



The University of the State of New York

The State Education Department

State Review Officer

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No. 24-294

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

Appearances:

Thomas, Drohan, Waxman, Petigrow & Mayle, LLP, attorneys for petitioner, by Steven L. Banks, Esq. and Cassidy E. Allison, Esq.

The Law Office of Andrew Weisfeld, PLLC, attorneys for respondents, by Andrew Weisfeld, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from a decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to respondents' (the parents') son during the 2021-22, 2022-23, and 2023-24 school years and ordered it to reimburse the parents for the costs of their son's tuition at the Flex School (Flex) for the 2022-23 and 2023-24 school years. 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

Review of the student's educational history shows that he has received diagnoses of autism spectrum disorder (autism), disruptive mood dysregulation disorder, attention deficit hyperactivity disorder (ADHD) combined type, and anxiety disorder (Dist. Exs. 18 at p. 2; 22 at p. 1; 23 at p. 1). The student has also demonstrated extremely high range cognitive abilities with concerns noted

in executive functioning, processing speed, and writing, and has been described as being "twice exceptional" (Dist. Exs. 5 at p. 3; 7 at pp. 3-7; 11 at pp. 2-8).

A CSE in another school district convened in March 2019, found the student eligible for special education as a student with autism, and recommended that he receive one 30-minute session per week of small group counseling and numerous supplementary aids and services, and program modifications (Dist. Exs. 14 at pp. 1, 7-8; 15 at p. 1). The student moved to the district in summer 2019 and began attending the district's middle school therapeutic support program (TSP), consisting of instructional support and counseling services, in fall 2019 (sixth grade) (Dist. Exs. 7 at p. 2; 9 at p. 1; see Dist. Ex. 1 at p. 2). In September 2019, the CSE amended the student's IEP and added one 30-minute session per week of individual counseling, and continued the recommended small group counseling, and supplementary aids and program modifications (compare Dist. Ex. 14 at pp. 7-8, with Dist. Ex. 15 at pp. 1, 7-8).

For the 2020-21 school year (seventh grade), the CSE convened on April 20, 2020 for the student's reevaluation and annual review (see generally Dist. Ex. 17). The April 2020 CSE recommended that the student participate in the district's TSP and receive four 40-minute periods per week of 15:1+1 special class instruction for "[s]upport and [s]kills" together with one 30-minute session per week of group counseling (5:1), one 30-minute session per week of individual counseling, and supplementary aids and services and program modifications (Dist. Ex. 17 at pp. 1-2, 8).

On April 7, 2021, the CSE convened for an annual review and recommended the student continue to participate in the TSP for the 2021-22 school year (eighth grade) (Dist. Ex. 1 at p. 2). Specifically, the CSE recommended that the student attend a 15:1+1 special class four times per week for 40 minutes and receive one 30-minute session per month of group counseling and one 30-minute session per week of individual counseling (id. at pp. 1, 8). In addition, the April 2021 CSE recommended the following supplementary aids and services, modifications, and accommodations: special seating arrangements, reasonable movement breaks, use of a graphic organizer, breaking larger assignments into smaller components with interim due dates, and having the student repeat directions/expectations to ensure that he understands (id. at p. 8). Next, on July 13, 2021, the CSE reconvened at the request of the parents to consider other placements outside of the district (Dist. Ex. 2 at pp. 1-3).¹ On August 25, 2021, an amendment to the student's IEP was agreed upon without a CSE meeting to add adult supervision for the student during lunch and recess and to add a social/emotional and behavioral annual goal (Dist. Ex. 3 at pp. 1, 8-9). The student attended the district's middle school during the 2021-22 school year (see Dist. Ex. 28 at p. 1).

For the 2022-23 school year (ninth grade), the CSE convened for an annual review on April 19, 2022, which was continued on May 12, 2022 (see generally Dist. Ex. 4). The May 2022 CSE recommended that the student continue with the TSP in high school, increasing the frequency of the 15:1+1 special class to once daily for 40 minutes, together with one 30-minute session per

¹ The hearing record contains multiple duplicative exhibits. For purposes of this decision, only parent exhibits were cited in instances where both a parent and district exhibit were identical. The IHO is reminded that it is her responsibility to exclude evidence that she determines to be irrelevant, immaterial, unreliable, or unduly repetitious (8 NYCRR 200.5[j][3][xii][c]).

week of individual counseling and quarterly parent counseling and training (Dist. Ex. 4 at pp. 1-3, 9). The May 2022 CSE continued to recommend special seating arrangements, reasonable movement breaks, use of a graphic organizer, and breaking larger assignments into small components with interim due dates and added modified homework assignments (compare Dist. Ex. 1 at p. 8, with Dist. Ex. 4 at p. 9). As for supports for school personnel on behalf of the student, the May 2022 CSE added a once quarterly observation of the student by an "expert in twice exceptionality" and consultation with the student's academic team and attendance at parent counseling and training sessions (Dist. Ex. 4 at p. 10).

On August 2, 2022, the parents entered into an enrollment contract with Flex for the 2022-23 school year (see Parent Ex. XX).

The CSE conducted a program review on August 9, 2022, and the parents indicated that their intention was to place the student at Flex for the 2022-23 school year (Dist. Ex. 5 at p. 1).² The August 2022 CSE amended the student's IEP to recommend monthly parent counseling and training, monthly consultation with the "expert in twice exceptionality," and to add a support of wait time for the student to process and formulate a response (id. at pp. 1, 10-11).

On August 19, 2022, the parents recounted the student's educational history in the district and notified the district of their disagreement with the CSE's recommended program and services contained in the August 2022 IEP and of their intent to unilaterally place the student at Flex for the 2022-23 school year (see Dist. Ex. 69). The parents' August 19, 2022 communication to the district included a June 14, 2022 letter from the student's psychologist acknowledging the supports provided to the student by the district and recommending that the student needed "a different, more protective school placement" such as Flex, a June 15, 2022 letter from the student's doctor indicating that the student was experiencing gastritis and ulcerations likely caused by stress and anxiety, and a June 20, 2022 letter from a psychiatrist indicating that the student "need[ed] a learning environment that is designed for twice exceptional children" and specifically recommending placement in Flex for the student (id. at pp. 5-9).

An attorney representing the parents sent a letter, dated November 7, 2022, to the district requesting reimbursement of the student's tuition at Flex for the 2022-23 school year (see Parent Ex. A). The student attended Flex for the 2022-23 school year (Parent Ex. LL).

On May 16, 2023, the CSE convened for the purposes of the student's reevaluation and annual review (see generally Dist. Ex. 6). The May 2023 CSE recommended that for the 2023-24 school year (tenth grade) the student continue in the TSP, but modified the recommended placement to a 12:1+1 special class two times daily for 40 minutes, along with indirect consultant teacher services once daily for three hours, one 30-minute session per day of individual counseling, and monthly parent counseling and training (Dist. Ex. 6 at pp. 1-4, 11). In addition, the May 2023 CSE recommended that the student would have access to a shared teaching assistant (5:1) for support in his general education courses, within the TSP room, or to monitor his attendance and mood (id. at p. 12). Further, the May 2023 CSE added supports for school personnel on behalf of the student to include a monthly 30-minute psychological consultation, a yearly team meeting

² The Commissioner of Education has not approved Flex as a school with which districts may contract to instruct students with disabilities (8 NYCRR 200.1[d], 200.7).

between the school counselor, TSP team, and teachers, information to be provided by an expert on twice exceptional students once per year, monthly team meetings to discuss progress and concerns with Cognitive Behavioral Consultants (CBC), and monthly observation of the student and consultation with teachers by the twice exceptional consultant (id. at pp. 12-13).³

On May 24, 2023, the parents, through an attorney, expressed concern with the program recommended by the May 2023 CSE and requested that the district fund the costs of the student's tuition at Flex for the 2023-24 school year (Dist. Ex. 36).

The student continued his enrollment at Flex for the 2023-24 school year (see Parent Exs. MM, YY).⁴

A. Due Process Complaint Notice

In a due process complaint notice dated September 21, 2023, the parents alleged that the district denied the student a free appropriate public education (FAPE) for the 2021-22, 2022-23, and 2023-24 school years (see IHO Ex. IV). More specifically, in connection with the 2021-22 school year, the parents alleged that although the district cooperated with the parents in developing an IEP for the student that "all parties believed would assist [the student] in making progress both academically and socio-emotionally," during the course of the year it became increasingly apparent that the general education environment was "overwhelming" for the student, and he struggled throughout the school day (IHO Ex. IV at pp. 3-4). The parents also alleged that although the IEP contained accommodations for homework, the student's teachers continued to assign "a large amount of unnecessary practice work," which was stressful and overwhelming for the student (id. at p. 4). According to the parents, the student experienced stress-induced medical issues and toward the end of the eighth-grade year, the student was subjected to bullying incidents that caused "social and emotional damage" to the student (id.). The parents claim that during eighth grade the student felt different from his peers and experienced feelings of isolation, stress, and depression which "made it impossible for him to access his education and make appropriate progress" (id. at pp. 4-5).

In connection with the 2022-23 school year, the parents claimed that a general education environment in a large classroom with dissimilar peers caused the student severe stress (IHO Ex. IV at p. 5). The parents also claimed that they requested a neuropsychological evaluation of the student, but the CSE determined no further evaluations were needed (id.). In addition, the parents argued that the recommendation for a twice exceptional consultant failed to address the student's "primary impairment, his severe distress at simply sitting in the general education classroom" (id.). The parents asserted that the CSE removed group counseling from the IEP and provided minimal supplementary aids and services to address the student's academic workload, services that were insufficient as the student spent the remainder of the day in a general education environment (id.).

³ CBC is an agency that delivers dialectical behavior therapy (DBT) services (Tr. p. 519).

⁴ The hearing record did not contain an enrollment contract for the 2023-24 school year with Flex (see Parent Exs. A-BBB).

