperated with the district evaluations, timely provided 10-day notice of their intent to unilaterally place the student at district expense, and participated in the April 2022 CSE meeting which was delayed considerably by the district through no fault of their own (see Parent Exs. B-F; M; Dist. Exs. 1; 2; 6).

## **VII. Conclusion**

I have considered the parties' remaining contentions and find that I need not address them in light of my determination herein.

### **THE APPEAL IS SUSTAINED.**

**IT IS ORDERED** that the IHO's decision dated October 8, 2022, is modified by reversing those portions which found that the student was not eligible for special education and did not have to develop an IEP for the student for the 2021-22 school year; and,

**IT IS FURTHER ORDERED** that, upon proof of payment shown the district shall be required to reimburse the parents for the cost of the student's tuition at the Quad Preparatory School for the 2021-22 school year.

**Dated:** Albany, New York  
January 13, 2023

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**JUSTYN P. BATES**  
**STATE REVIEW OFFICER**