With respect to the May 2023 IEP, the parents asserted that the CSE failed to address the student's "significant social-emotional needs" and that continuing to recommend placement in a general education environment was not appropriate for the student (*id.*). According to the parents, the student felt like an outsider in a general education environment because his neurotypical peers did not understand the student's differences (*id.*). The parents also asserted that sensory experience of a general education environment was overwhelming and that although the student now wears headphones or earplugs, he did not feel as though that was an option in the public school as he was avoiding anything that would make him seem more different (*id.*). The parents argued that Flex was an appropriate unilateral placement for the student as the student made friends, was not resistant to attending school, not having meltdowns at school, and his physical ailments decreased (IHO Ex. IV at p. 7). The parents further argued that the Flex program offered small classes with similar peers, an accelerated work pace, and social/emotional support (*id.* at pp. 7-8). In conclusion, the parents asserted that the district denied them meaningful participation in the IEP process by ignoring their concerns and that the district failed to recommend an appropriate program for the student for the 2021-22, 2022-23, and 2023-24 school years (*id.* at p. 8). As relief, the parents requested reimbursement of the student's tuition at Flex for both the 2022-23 and 2023-24 school years and that the district be declared responsible for round-trip transportation of the student to and from Flex for the same years (*id.* at p. 8). Further, the parents sought compensatory education for the denial of FAPE by the district for the 2021-22, 2022-23, and 2023-24 school years "including, but not limited to, the costs of tuition, transportation, private tutoring, and therapeutic interventions provided at [parents'] expense" and for all any other out-of-pocket expense incurred by the parents as a result of the district's denial of FAPE (*id.*).

The district submitted a response to the due process complaint notice (*see* IHO Ex. V). For each of the school years under review, the district asserted that the IEPs were appropriate and were the least restrictive environment (LRE) for the student (IHO Ex. V at pp. 1-2). The district further asserted that the parents meaningfully participated in the development of the IEPs and that the district appropriately evaluated the student and considered and reviewed evaluations obtained from the parents (*id.* at p. 2).

B. Impartial Hearing and Decision

A prehearing conference was held by an IHO on November 1, 2023; however, that IHO later recused himself (IHO Ex. II at p. 1).⁵ After appointment of the IHO who presided over this matter, a second prehearing conference was held on December 28, 2023 wherein the IHO issued a prehearing conference summary and order (*see* IHO Exs. I; II). An impartial hearing convened on January 25, 2024 and concluded on March 4, 2024, after six days of proceedings (Tr. pp. 1-1155).⁶

⁵ Contrary to State regulations, the hearing record does not include a transcript or a written summary of the prehearing conference (*see* 8 NYCRR 200.5 [j][3][xi] [requiring that a "transcript or a written summary of the prehearing conference shall be entered into the record by the [IHO]"]).

⁶ Although an attorney representing the parent sent letters to the district in November 2022, January 2023 and May 2023, and drafted and filed the parents' due process complaint notice in this proceeding, the parents appeared on their own behalf at the hearing (*see* Tr. pp. 1-1155; Parent Exs. A;B; Dist. Ex. 36).

In a decision dated May 31, 2024, the IHO found that the district denied the student a FAPE for the 2021-22, 2022-23, and 2023-24 school years, that Flex was an appropriate unilateral placement for the student for the 2022-23 and 2023-24 school years, and that equitable considerations weighed in favor of the parents' requested relief (IHO Decision at pp. 24-41). In connection with the 2021-22 school year, the IHO found that the student's needs were complex and that the "TSP program described by [d]istrict staff appear[ed] to be an exemplary program staffed with highly skilled professionals to meet the needs of students who suffer from behavioral dysregulation"; however, the IHO stated that the student needed more than the dialectical behavior therapy (DBT) program offered to the student (id. at pp. 27-28). Next, the IHO stated there was no evidence of a speech-language evaluation or an assessment of the student's social pragmatic language needs (id. at p. 28, 30). The IHO found that the IEP noted the student needed support in developing and maintaining peer relationships and the addition of a lunch aide was ineffective (id. at p. 28). The IHO further noted that the student had difficulty implementing the DBT skills independently (id.). Additionally, the IHO held that there was no evidence of an occupational therapy (OT) evaluation or an assessment of the student's sensory needs (id. at pp. 28, 30). The IHO noted that the consistent implementation of homework modifications was an issue throughout the year and cause the student stress (id. at p. 28). The IHO held that the IEP failed to contain goals to assist the student in interpersonal relationships, self-advocacy, or developing social language skills (id.). The IHO stated that "[g]rades [we]re not the issue, and his superior intellect should not be confused for an appropriate education" (id. at p. 29). The IHO found that the student's placement in the TSP, with its focus on DBT, was not appropriate as it "never addressed the root cause of the [s]tudent's special education needs," and the student was denied a FAPE for the 2021-22 school year (id. at p. 30).

Next, the IHO discussed the 2022-23 school year, and found similarly to the 2021-22 school year that the CSE failed to have sufficient evaluative information about the student's social pragmatic language needs and sensory needs and failed to have annual goals for the student's social skills and language (IHO Decision at pp. 30-35). The IHO held that the IEP failed to include group counseling or a social skills group (id. at p. 35). The IHO stated that the high school TSP did not meet the student's needs and the student was denied a FAPE for the 2022-23 school year (id.).

The IHO then reviewed the 2023-24 school year, the IHO found that even though the district conducted a reevaluation of the student, it failed to assess the student's social pragmatic language and sensory needs, and the annual goals did not address social pragmatics and self-esteem (IHO Decision at pp. 35-38). Overall, the IHO found that the May 2023 IEP failed to contain sufficient evaluative information and goals to address the student's social skills and language and "self-worth," again noting that the district did not recommend group counseling or a social skills group (id. at p. 39). Accordingly, the IHO found that the IEP was not reasonably calculated to enable the student to make progress and that the district denied the student a FAPE for the 2023-24 school year (id.).

Next, the IHO addressed the appropriateness of Flex and found that the parents met their burden that the unilateral placement met the student's unique needs for both the 2022-23 and 2023-24 school years (IHO Decision at pp. 39-41). The IHO discussed equitable considerations finding that the parents cooperated with the district and did not interfere with the CSE process, and therefore, equities weighed in their favor (id. at p. 41).

The IHO addressed the additional relief requested by the parents and found that the parents did not request transportation to and from Flex in their due process complaint notice, and that the hearing record did not support the parents request for reimbursement of the student's private therapy sessions and applied behavior analysis (ABA) sessions (IHO Decision at p. 42). As relief, the IHO ordered the district to reimburse the parents for the tuition paid to Flex for the 2022-23 and 2023-24 school years (id.).

IV. Appeal for State-Level Review

The district appeals, alleging that the IHO erred in finding that the district denied the student a FAPE for the 2021-22, 2022-23, and 2023-24 school years; that Flex was an appropriate unilateral placement; and that equitable considerations weighed in favor of the parents.

Initially, the district argues that the IHO erred by making findings on issues that were not contained in the due process complaint notice. Specifically, the district asserts that the due process complaint notice did not allege that the IEPs were not appropriate because of a lack of evaluative data regarding the student's speech-language or occupational therapy needs. In addition, the district asserts that the due process complaint notice did not allege that the annual goals were deficient.

In connection with the three school years in question, the district argues that the IEPs for each school year were "reasonably calculated to enable [the student] to receive educational benefits" as the student had a "successful academic record" and received passing grades. The district asserts that the annual goals were "sufficiently ambitious" and aligned with the student's needs and the student did not require a more restrictive placement. The district further argues that the IHO's finding that the general education environment placed the student's mental and physical health at risk was not supported by the hearing record.

Next, the district contends that the parents failed to meet their burden that Flex was an appropriate unilateral placement for the student as the parent did not produce evidence showing that Flex modified instruction to meet the student's needs. The district also argues that Flex was too restrictive. Further, the district argues that equitable considerations do not weigh in favor of the parents and the IHO's award of tuition reimbursement should be vacated.

In its answer, the parents "do not contest," refute, or contest each of the numbered paragraphs contained in the request for review.⁷ The parents further state that the memorandum of law would provide a more detailed response to the request for review.⁸

⁷ The parents did not cross-appeal the IHO's denial of transportation or reimbursement for the student's private therapy sessions or ABA services, and therefore, these findings have become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]). (IHO Decision at p. 42).

⁸ As a general matter, it has long been held that a memorandum of law is not a substitute for a pleading (see 8 NYCRR 279.4, 279.6; see also Davis v. New York City Dep't of Educ., 2021 WL 964820, at *11 [S.D.N.Y. Mar. 15, 2021]; Application of a Student with a Disability, Appeal No. 19-021; Application of the Dep't of Educ., Appeal No. 12-131). After an independent review of the parents' answer, it appears that the parents did not

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. 386, 399 [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

specifically raise any claims in their answer and instead, rely solely on the memorandum of law. Accordingly, the parents' use of the memorandum of law is improper. The parents could have placed some of the specific references to the hearing record and arguments in the 4-page answer and would still have been under the 10-page limitation (see 8 NYCRR 279.8[b]).

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" (Andrew F., 580 U.S. at 404). 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 Andrew F., 580 U.S. at 403 [holding that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"]; Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132).

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

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

⁹ 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" (Andrew F., 580 U.S. at 402).

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

VI. Discussion

A. Preliminary Matter

1. Scope of the Impartial Hearing

The district argues that the IHO erred in making findings on issues that were not contained in the due process complaint notice. In particular, the district contends that there were no allegations in the due process complaint notice asserting that the IEPs were deficient due to a lack of evaluative information with respect to the student's need for speech-language therapy or occupational therapy. Furthermore, the district argues that the due process complaint notice did not allege that the annual goals contained in the IEPs were inadequate.

Generally, the party requesting an impartial hearing has the first opportunity to identify the range of issues to be addressed at the hearing (Application of a Student with a Disability, Appeal No. 09-141; Application of the Dep't of Educ., Appeal No. 08-056). Under the IDEA and its implementing regulations, a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its original due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.508[d][3][i], 300.511[d]; 8 NYCRR 200.5[i][7][i][a]; [j][1][ii]), or the original due process complaint is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.507[d][3][ii]; 8 NYCRR 200.5[i][7][b]). Indeed, "[t]he parent must state all of the alleged deficiencies in the IEP in their initial due process complaint in order for the resolution period to function. To permit [the parents] to add a new claim after the resolution period has expired would allow them to sandbag the school district" (R.E., 694 F.3d 167 at 187-88 n.4; see also B.M. v. New York City Dep't of Educ., 569 Fed. App'x 57, 58-59 [2d Cir. June 18, 2014]).

When a matter arises that did not appear in a due process complaint notice, the next inquiry focuses on whether the district, through the questioning of its witnesses, "open[ed] the door" to the issue under the holding of M.H. v. New York City Department of Education (685 F.3d at 250-51; see also Bd. of Educ. of Mamaroneck Union Free Sch. Dist. v. A.D., 739 Fed. App'x 79, 80 [2d Cir. Oct. 12, 2018]; B.M., 569 Fed. App'x at 59; J.G. v. Brewster Cent. Sch. Dist., 2018 WL 749010, at *10 [S.D.N.Y. Feb. 7, 2018]; C.M. v. New York City Dep't of Educ., 2017 WL 607579, at *14 [S.D.N.Y. Feb. 14, 2017]; D.B. v. New York City Dep't of Educ., 966 F. Supp. 2d 315, 327-28 [S.D.N.Y. 2013]; N.K. v. New York City Dep't of Educ., 961 F. Supp. 2d 577, 584-86 [S.D.N.Y. 2013]; A.M. v. New York City Dep't of Educ., 964 F. Supp. 2d 270, 282-84 [S.D.N.Y. 2013]; J.C.S. v. Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, *9 [S.D.N.Y. Aug. 5, 2013]).

Here, the due process complaint notice includes an assertion that the parents had requested a neuropsychological evaluation of the student "to better determine [the student's] needs"; however, the parents did not allege that the district did not allege that the district did not have sufficient evaluative information to develop the IEPs for the student for any of the school years at

issue (IHO Ex. IV at p. 5). More specifically, at no point in the due process complaint notice did the parents allege that the district failed to assess the student's social pragmatic needs through a speech-language evaluation or evaluate the student's sensory needs with an occupational therapy evaluation (see IHO Ex. IV). Moreover, the district did not open the door to the issue of evaluative information during the hearing (see R.E., 694 F.3d 167 at 187-88 n.4). Accordingly, the issue of sufficiency of evaluative information was not properly raised within the due process complaint notice and as such was beyond the scope of the impartial hearing (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.508[d][3][i], 300.511[d]; 8 NYCRR 200.5[i][7][i][a]; [j][1][ii]); see also B.P. v. New York City Dep't of Educ., 841 F. Supp. 2d 605, 611 [E.D.N.Y. 2012] [explaining that "[t]he scope of the inquiry of the IHO, and therefore the SRO . . . , is limited to matters either raised in the . . . impartial hearing request or agreed to by [the opposing party]"]. Accordingly, the issue of evaluative information will not be further addressed herein, and the IHO's findings that are based upon inadequate evaluation of the student were error and must be reversed.

In connection with the annual goals, the issue of the adequacy of the goals was not addressed in the due process complaint notice. However, the district raised the issue of goals and the student's progress towards those goals in its direct case, as a way of explaining how the IEPs were designed to address areas such as counseling, socialization, and study skills (Tr. pp. 43-44, 73, 160-61, 445-46), and raised the issue of the appropriateness of the recommended annual goals related to social-emotional skills on cross-examination (Tr. pp. 697-99). Accordingly, I find that even though the issue was not properly identified in the parents' due process complaint notice the IHO did not exceed her jurisdiction and properly reached the issue of annual goals due to the district opening the door to this issue.

B. 2021-22 School Year

As the development of the student's 2021-22 school year IEP did not occur in a vacuum, a brief review of the student's needs leading up to the CSE meetings is warranted. Prior to entering the district in the summer of 2019, the student was hospitalized as his outpatient providers reported an increase in mood instability and behavioral dysregulation and at least three incidents of the student running into traffic (Dist. Ex. 18 at p. 4). For the 2019-20 school year (sixth grade), the student transferred into the district and the CSE recommended that he receive one 30-minute session per week of small group counseling and a number of supplementary aids and services (Dist. Ex. 14 at pp. 1, 7-8; see Dist. Ex. 15 at p. 1). On September 26, 2019, the CSE amended the student's IEP to add one 30-minute session per week of individual counseling and modified the annual goals in his IEP (compare Dist. Ex. 14 at pp. 6-7, with Dist. Ex. 15 at pp. 1, 6-7). A November 2019 CSE review of the student's IEP indicated that incidents of the student's elopement and dysregulation had decreased, the parents reported that the student had "just started to feel comfortable within the new school setting," and teachers reported that the student had "responded well to the program supports within the TSP program" (Dist. Ex. 16 at p. 1). In April 2020, the CSE recommended that the student continue in the TSP for the 2020-21 school year (seventh grade), receive counseling, with coaching available throughout the day, in addition to four 40-minute periods per week of a 15:1+1 special class for academic support (Dist. Ex. 17 at pp. 1-2). At that time, the parent reported that the student benefitted from the supports provided to him in school, and he continued to need significant social/emotional support (id. at p. 1).

Because the CSE developed several IEPs for the student for the 2021-22 school year, I will briefly address which IEP should be treated as the operative IEP for purposes of assessing the district's offer of a FAPE. 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 (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"]).

For the 2021-22 school year, the CSE developed an IEP on April 7, 2021, an IEP dated July 13, 2021, and an IEP dated August 25, 2021 (see Dist. Exs. 1-3). The April 2021 CSE convened for the student's annual review, and at the request of the parents reconvened in July 2021 (Dist. Exs. 1 at p. 1; 2 at p. 1). The August 2021 IEP was developed as a result of an amendment to the IEP and no CSE meeting was held (Dist. Ex. 3 at p. 1).¹⁰ In this matter, the IHO did not grant any relief for the 2021-22 school year and the parents are not seeking any relief for that school year on appeal; the only issue related to the 2021-22 school year is the district's appeal of the IHO's determination that the district failed to offer the student a FAPE. Accordingly, review of the 2021-22 school year must be assessed based on the IHO's findings which focused on the appropriateness of the annual goals and the placement recommendation (see IHO Decision at p. 30). As the August 2021 IEP was in place prior to the start of the 2021-22 school year, it was the only IEP implemented during the 2021-22 school year and is the operative IEP for purposes of this discussion.

At the July 2021 CSE meeting, the parents expressed that the student's autism diagnosis caused significant issues with him making friends, and although he did well academically, the gaps in his abilities frustrated him (Dist. Ex. 3 at p. 1). The parents expressed that the effects of the student's social isolation impacted his emotional well-being, and felt he needed a significant change because the private psychiatrist believed the school environment created stress for the student (id.). The private psychologist reported at the meeting that the student's depressive episode earlier in the year lifted a little and she highlighted three concerns: the student's social isolation and difficulty turning a peer into a friend, his anxiety answering questions and being a part of class discussion, and his tendency to be perfectionistic (id. at p. 2). The private psychologist stated that the student needed a specialized program as these were issues in a typical classroom setting (id.). The chairperson expressed her view that the recommended program "was not a typical setting given all of the supports provided" (id.). The school psychologist discussed continuing supports such as lunch group and maker space and starting a club with the special education teacher in one of the student's areas of interest to support his social needs (id.). The special education teacher agreed with the supports to be provided at lunch as well (id.). Contrary to the private psychologist's

¹⁰ The IDEA contains detailed provisions that set forth the required content and procedure for developing an IEP, including provisions that specify the procedure for making changes to an IEP (20 U.S.C. § 1414[d][3]-[D], [F]). Both the IDEA and State and federal regulations provide that an IEP can be modified by the development of a new IEP by the CSE, or pursuant to an amendment by agreement (20 U.S.C. § 1414[d][3][D], [F]; 34 CFR 300.324[a][4], [6]; 8 NYCRR 200.4[f], [g]). To change an IEP by agreement, the parents and district may agree not to convene a CSE meeting and instead develop a written document to amend or modify the student's current IEP (20 U.S.C. § 1415[d][3][D]; 34 CFR 300.324[a][4][i]; 8 NYCRR 200.4[g][2]). State regulations expressly provide that if a district wishes to amend a student's IEP by agreement, the district must provide the parent with a written proposal to amend the IEP and the parent must agree in writing to the proposed amendments (8 NYCRR 200.4[g][2]).

expressed concerns regarding classroom participation, the regular education math teacher reported that the student "raised his hand fairly frequently and he was often correct in his response and, when he was incorrect, he did not evidence any outward signs of anxiety" (id.). The parents reported the district had gone through extraordinary efforts to support the student, and understood the demands of the pandemic year (id.).

Further, the meeting information reflected that the July 2021 CSE discussed private school options for the student; the CSE described the search for a Board of Cooperative Educational Services (BOCES) program and responded to the parents' concerns regarding class sizes (Dist. Ex. 3 at p. 2). Both the school psychologist and special education teacher reported the student did not express concerns regarding class size or noise level, but rather about the amount of work and the student's perception that he was behind (id. at pp. 2-3). The regular education math teacher stated that he did not see social concerns impacting the student's academics or the number of students affecting his academics (id. at p. 3). The parents expressed a need for a follow up meeting, the special education teacher proposed a meeting with the student to "get the student on board and motivated" and the chairperson indicated the CSE would convene following a response from the BOCES program (id.).

According to a review of the student's 2021-22 school year IEPs, the April 2021 CSE considered a counseling verbal report and observations, parent and teacher verbal reports and observations, with verbal report and observation information updated at the July 2021 CSE, as well as the student's report cards and February and March 2021 iReady math and reading test results (Dist. Exs. 1 at p. 3; 2 at p. 4; 3 at p. 4). The August 2021 IEP reported information from a November 2019 administration of the Weschler Intelligence Scale for Children-Fifth Edition (WISC-V) that yielded a full scale intelligence quotient (FSIQ) of 125 (very high range), and a visual processing score of 92 (average range), which was determined to be an area of relative weakness (Dist. Exs. 3 at p. 5; 7 at p. 3). The IEP reported March 2020 Stanford Achievement Test Series, Tenth Edition (SAT10) results in mathematics and reading comprehension, with standard scores of 99 and 92, respectively (Dist. Ex. 3 at pp. 4-5). The student achieved a scaled score of 126 (96 percentile rank) on an administration of the Woodcock-Johnson IV ACH Tests, Form A, writing samples subtest (id. at p. 5).

In the area of study skills, the August 2021 IEP reported the student as motivated, competent, organized and usually prepared for class, and described him as a strong self-advocate who asked questions when not understanding a teaching point (Dist. Ex. 3 at p. 5). The August 2021 IEP reflected that, at times in group settings, it appeared the student did not attend due to not looking in the direction of the speaker, although his participation indicated he listened and learned despite his lack of eye contact (id.). According to the IEP, when working independently, the student sometimes required prompts for refocusing and redirection to sustain attention (id.).

The August 2021 IEP reported reading as an area of strength and stated the student "exhibit[ed] excellent literal and inferential comprehension, making inferences and predictions based on the text," discussed characters motivations and traits, and had an excellent vocabulary (Dist. Ex. 3 at p. 6). As related to writing, the IEP indicated that the student tended to be concise, but edited his writing well, and graphic organizers were helpful in arranging his ideas and completing all pieces of the task (id.). In the area of mathematics, the student demonstrated the ability to learn and apply seventh and eighth grade concepts in the classroom (id.).

Next, the August 2021 IEP reported, in the area of social development, that the student demonstrated friendly and respectful behaviors to teachers, program staff and peers, and continued to need support to develop and maintain peer relationships (Dist. Ex. 3 at p. 6). The IEP indicated the student actively participated in individual and group counseling, and at times demonstrated difficulty and reluctance discussing unpleasant emotions but improved in his ability and willingness to tolerate these discussions (*id.*). According to the IEP, the student was reported to be "a good classroom participant" and the IEP stated that he experienced "significantly less classroom interfering emotion dysregulation this year than he did last year" (*id.*). The IEP reported the student continued to struggle with anxiety, feelings of anger, and stress (*id.*). Further, the IEP stated that when the student exhibited instances of emotional dysregulation, he was receptive to coaching and engaged in mindfulness and distraction exercises with support to manage and decrease dysregulation (*id.*).

The August 2021 IEP reported that in July 2019, the student received a diagnosis of disruptive mood dysregulation disorder in addition to his autism diagnosis (Dist. Ex. 3 at p. 6). The social development section included results of the Behavior Assessment System for Children-3 (BASC-3) self and teacher report rating scales that assessed social/emotional functioning and indicated several areas of emotional difficulties (*id.*). Specifically, within the internalizing domain, results revealed "elevations" on both scales measuring depression and atypicality, and the teacher report indicated elevations in terms of withdrawal and anxiety, as she reported the student tended to isolate himself from others and worried about things (*id.*).

In the area of physical development, the August 2021 IEP reported the student's physical levels and abilities were within age expectations, the student had a secondary diagnosis of ADHD, combined type, and the student participated in a physical education class and fencing outside of school (Dist. Ex. 3 at p. 7).

The August 2021 IEP provided for strategies to support the student's management needs that included checks for understanding, preferential seating, movement breaks, and access to coaching and distress tolerance skills when he demonstrated emotional dysregulation (Dist. Ex. 3 at p. 7). As related to the effects of the student's needs and progress in the general education curriculum, the IEP reported the student's experiences with emotional dysregulation required coaching and reminders to use strategies so that he could re-regulate and return to academic tasks, and he required teacher assistance to use interpersonal effectiveness skills to develop and maintain social connections and navigate group dynamics, in addition to supports in developing executive functioning such as planning, prioritizing, organization, and study strategies (*id.*).

1. Annual Goals

As related to goals, the district appeals from the IHO's conclusion that the 2021-22 IEP failed to contain annual goals to address the student's social skills, social language, and feelings about himself (*see* IHO Decision at pp. 28-29).¹¹

¹¹ The August 2021 IEP included five total annual goals with two in the areas of study skills and three that addressed social/emotional and behavioral needs as discussed above (Dist. Ex. 3 at p. 8). In the area of study skills, two annual goals were designed to improve the student's ability to, given an upcoming test, identify 80

An IEP must include a written statement of measurable annual goals, including academic and functional goals designed to meet the student's needs that result from the student's disability to enable the student to be involved in and make progress in the general education curriculum; and meet each of the student's other educational needs that result from the student's disability (see 20 U.S.C. § 1414[d][1][A][i][II]; 34 CFR 300.320[a][2][i]; 8 NYCRR 200.4[d][2][iii]). Each annual goal shall include the evaluative criteria, evaluation procedures and schedules to be used to measure progress toward meeting the annual goal during the period beginning with placement and ending with the next scheduled review by the committee (8 NYCRR 200.4[d][2][iii][b]; see 20 U.S.C. § 1414[d][1][A][i][III]; 34 CFR 300.320[a][3]).

In the area of social/emotional and behavioral needs, the August 2021 IEP included three annual goals: a goal that provided the student would report having used one distress tolerance and emotion regulation skill to manage instances of emotional dysregulation when discussing it during counseling; a second goal that the student would report use of one socialization skill such as initiating a conversation with peers, joining a club, or making plans with friends in order to foster success regarding interpersonal relationships; and a third goal that the student would report, during individual counseling sessions, having attended at least one club that week or prior week in order to increase his sense of social belonging (Dist. Ex. 3 at p. 8).

Here, I find that the IHO erred in finding that the 2021-22 IEP did not contain annual goals to address the student's social skills, social language, and feelings about himself. The IDEA does not require that a district create a specific number of annual goals for each of a student's deficits, and the failure to create a specific annual goal does not necessarily rise to the level of a denial of FAPE; rather, a determination must be made as to whether the IEP, as a whole, contained sufficient goals to address the student's areas of need (J.L. v. New York City Dep't of Educ., 2013 WL 625064, at *13 [S.D.N.Y. Feb. 20, 2013]; see C.M. v. New York City Dep't of Educ., 2017 WL 607579, at *20-*21 [S.D.N.Y. Feb. 14, 2017]). In this instance, as discussed in more detail below, the IEP as a whole addressed the student's needs related to the student's social skills, his social language, and his feelings about himself. Accordingly, even if the IEP lacked an annual goal to address each of these need areas, it would not result in a denial of FAPE.

2. Therapeutic Support Program – 15:1+1 Special Class

For the 2021-22 school year, the August 2021 CSE recommended that the student continue in the TSP, which consisted of instructional support and counseling services (Dist. Ex. 3 at p. 3).¹² According to the IEP, as part of the TSP, "[c]oaching w[ould] be available to the student throughout the day" (id.). Additionally, the IEP meeting information identified that, as part of the TSP, the student received an academic period with the special education teacher at a minimum of four times per week, in addition to parent counseling and training offered to support the

percent of the essential skills or concepts to study provided no more than two teacher prompts, and implement a study plan with no more than three teacher prompts, respectively (id.).

¹² The CSE recommended weekly individual counseling and reported that the student "ha[d] completed two years of a weekly skills group using the DBT model, and as such ha[d] graduated from this" model with the recommendation that he receive a monthly group session to reinforce and review skills he had learned (Dist. Ex. 3 at p. 3).

student/family (*id.*). The special education teacher testified that similar features of students placed in the TSP were anxiety and some emotional or behavioral dysregulation (Tr. pp. 175-76).

During testimony, the school psychologist described the TSP as being made up of components, one being a "learning lab," that was provided four times per week with a special education teacher in order to "provide support with executive functioning, academic difficulties and to reinforce the social-emotional part of the program which [wa]s the counseling piece" (Tr. pp. 30, 32).¹³ The school psychologist testified to providing the counseling piece with a weekly individual counseling session, and a skills group in DBT (Tr. p. 32). The school psychologist described that all staff in the program, including herself, the special education teacher, teacher assistants, and teacher aides, were trained in DBT with the principles aimed to replace problematic behaviors with more skillful behaviors in five key areas that included: mindfulness, distress tolerance, emotion regulation, interpersonal effectiveness, and walking the middle path (Tr. pp. 32-33; *see* Tr. p. 131). The school psychologist testified regarding the creation of a distress tolerance kit for the student that included things such as putty, puzzles, and a visual reminder of the skills, and providing a communication email, regarding strategies that worked at school, to both the parents and the private therapist along with a visual attachment of DBT skills to provide a reminder for the student and carryover (Tr. pp. 109-10; *see* Dist. Ex. 41).¹⁴

The August 2021 IEP identified the academic period of the TSP as a 15:1+1 special class (support and skills), with services recommended for four 40-minute periods per week (Dist. Ex. 3 at p. 1).¹⁵ During the 2021-22 school year, the special education teacher testified that within this academic period, although there could have been up to 15 students, there were eight students enrolled throughout the school year (Tr. pp. 180-81). During the academic period, the special education teacher testified to providing individualized support to the student that included helping him get organized and develop a routine, and featuring DBT pillars such as mindfulness, pace breathing, in addition to providing puzzles, mazes, or videos to watch (Tr. pp. 176-77). The special education teacher testified that the student needed homework modifications, particularly in the

¹³ The special education teacher testified that references to the "learning lab" were to the 15:1+1 special class component of the IEP (*see* Tr. pp. 127, 179-80).

¹⁴ The private psychologist testified that the school psychologist and herself shared suggestions on working with the student, and the private psychologist although finding the student did not respond to all of DBT, found helpful ideas such as "TIPS" which addressed "how to bring your body back to stasis" through use of a cold compress, as well as finding activities that the student found pleasurable to bring him out of a dark place (Tr. pp. 672-75, 702-703).

¹⁵ State regulation provides that a 15:1+1 special class placement is designed for students "whose management needs interfere with the instructional process, to the extent that an additional adult is needed within the classroom to assist in the instruction of such students" (8 NYCRR 200.6[h][4][i]). In turn, "management needs" are defined as "the nature of and degree to which environmental modifications and human or material resources are required to enable the student to benefit from instruction" (8 NYCRR 200.1[ww][3][i][d]). A student's "management needs" shall be determined by factors which related to the student's (a) academic achievement, functional performance and learning characteristics; (b) social development; and (c) physical development (*see* 8 NYCRR 200.1[ww][3][i][a]-[d]).

Regents courses of Algebra I and Earth Science, as he picked up the material quickly; however, the amount of work overwhelmed the student (Tr. pp. 153-55).

As related to academic work, the special education teacher supported the student in checking "schoolology" for homework assignments, homework lists, and his email to see if teachers provided homework modifications (Tr. p. 177).¹⁶ The special education teacher described that as the student was mainstreamed for all classes, the teachers assistants and aides also provided support within the general education classes (Tr. pp. 135, 422-23). The special education teacher testified that the program provided consistency of staff available to the student as the staff needed to be trained in DBT and this "ma[de] sure that the communication was consistent from the staff going to the student" (Tr. pp. 178-79). In the area of study skills, the special education teacher testified about providing support to the student, particularly with modifying homework, and communicating with the teachers of the student's accelerated Regents Algebra 1 and Earth Science classes throughout the year, that included providing strategies to the teachers on how to modify the work and how to communicate those modifications to the student (Tr. pp. 152-56). The special education teacher provided strategies to support the student's time management skills to better estimate the time it took to complete assignments during school and after school, and created a template schedule to balance management of homework activities, after school activities, and free time (Tr. pp. 157-59; Dist. Ex. 51).

According to the August 2021 IEP, information from the July 7, 2021 CSE program review indicated the private psychologist stated "she [wa]s pretty convinced that the student needed a specialized program" due to the student's social isolation, difficulty making an acquaintance into a friend, and anxiety answering questions and being part of a class discussion (Dist. Ex. 3 at pp. 1, 2). However, the math teacher, during the program review indicated that the student raised his hand frequently, often provided the correct response, and even when incorrect did not evidence signs of anxiety, and the student did not seem shy about participating the next time after being incorrect (*id.*). The school psychologist testified that she did not agree with the private psychologist's statement, as the district program provided specialized programming for the student, with appropriate supports allowing the student to make progress (Tr. pp. 48-49).

Turing to an issue the IHO raised in her decision, the IHO stated that "[i]t is not the role of the public school to treat or cure mental health conditions or to guarantee a certain number of friends"; however, the IHO then indicated that "when the regular education environment exacerbates a [s]tudent's mental and physical health to the extent that they are suffering from suicidal ideation, hallucinations, and gastric ulcer, the role of the environment must be carefully considered" (IHO Decision at pp. 29-30). As discussed above, review of the evidence shows that the student's suicidal ideation and more significant behavioral dysregulation and decompensation

¹⁶ The parents argued in the due process complaint notice that the sensory experience of the district general education class was overwhelming, and the parent testified that, even in crowds or when out, the student covered his ears or needed earplugs or headphones; the special education teacher testified he did not recall this as an issue for the student (Tr. pp. 388, 390-91, 1029). The hearing record included a parent email to a teacher chaperoning a field trip regarding sending the student with ear plugs due to concerns that the boat/music would be loud; however, the hearing record did not have a common theme of emails that detailed concerns regarding the student's sensory needs within the classroom setting, or contain emails from the parents that the student would feel different if he wore earplugs as detailed in their due process complaint notice (*see* Parent Ex. HH; IHO Ex IV at p. 7).

occurred prior to the 2021-22 school year, while evidence of the student experiencing gastric ulcers was not presented to the district until the end of the 2021-22 school year (see e.g., Dist. Exs. 5 at p. 3; 7 at p. 2; 9 at p. 2; 18; 69), thus the IHO was conflating past and future events and instead needed to focus on how the student presented at the time that the August 2021 IEP was developed.

In connection with the school setting, the parents argued that the student became dysregulated due to the class size, as the student did not function in a class with other students. However, the hearing record provides information, including what was reported in the student's August 2021 IEP, from the special education teacher and school psychologist indicating that the student did not report concerns with class size or the number of kids or noise level in the classroom (Dist. Ex. 3 at pp. 2-3). The school psychologist reported the student discussed the amount of homework, and the perception that he was behind, and the special education teacher stated that the student struggled with the need to "recalibrate his expectations regarding the amount of time the work w[ould] take him" and had confidence in the plan developed (*id.* at pp. 2-3, 9-10).

Moreover, as the parents shared concerns regarding the student's perception of not having friends, the district addressed the student's socialization with increased supports in the IEP by creating a school club and providing for adult supervision at lunch (see Dist. Ex. 3 at pp. 1, 8, 9). Specifically, in order to support the student's social needs, both the school psychologist and special education teacher testified regarding starting an after-school club with the student's interest of playing Dungeons and Dragons (D&D) in mind, as they felt other students would have this area of interest as well and it would support development of friendship for the student with likeminded peers (Tr. pp. 49-50, 149; Dist. Ex. 3 at pp. 1, 2). Further, the school psychologist testified that the CSE added a teacher assistant at lunch to the student's eighth grade IEP in order to support him having more than one friend, as perceived by the student at that time (Tr. pp. 106-08; Dist. Ex. 3 at p. 1). Although not relevant to the IEP at the time it was created in August 2021 and thus I do not consider it to retrospectively justify the August 2021 IEP, since this is the first year of a multiyear case, I would be remiss not to note that there is evidence in the record that the strategy was ultimately effective. Both the middle school special education teacher and school psychologist testified that the student found friendships from this club that extended outside of school during the eighth grade; friendships that continued even throughout the school years the student attended Flex (Tr. pp. 58, 121, 150-52). In addition, the student's private therapist and parent testified that the student remained friends and continued the D&D club started in the district, even after leaving the district and attending Flex (Tr. pp. 699, 734-36, 1121).

Next, the hearing record shows that the student made progress toward his IEP annual goals in the areas of study skills and social/emotional and behavioral needs during the 2020-21 school year, the year prior to development of the August 2021 IEP, while the student was also in the middle school TSP (see Dist. Ex. 33).¹⁷ Specifically, by June 2021 the student had achieved an

¹⁷ It is well settled that a student's progress under a prior IEP is a relevant area of inquiry for purposes of determining whether an IEP has been appropriately developed, particularly if the parents express concern with respect to the student's rate of progress (see *H.C. v. Katonah Lewisboro Union Free Sch. Dist.*, 528 Fed. App'x 64, 66-67 [2d Cir. 2013]; *Adrienne D. v. Lakeland Cent. Sch. Dist.*, 686 F.Supp.2d 361, 368 [S.D.N.Y. 2010]; *M.C. v. Rye Neck Union Free Sch. Dist.*, 2008 WL 4449338, *14-*16 [S.D.N.Y. Sept. 29, 2008]; see also "Guide to Quality Individualized Education Program (IEP) Development and Implementation," at p. 18, Office of Special Educ. Mem. [Dec. 2010], available at <https://www.nysed.gov/sites/default/files/programs/special-education/guide-to-quality-iep-development->

annual goal to use a system to record homework, project due dates, and upcoming tests; was progressing satisfactorily toward an annual written language goal, achieved an annual goal to identify how others feel in hypothetical situations and how it may impact behavior; and made some progress (three out of five trials) toward an annual goal to complete a diary card to monitor emotions and use DBT skills (*id.*). Additionally, during the 2020-21 school year, the student's report card reflected that the student achieved grades in the "A" range for all subjects except for ELA, in which he achieved a "B+" (Dist. Ex. 27).

Regarding the general appropriateness of the August 2021 CSE's recommendations, the evidence in the hearing record demonstrates that the CSE met multiple times and recommended services that would not only support the student's study skills within accelerated and general education classes, but also support the student's social/emotional needs within the TSP through counseling services, a 15:1+1 special class, management strategies and accommodations, and annual goals that addressed the student's needs. Further, the CSE created a club specific to the student's interests, knowing other students would also be interested, in order to support the student in developing his peer acquaintances into friendships. As a result, the district's TSP in the August 2021 IEP provided the student with an appropriate program given his need to improve socialization, social/emotional, and behavioral skills, as well as a curriculum that supported the student's cognitive abilities. As such the IHO erred in finding that the district did not provide the student a FAPE for the 2021-22 school year.

C. 2022-23 School Year

In preparation for the 2022-23 school year (ninth grade), the CSE first convened in April 2022 for the student's annual review, which was continued in May 2022 (Dist. Ex. 4 at pp. 1-3). The CSE reconvened for a program review on August 9, 2022, to discuss the CSE's recommendations and the parents' intent to place the student at Flex (Dist. Ex. 5 at p. 1).¹⁸ Accordingly, in line with the prospective analysis required by the Second Circuit, the August 2022 IEP was the operative IEP at the time of the parents' decision to place the student at Flex (*see Bd. of Educ. of Yorktown Cent. Sch. Dist.*, 990 F.3d at 173; *R.E.*, 694 F.3d at 187-88). Therefore, the August 2022 IEP will be the focus of the review in connection with determining whether the district offered the student a FAPE for the 2022-23 school year.

Per the April 2022 CSE meeting information, the parents reported that the student's stress level had caused him ulcers and required the student to take medication to address stress and

and-implementation.pdf). Although, a subsequent IEP may not be appropriate if it is simply a copy of an IEP under which a student failed to produce any gains in a prior year (*Carlisle Area Sch.*, 62 F.3d at 534), recommending a similar program as in a prior school year may be reasonably expected to continue to produce progress when a student made progress under that same IEP during a prior school year (*see S.H. v. Eastchester Union Free Sch. Dist.*, 2011 WL 6108523, at *10-11 [S.D.N.Y. Dec. 8, 2011] [decision to recommend continuation of the same program student had made progress in for prior school year was appropriate and a more restrictive placement was not necessary]).

¹⁸ Present at the April 2022 and May 2022 CSE meeting included the director of special services for the district, who acted as chairperson, the district middle school psychologist, the special education teacher, a regular education teacher, and the student's parents (Dist. Ex. 4 at pp. 1-2). At the August 2022 program review, the CSE in addition included an educational consultant with expertise in twice exceptionality (Dist. Ex. 5 at p. 1).

anxiety (Dist. Ex. 5 at p. 3).¹⁹ At the CSE meeting, the team reported and reviewed the progress made on the eighth grade goals at the time of the meeting, with the parents acknowledging the student made some progress but asserting there was no significant growth (*id.*). During the meeting, the regular education teacher reported the student completed required work, worked well with peers, and advocated for himself when needed and had grades in the A range (*id.*). The special education teacher reported the student used class time well and participated actively in class, contrary to the parents' report that he was not productive at home (*id.*). Both the special education teacher and school psychologist reported on the student's participation in extra-curricular activities, and the school psychologist reported the student demonstrated "overall growth in his social skills since sixth grade as evidenced by his participation in a club this year and engagement with social activities during lunch/recess" (*id.*). The school psychologist reported that the student had learned DBT strategies and skills and no longer required group counseling (*id.*).

According to the May 2022 CSE meeting information, the parents reported that the student's academics were not a concern, and that his difficulties were mainly social/emotional and that he experienced physical manifestations from stress (Dist. Ex. 5 at p. 2). The parents expressed that the student "[wa]s stressed by being in a bigger class with students who were [we]re not on the same wavelength," and although they felt the team had not left "any stone unturned," the student was "not in a place where he [wa]s okay" and even with all the interventions "the environment [wa]s still not working for the student" (*id.*). The chairperson expressed that the April 2022 CSE recommendations were appropriate and considered the parents' concerns, as the district added an educational consultant who specialized in twice exceptionality to observe the student and meet with the parents and staff, and who could also attend the parent training and counseling meetings with the team and parents (*id.*). The parents inquired about the educational consultant observing the student during his current eighth grade year, inquired how this would help, and stated that the "TSP [wa]s great but it d[id] not change the dynamic of the students" (*id.* at p. 3). The parents reported that they wanted to change schools to one with students more like their child (*id.*). The chairperson expressed that the district provided academic opportunities for the student to take accelerated classes and her view that it was the LRE with supports and services and access to general education peers, which was the most appropriate environment and would support his post-secondary transition goals into college (*id.*).²⁰ The parents stated they originally believed this;

¹⁹ The hearing record provided information that the student was prescribed and taking medications for stress and anxiety prior to entering the district (Dist. Ex. 18 at pp. 9-13). As related to the student's development of ulcers in eighth grade, the hearing record included a letter dated June 15, 2022 from the student's gastroenterologist that the student had received diagnoses in May 2022 of gastritis and ulcerations related to acid production that he attributed primarily to "stress and anxiety," but he also agreed that most medications can cause stomach pain, upset, and nausea (Dist. Ex. 21; *see* Tr. pp. 1002-04).

²⁰ The IDEA requires that a student's recommended program must be provided in the LRE (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.107, 300.114[a][2][i], 300.116[a][2], 300.117; 8 NYCRR 200.1[cc], 200.6[a][1]; *see T.M.*, 752 F.3d at 161-67; *Newington*, 546 F.3d at 111; *Gagliardo*, 489 F.3d at 105; *Walczak*, 142 F.3d at 132; *Patskin v. Bd. of Educ. of Webster Cent. Sch. Dist.*, 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]). In determining an appropriate placement in the LRE, the IDEA requires that students with disabilities be educated to the maximum extent appropriate with students who are not disabled and that special classes, separate schooling, or other removal of students with disabilities from the general educational environment may occur only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily (20 U.S.C. § 1412[a][5][A]; *see* 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.6[a][1]; *Newington*, 546 F.3d at

however, "the student's private providers have told [the]m that many students need a different setting and venue to thrive" (id.).

Meeting information reflected that at the August 2022 CSE program review, the educational consultant described her observation of the student in his district earth science class prior to the end of his eighth-grade year, and stated she observed that he squirmed in his seat at times; however, she would not have picked the student out in the classroom (Dist. Ex. 5 at p. 1). The educational consultant reported that the lesson presented was "clearly at a level that would be appropriate for the student" (id.). The chairperson reviewed letters written by the student's gastroenterologist, private psychologist, and private psychiatrist and discussed concern from the private psychologist that the student had anxiety when called on in class and did not quickly have an answer (id.).²¹ The parents stated their belief that the student "need[ed] a break from the least restrictive environment" as that was "not what [wa]s best for the student" and expressed their concerns about the general education environment for the student (id. at p. 2).

The August 2022 IEP included February 2022 State and district wide assessment results in math and reading with composite scores both in the 99th percentile (Dist. Ex. 5 at p. 6). The August 2022 IEP included similar information about the student in the areas of study skills and reading as compared to the August 2021 IEP (compare Dist. Ex. 5 at pp. 6-7, with Dist. Ex. 3 at pp. 5-6). In the area of writing, the August 2022 IEP indicated that the student edited his writing well, and his writing was consistent with the way he communicated, as he would get to the point and meet requirements, but he lacked elaboration and sufficient details (Dist. Ex. 5 at p. 7). In the area of math the IEP stated that the student earned grades in his accelerated eighth grade math class of 95 and 99 in the first two trimesters and worked quickly and accurately (id.).

112, 120-21; Oberti v. Bd. of Educ. of Borough of Clementon Sch. Dist., 995 F.2d 1204, 1215 [3d Cir. 1993]; J.S. v. N. Colonie Cent. Sch. Dist., 586 F. Supp. 2d 74, 82 [N.D.N.Y. 2008]; Patskin, 583 F. Supp. 2d at 430; Watson v. Kingston City Sch. Dist., 325 F. Supp. 2d 141, 144 [N.D.N.Y. 2004]; Mavis v. Sobol, 839 F. Supp. 968, 982 [N.D.N.Y. 1993]). The placement of an individual student in the LRE shall "(1) provide the special education needed by the student; (2) provide for education of the student to the maximum extent appropriate to the needs of the student with other students who do not have disabilities; and (3) be as close as possible to the student's home" (8 NYCRR 200.1[cc]; 8 NYCRR 200.4[d][4][ii][b]; see 34 CFR 300.116). Consideration is also given to any potential harmful effect on students or on the quality of services that they need (34 CFR 300.116[d]; 8 NYCRR 200.4[d][4][ii][c]). Federal and State regulations also require that school districts ensure that a continuum of alternative placements be available to meet the needs of students with disabilities for special education and related services (34 CFR 300.115; 8 NYCRR 200.6). The continuum of alternative placements includes instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions; the continuum also makes provision for supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement (34 CFR 300.115[b]).

²¹ In a June 14, 2022 letter the student's private psychologist stated that the student had made good progress over the past several years in "handling rather intense emotional reactivity;" however, he continued to struggle in school despite the support provided by the school psychologist and special education teacher and needed a more protective school placement (Dist. Ex. 23). A letter dated June 15, 2022 from the student's pediatric gastroenterologist reported that the student's diagnoses of gastritis and ulcerations related to acid production were likely caused by symptoms of stress and anxiety (Dist. Ex. 21). The student's psychiatrist since April 2019 described the medical management he provided for the student; however, reported that even with the support by his private psychologist and school psychologist, the student remained anxious and depressed, and needed a learning environment to meet his academic and emotional needs (Dist. Ex. 22 at pp. 1-2).

As related to the area of social development, the August 2022 IEP reported that the student had a friend he spent time with inside and outside of school; however, he continued to have difficulty developing and maintaining peer relationships and was reluctant to supports from program staff in this area and resistant to discuss this in counseling (Dist. Ex. 5 at pp. 7-8). The 2022 IEP indicated the student developed new peer relationships through participation in a club and he saw the students outside of school as well (id. at p. 8). According to the IEP, the student continued to struggle with anxiety, depression, and feelings of anger and stress, although he was more open to discussing those emotions and engage in work to lessen those feelings (id.). Additionally, when the student had instances of emotional dysregulation during the year, he had been open and receptive to coaching and engaged in mindfulness and distraction exercises to manage and decrease his dysregulation; however, he had difficulty implementing these skills independently (id.).

In the area of physical development, the August 2022 IEP included diagnoses from the student's private psychiatrist of autism, mood disorder, and anxiety disorder (Dist. Ex. 5 at p. 8). The IEP reported that the student continued to have age-appropriate physical development levels and abilities (id.).

The August 2022 IEP management needs reflected that the student required movement breaks, access to coaching/distress tolerance skills when emotionally dysregulated, support of program support staff for emotional coaching, and social skills provided to the student, and indicated that the school psychologist would train program staff in the coaching of social skills (Dist. Ex. 5 at p. 8). As related to the effect of student needs on involvement and progress in a general education setting, the student required coaching and reminders to use his strategies so that he could "re-regulate and return to the academic task at hand" and required teacher assistance to use interpersonal effectiveness skills to develop and maintain social connections and navigate group dynamics (id.).

1. Annual Goals

The district appeals from the IHO's finding with respect to the annual goals, in that the August 2022 IEP failed to contain goals to address the student's social skills and social language needs (IHO Decision at p. 34).²²

According to meeting information, at the April 2022 CSE meeting the parents "acknowledged that some progress was noted in each IEP goal area but indicated that there was no significant growth" (Dist. Ex. 5 at p. 3). In contrast, district staff reported on the student's progress toward his 2021-22 annual goals, including that the student had demonstrated overall growth in his social skills evidenced by his friendship with a peer, participation in a club, and engagement in social activities during lunch/recess, and that by that point in the school year, he had achieved three annual goals (id.; see Dist. Ex. 34). The meeting information indicated that the

²² The August 2022 IEP included four total annual goals with two in the area of study skills and two that addressed social/emotional and behavioral needs (Dist. Ex. 5 at p. 9). In the area of study skills, the first annual goal provided that the student would estimate how much time it took to complete an assignment and then compare how much time it actually took versus his estimate; and the second annual goal required the student to develop a schedule with interim due dates to complete a project on time for assignments of over one week in duration (id.).

special education teacher and school psychologist recommended IEP annual goals for the student (id.).

By June 2022, the student had achieved both of his 2021-22 school year socialization annual goals (Dist. Ex. 34). According to the August 2022 IEP, for the upcoming school year the student needed to identify personal values and engage in values-related goals, and support to maintain and develop peer relationships and understand/identify alternate perspectives and reasons for people's actions (Dist. Ex. 5 at p. 8). To address those needs, the August 2022 IEP included two annual goals; the first annual goal provided that when presented with a real or hypothetical situation, the student would identify at least two explanations or interpretations of the other person's behavior, and the second annual goal required the student to identify two values and one short-term and one long-term goal associated with these values (id. at p. 9). The director of special services for the district testified that the IEP goals included in the August 2022 IEP supported the student's needs as related to study skills and working on social-emotional coping skills (Tr. pp. 261-62, 296).

Here, the evidence in the hearing record shows that the student was making progress toward his social skills and relationship development, the CSE identified the student's continuing needs in these areas, and developed annual goals to address those needs (Dist. Ex. 5 at pp. 8, 9). Thus the evidence does not support the IHO's finding that the 2022-23 IEP did not contain annual goals to address the student's social skill needs.

2. Therapeutic Support Program – 15:1+1 Special Class

For the 2022-23 school year, the CSE recommended that the student participate in the TSP at the district high school, which consisted of one 40 minute period per day of 15:1+1 special class instructional support, with a focus on executive functioning skills (Dist. Ex. 5 at pp. 3, 10).²³ At the CSE meeting, the school psychologist indicated that this period would be first period each day, which was beneficial for the student as "he could have time for any work that he did not finish at home and knowing that he ha[d] this time could help to reduce his anxiety at home" (id. at p. 2). The TSP included one 30-minute session per week of individual counseling services and "coaching w[ould] be available to the student throughout the day" (id. at pp. 3, 10). The CSE recommended accommodations for the student including special seating arrangements, reasonable movement breaks, graphic organizers, wait time to process and formulate a response, and larger assignments broken into smaller components with interim due dates (id. at pp. 10-11). As related to her services, the educational consultant described conducting regular observations of the student in the classroom, holding a meeting at the start of the year to support the teachers' understanding of the student and discuss recommendations, and working with the team to address any issues and problem solve (id. at pp. 2, 11). In addition, the August 2022 IEP provided for monthly parent counseling and training (id. at p. 10).

During testimony, the district high school psychologist described the high school TSP as a program designed for students in 9th through 12th grade that struggled with regulating mood and emotion, for example struggling with anxiety and depression, and for students who may struggle

²³ At the middle school the special class portion of the TSP was called the "learning lab," at the high school, it was referred to as the "special class support" period (see Tr. pp. 337-38).

with learning or socially, and students on the autism spectrum (Tr. pp. 431-32). The high school TSP, like the middle school program described above, used the DBT model to manage students' difficult moments and provide both an academic and counseling component (Tr. pp. 433-35). The district high school special education teacher testified that the TSP supported students with emotional disabilities, learning disabilities, ADHD, and students with autism for the main purpose of "giv[ing] the students a therapeutic approach in their learning throughout the day" (Tr. pp. 591-92). The high school psychologist testified that the academic component focused on executive functioning and managing academics at the high school level; however, the program could also be "therapeutic in the sense that students c[ould] unwind in there a little while" as they were not expected to always be on the go at all times (Tr. p. 435). In addition to the high school special education teacher and high school psychologist, two full time teaching assistants rounded out the program; all the staff were trained in DBT together and they met daily to discuss students and skills (Tr. pp. 436, 593). Further, the teaching assistants provided support to the students in their general education classes and during the support period (15:1+1 special class) (Tr. pp. 436, 593-94).

The district high school psychologist testified that the location of the TSP in the high school had a direct entrance connected to a lobby, classroom, office, and bathrooms and "[t]he beauty of our location [wa]s we c[ould] have students enter directly into our program area and not have to go through the main high school building" and this provided comfort and confidentiality (Tr. pp. 436-37). The district high school special education teacher also testified to the privacy of the separate entrance to the TSP, as well as use of "the Remind app" as a way to privately communicate to students throughout the day as used by all staff in the TSP (Tr. pp. 596-97). For example, students in the program could get support by requesting assistance without drawing attention to themselves and this "Remind app" provided the students "a very private way to communicate with us and us to be able to help the students in real-time manage emotions or just do some problem solving with them or coaching them to use some skills" (Tr. pp. 597-98).

The director of special services for the district and chairperson of the May and August 2022 CSE meetings testified that the program developed on May 12, 2022 was appropriate for the student as the IEP identified the student's need areas related to study skills, coping, and behavior regulation skills and recommended annual goals, specific program supports, special education and related services, and accommodations to address those needs (Tr. pp. 292, 296; see Dist. Exs. 4 at p. 1; 5 at p. 1). Further, the director of special services testified that the recommended change in frequency from quarterly to monthly for parent counseling and training as well as the monthly consultation with the twice exceptional expert educational consultant were appropriate (Tr. pp. 294-95). The director of special services reported bringing in the educational consultant as the parents were concerned with potential stressors present in the recommended classroom setting and that the classroom would not meet the student's needs; the educational consultant's perspective could advise if adjustments were needed to make in the classroom (Tr. p. 318). The director of special services further testified that the regular education teachers in the meetings where she served as chairperson reported that the student was making progress in their classes and they did not have specific concerns that would require the consultant's expertise; rather, she enlisted the educational consultant on the team to "understand the parents' concerns" and to have the parents feel like the district was "doing everything [it] could to support [the student]" (Tr. p. 319).

Turning to the parents' concerns with the high school TSP, at the time of the CSE meetings for the 2022-23 school year, the parents expressed that providing the student with supports did not address the core issue that "in a general education classroom [] the student fe[lt] different" and "being in classes with students who he d[id] not get and students who demonstrate[d] behavior he d[id] not understand cause[d] the student stress" (Dist. Ex. 5 at pp. 2-3). During the August 2022 CSE meeting, the chairperson expressed the importance of educating the student in the LRE, with supports and services discussed and access to general education peers (id. at p. 3). During the impartial hearing, the school psychologist, who worked with the student in middle school testified that herself and the middle school special education teacher, as part of the CSE team agreed with the recommendations for ninth grade (Tr. pp. 97-98). The school psychologist testified that she did not recall the parents objecting specifically to the student being in a general education class, but that the parents had concerns about class size; however, testified that the team did not feel having the student in small classes made sense given his cognitive abilities and also explained that it would further isolate him from his peers (Tr. p. 98).

Moreover, although the private psychologist and private psychiatrist advocated that the student be moved out of the district setting, the private psychologist testified that the student would likely always struggle with social relationships and social challenges (Tr. p. 721; see Dist. Exs. 22-23).

At this juncture, it must be noted that despite the parents' concerns regarding LRE, the district was mandated to consider placing the student with his nondisabled peers in light of the IDEA's LRE requirements (see 20 U.S.C. § 1412[a][5][A]; 34 CFR 300.107, 300.114[a][2][i], 300.116[a][2], 300.117; 8 NYCRR 200.1[cc], 200.6[a][1]). However, the private psychologist and private psychiatrist were not required to take LRE considerations into account as they are not bound to adhere to the same mandates as the district personnel on the CSE in formulating recommendations for the student, and review of the letters submitted reveals little to no consideration of the benefits of access to nondisabled peers when they recommended full-time placement at Flex (Dist. Exs. 22; 23; see T.M., 752 F.3d at 161-67; Newington, 546 F.3d at 119-20).

Additionally, both the private psychologist and private psychiatrist recommended that the student needed to be placed in an environment designed for "twice exceptional" students (Dist. Exs. 22 at p. 1; 23 at p. 2).²⁴ The private psychiatrist specifically noted that the student "need[ed] a learning environment that is designed for twice exceptional children" (Dist. Ex. 22 at p. 1). However, special education in this State is not designed to address a student's intellectual giftedness, rather specially designed instruction is defined 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"

²⁴ 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.

(8 NYCRR 200.1[vv]).²⁵ Accordingly, while it is understandable that the parents wished for the student to be placed in an environment with peers who resembled him more, particularly in regards to his higher cognitive functioning, I must review the district's recommendations in light of the district's responsibilities, which as noted above are to address the student's unique needs that result from the student's disability and to keep the student in his LRE.

Also, review of the letters from the private psychiatrist and the private psychologist indicated that the basis for their recommending the removal of the student from a general education program in the public schools was a belief that the student was not making progress (see Dist. Exs. 22; 23), an assumption on their part that was not borne out by the evidence. The psychiatrist noted that the student's "medical conditions have not been sufficiently accommodated for too long" and the psychologist noted that the student, despite receiving what she described as "good support" in middle school "continued to experience significant depressive symptoms, panic and anxiety, and social isolation in school" (Dist. Exs. 22 at p. 2; 23 at p. 1). However, review of the hearing record, as a whole, paints a more complex picture of the student's experience during his last year of middle school.

In fact, review of the student's performance during the 2021-22 school year while in a similar TSP shows that he made progress (see Dist. Ex. 34). Specifically, the hearing record included a June 2022 progress report as related to the student's annual goals in the area of study skills and social/emotional and behavioral needs for the 2021-22 school year (id.).²⁶ The progress report indicated for the first social/emotional and behavioral goal of having the student discuss an instance of emotional dysregulation during counseling and reporting on using one distress tolerance and/or an emotion regulation skill to manage this, that the student made satisfactory progress during the December 2021 and March 2022 marking periods, and achieved the annual goal by the June 2022 marking period (id. at p. 2). The second annual goal related to having the

²⁵ 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 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 one was available to the student in a public school program (see Application of a Bd. Of Educ., Appeal No. 21-219).

²⁶ The June 2022 progress report stated that the student achieved all goals in the area of study skills as related to studying essential skills for upcoming tests and implementing a study plan (Dist. Ex. 34 at p. 2). The progress report specified that in December 2021, the student had demonstrated considerable independence in managing his workload, preparing for assessments, and "ha[d] been developing a study plan that [wa]s effective at preparing him for tests (id.).

student use socialization skills such as initiating a conversation with peers, joining a club, or making plans with friends, and that the student made satisfactory progress during the December and March 2021-22 school year marking periods (*id.*). The progress report specified that the student joined one club in school, attended all meetings except one, at the time of progress reporting in December and March, and in addition participated in a Minecraft lunch group when offered, played with one established friend and a new peer for a few weeks at the time of the December 2021 reporting (*id.*). As of the December 2021 reporting, the student did not extend new peer interactions into friendships outside of school activities; however, the March 2022 progress update stated the student began communicating and meeting with students he met in the club once a week, outside of the club/school (*id.*). By June 2022, the student achieved this goal (*id.* at p. 3). Regarding the third annual goal, the progress report stated that in December 2021, the student made satisfactory progress in reporting having attended at least one club that week or the week prior in order to increase his sense of belonging; however, he had not yet identified feeling that the club had increased his sense of belonging and at times reported not liking people who were involved with the game he played during the club (*id.*). However, by March of 2022, the student had achieved this goal, and the progress report stated that the student "ha[d] begun to meet with students from the club once a week outside of the club hours and outside of school, and he ha[d] reported enjoying his time with these other students" (*id.*).

Next, the hearing record includes logs that reflected the student's progress during the 2021-22 school year in counseling; the logs identified and reported his use of socialization skills such as talking to people in groups during class, going to counselor's lunch group, texting a friend to play video games outside of school, playing D&D outside of school, hanging out with friends outside of school, and engaging in clubs (*see* Parent Ex. D at pp. 8-10 ; *see also* Tr. pp. 604-05). Moreover, the logs addressed skills of having the student identify feelings about himself such as feeling anxious about upcoming events, being angry with his brother, or experiencing frustration with teaching assistants pushing him to make friends and socialize, as well as reporting on skills he used such as coping ahead and planning during sessions, use of deep breathing, or problem solving in sessions (*see* Parent Ex. D at pp. 6-8). The school psychologist testified that the student spoke with peer group members, participated in game play during the club, and managed conflicts with support and sometimes independently (Tr. p. 57). She also testified that the student "grew again in his ability, willingness to discuss his emotions and also to plan for the future and to be more engaged in helping himself feel better, and again, planning for his life as well as the social improvement in engaging with kids outside of school in an ongoing group" (Tr. p. 71). According to the school psychologist, she met with teachers multiple times to reduce the student's homework demands, involved the student in some meetings to advocate for himself, and reported that the student progressed in this area of advocacy for himself in eighth grade (Tr. pp. 75-76).

Additionally, the hearing record included the student's district report card from his 2021-22 school year, that reflected one final grade in the high 80's, and the majority of the remaining grades in the mid to high 90's (Dist. Ex. 28 at p. 1). On the Math Algebra 1 and Earth Science Regents' exams, the student received scores of 85, and 97, respectively (*id.*). Further, the school psychologist testified that the student did not leave school frequently during his eighth-grade year, noting a couple of illnesses; however, this did not affect his grades (Tr. pp. 64-65; Dist. Ex. 28 at p. 1).

As described above, the August 2022 CSE made a recommendation that the student continue in the TSP at the high school, in addition to recommending supports, services, annual goals, and accommodations substantially similar to the program provided to the student in eighth grade in which the student made progress related to his needs and goals in the areas of study and social skills. Overall, review of the hearing record as described above shows that while the student certainly exhibited challenges during the 2021-22 school year, the August 2022 CSE designed a program to address the student's identified areas of need, particularly with counseling and the supports provided in the TSP. Although it is understandable that the parents wanted what they felt was best in the form of a smaller environment with peers who were also twice exceptional, the CSE offered the student appropriate, supportive programming that was individually tailored to address the student's needs and was mindful of the IDEA's mandate to provide instruction in the LRE to the maximum extent appropriate (see Newington, 546 F.3d at 120). Therefore, the recommendation to continue a similar program at the high school, with added consultation from an expert on twice exceptional students, was appropriate. Based on the foregoing, the evidence in the hearing record supports finding that the district offered the student a FAPE for the 2022-23 school year.

D. 2023-24 School Year

The May 2023 IEP meeting information reflected that the student attended Flex during the 2022-23 school year, and the Flex school representative reported the student had a nice peer group with "quirky friends" with shared interests (Dist. Ex. 6 at pp. 1, 2). The Flex representative reported the student did not exhibit "struggles" academically, and that socially, he had some self-doubt and struggled with maintaining and sustaining relationships (*id.* at p. 2). As reported to the CSE chairperson, the student's class size consisted of a cohort of three to four students, the student took frequent breaks throughout the day, and Flex had a school counselor available who offered small group sessions for the student (*id.*).²⁷ The parents reported that placement at Flex with twice exceptional students and having small class sizes and little stressors had helped the student (*id.*).

The student's May 2023 IEP contained updated psychoeducational evaluation results from February 2023 (Dist. Ex. 6 at pp. 5-7; see Dist. Ex. 11). During the impartial hearing, the district high school psychologist who completed the testing reported that the student continued to display strengths in his cognitive abilities of verbal comprehension, fluid reasoning, working memory, and visual spatial/problem solving skills, which were in the extremely or very high ranges, and that the student's processing skills continued to be in the average range, consistent with previous findings (Tr. pp. 438-39; Dist. Ex. 11 at p. 2). As related to academic achievement, the high school psychologist reported that testing yielded scores in the "very high range" for reading and math, and in the "average range" for writing (Tr. p. 439; Dist. Ex. 11 at pp. 5-7). The high school psychologist testified that results of social/emotional testing indicated that the student tended to internalize stress, including social stress, anxiety, and depression (Tr. pp. 439-40; Dist. Ex. 11 at pp. 7-8). In comparison to previous social/emotional testing, the student continued to demonstrate clinically significant findings in the area of depression, and in areas of personal adjustment and

²⁷ The Flex representative reported that the counselor "ha[d] access to the student's therapeutic team"; however, the Flex head of school testified that the school did not consider itself a therapeutic program and did not provide psychiatric or psychological treatment (Tr. p. 930; Dist. Ex. 6 at p. 3).

internalizing distress, current testing indicated a similar profile to the previous assessment (Tr. pp. 440-42).

The district high school special education teacher testified to including information on the May 2023 IEP in the area of career/vocational/transition in order to explore areas of interest for the student through use of technology and talking to guidance counselors (Tr. pp. 606-07; Dist. Ex. 6 at p. 7). Additionally, review of the present levels of performance shows that the CSE updated academic achievement and functional performance section, and the high school psychologist testified to updating the social development section (Tr. pp. 444-45; Dist. Ex. 6 at pp. 7-8). As reported in the May 2023 IEP, the student continued to need individual counseling to improve interpersonal effectiveness skills, and continued support to maintain, and develop peer relationships (Tr. p. 444; Dist. Ex. 6 at p. 8).

1. Annual Goals

The district appeals from the IHO's finding that the May 2023 CSE failed to develop annual goals to address the student's identified needs in social skills, social language, and the student's sense of self-worth.^{28, 29}

During the impartial hearing, the high school psychologist testified to completing the student's February 2023 psychoeducational evaluation, and based on this testing and in conjunction with the May 2023 CSE, recommended to carry over the annual goal from the August 2022 IEP that provided the student would, when presented with a real or hypothetical situation, identify at least two interpretations of the other person's behavior; the CSE also recommended a new goal that the student would identify the appropriate interpersonal effectiveness skills and he could use this skill to interact with peers based on his social interaction goal (Tr. pp. 445-46; compare Dist. Ex. 5 at p. 9, with Dist. Ex. 6 at p. 10). The high school psychologist testified that in developing the new interpersonal annual goal, the CSE discussed the student's struggles socially and the added goal addressed targeting interpersonal effectiveness and the difficulties in that area (Tr. p. 446; see Dist. Ex. 6 at p. 10). As for continuing the annual goal addressing the student's need to improve his ability to interpret others' behavior, as discussed previously, the high school psychologist wanted to continue to work on the student's social struggles (Tr. p. 445).

Here, the CSE used information from updated testing, and discussed the recommended annual goals to support the student's social/emotional and behavioral needs (see Dist. Ex. 6 at pp.

²⁸ The May 2023 IEP included six total annual goals with three in the areas of study skills, two that addressed social/emotional and behavioral needs, and one in the area of career/vocational/transition needs that provided the student would articulate one to two areas of interest in career exploration and begin researching those areas (Dist. Ex. 6 at p. 10). In the area of study skills, two annual goals were carried over from the previous August 2022 IEP and a new annual goal required that the student participate in one service or extra-curricular activity in one area of interest and one area of non-interest (compare Dist. Ex. 5 at p. 9, with Dist. Ex. 6 at p. 10).

²⁹ The IHO's conclusions with respect to each of the school years under review contain substantially the same language relating to evaluative information, social pragmatic language needs, and sensory needs (see IHO Decision at pp. 30, 35, 39).

1-3, 10). Contrary to the IHO's finding, the social/emotional and behavioral annual goals recommended for the 2023-24 school year were appropriate.

2. Therapeutic Support Program – 12:1+1 Special Class

The May 2023 CSE discussed recommendations to support the student in the TSP if he transitioned back to the district for 10th grade (see Dist. Ex. 6 at pp. 2-3). The chairperson stated that unlike middle school, the students in high school could take courses with students from different grade levels and could pursue courses of interest which tended to contain students that had similar passions (id. at p. 2).

For the 2023-24 school year, the May 2023 CSE recommended the TSP, which consisted of two 40-minute periods per day of 12:1+1 special class instruction, three hours per day of indirect consultant teacher services, and one 30-minute session per day of individual counseling (Dist. Ex. 6 at pp. 1-4, 11).³⁰ In addition, the May 2023 CSE recommended that the student would have access to a teaching assistant (5:1) in his general education courses, within the TSP room, and to monitor his attendance and mood (id. at p. 12). Further, the CSE recommended special seating arrangements, reasonable movement breaks, graphic organizers, wait time to formulate a response, modified homework assignments, and assignments broken down into smaller components with interim due dates (id. at pp. 11-12). One 40-minute session per month of parent training and counseling was also recommended (id. at p. 11). Supports for school personnel included one 30-minute psychological consultation per month, a team meeting at the beginning of the school year, information to be provided by an expert on twice exceptional students once per year, monthly team meetings to discuss progress and concerns with the CBC consultant, and monthly observations of the student and consultation with teachers by the twice exceptional educational consultant (id. at pp. 3-4, 12-13).

The district assistant superintendent of student support services described the additional supports added to the student's 2023-24 school year programming and testified "so [the CSE] added an additional skills period, we added the consultant teacher services indirect. He received counseling daily which was an increase from what had been recommended previously, and then there were also several consultations that we felt would be appropriate to add" (Tr. pp. 512, 514-16).³¹ The assistant superintendent of student support services testified that the student's return to

³⁰ State regulation provides that "the maximum class size for special classes containing students whose management needs interfere with the instructional process, to the extent that an additional adult is needed within the classroom to assist in the instruction of such students, shall not exceed 12 students, with one or more supplementary school personnel assigned to each class during periods of instruction" (8 NYCRR 200.6[h][4][i]). The district assistant superintendent of student support services testified that the 12:1+1 special class consisted only of students with disabilities, whereas the previous 15:1+1 class also included general education students in the TSP at the high school (Tr. pp. 583-84).

³¹ In addition to the supports recommended for the student in the TSP, the district superintendent of support services described the range of supports the program provided, such as the in the moment support previously described through use of the "[R]emind" app to text discreetly in real time, and that the TSP wing always had an adult present (Tr. pp. 548-50, 555-57, 596-98). The chairperson described that for students with severe needs such as suicidal ideation, the TSP space provided a safe location, where the student did not have to travel the hallways, and "provide[d] a student the space to be in school, access to their work . . . a space where they fe[l]t

district could be challenging and therefore having two skills periods per day would allow the student to enter the day in the TSP and settle in, and have the additional skills period to address academics (*id.*). The three hours of indirect consultant teacher services per day captured what the high school special education teacher worked on such as data collection or talking with teachers within general education classrooms regarding aspects of the student's program such as modifying assignments (Tr. pp. 516-17). As related to the increase in counseling services, in relaying the needs shared by the family, the high school psychologist recommended that the student receive daily counseling support (Tr. p. 517). Further, the increased consultation services recommended provided "a full kind of wraparound support, hearing from the family, hearing from the team and then sharing it out to the school team" (Tr. pp. 517-19). In addition, the assistant superintendent of student support services described that the expert in twice exceptionality would provide disability information to the team and support the teachers in the differentiation of the student's instruction (Tr. pp. 519-21). Moreover, she described the appropriateness of the May 2023 IEP and reported that testing accommodations and differentiation of instruction supported students with twice exceptionality (Tr. pp. 521-23). Specifically, the assistant superintendent of student support services testified that "based on my experience both as a teacher and as an administrator with programs of this nature and students of this profile, because these students tend to have, you know, high academic interest, if we are able to support them with courses that are high interest and then support those teams in modifying and differentiating the actual work that's expected to be produced, I found that this is a really good way to support them and that the students are successful" (Tr. p. 523).

As described above, the May 2023 CSE recommended increased supports within the high school TSP for 10th grade to support the student's possible transition from Flex back into the district setting. The increased academic supports, counseling services, consultations, and accommodations comprised appropriate programming to address the student's unique needs. As such, the evidence in the hearing record does not support the IHO's finding that the district did not offer the student a FAPE for the 2023-24 school year.

Generally, the crux of the dispute in this matter related to the parents' view that the district was required to create or offer the student a setting with students more similar to their child, such as a grouping with students with autism and who were twice exceptional, versus the CSEs' opinion that the student could receive meaningful educational benefit while attending a general education class placement with support of the TSP that provided counseling services, academic supports, and accommodations within a district public school.

Contrary to the IHO findings, the evidence in the hearing record supports finding that the district offered a program that was "reasonably calculated" to provide meaningful educational benefit to the student for each of the school years in question. While I empathize with the parents' preference for the student's placement at Flex, the IDEA ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (*Walczak*, 142 F.3d at 132).

safe or they [we]re with a team that kn[ew] them and c[ould] monitor them" (Tr. p. 556).

VII. Conclusion

Having determined that the IHO erred in finding that the district denied the student a FAPE for the 2021-22, 2022-23, 2023-24 school years, the necessary inquiry is at an end.

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

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision, dated May 31, 2024, is modified by reversing those portions which determined that the district did not offer the student a FAPE for the 2021-22, 2022-23, 2023-24 school years and directed the district to reimburse the parents for the cost of tuition at Flex for the 2022-23 and 2023-24 school years.

**Dated: Albany, New York
August 9, 2024**

**JUSTYN P. BATES
STATE REVIEW OFFICER**