The University of the State of New York

The State Education Department
State Review Officer
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No. 14-095

Application of the NEW YORK CITY DEPARTMENT OF EDUCATION for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:
Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for petitioner, Lisa R. Khandhar, Esq., of counsel

Mayerson & Associates, attorneys for respondents, Gary S. Mayerson, Esq., of counsel

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from the decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to respondents' (the parents') son and ordered it to reimburse the parents for the costs of the student's tuition at the McCarton School for the 2013-14 school year and to reimburse the parents for the costs of the student's home-based services for the 2013-14 school year. The appeal must be sustained in part.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

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

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

III. Facts and Procedural History

In this case, the student attended the McCarton School during the 2012-13 school year and received additional services through a home-based program (see Dist. Exs. 5 at p. 1; 6 at p. 1; 8 at pp. 10; 9 at pp. 1-8).[1] On April 26, 2013, the parents executed an enrollment contract—dated March 1, 2013—with the McCarton School for the student's attendance during the 2013-14 school year beginning July 1, 2013 (see Parent Ex. I at pp. 1, 3).

On May 10, 2013, the CSE convened to conduct the student's annual review and to develop an IEP for the 2013-14 school year (see Dist. Ex. 1 at pp. 1, 12-13, 15). Finding that the student

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

remained eligible for special education and related services as a student with multiple disabilities, the May 2013 CSE recommended a 12-month school year program in a 6:1+1 special class placement at a specialized school, together with the following related services: five 30-minute sessions per week of individual occupational therapy (OT), one 60-minute session per month of parent counseling and training, and five 30-minute sessions per week of individual speech-language therapy (id. at pp. 12-13).[2] In addition, the May 2013 CSE completed a functional behavioral assessment (FBA) of the student at the meeting and created a behavioral intervention plan (BIP) for the student (see Dist. Exs. 1 at pp. 3-4; 2 at pp. 1-3). The May 2013 also recommended the services of a full-time, 1:1 crisis management paraprofessional, and developed annual goals with short-term objectives to address the student's needs (see Dist. Ex 1 at pp. 4-13).

In a final notice of recommendation (FNR) dated June 14, 2013, the district summarized the special education and related services recommended in the May 2013 IEP, and identified the particular public school site to which the district assigned the student to attend for the 2013-14 school year (see Dist. Ex. 4).

By letter dated June 14, 2013, the parents notified the district that the "proposed IEP" was not appropriate for the student because it failed to include sufficient "1:1 teaching intervention" and a sufficient "level of services" (Parent Ex. D at p. 2). The parents also indicated that the "proposed IEP" failed to include individualized parent counseling and training, and further, it failed to include appropriate and sufficient "behavioral interventions" (id.). In addition, the parents noted that they had not received an FNR nor been "invited to meet to discuss possible placements that might be appropriate for the student (id.). Consequently, the parents notified the district that they would seek reimbursement or funding for the costs of a 12-month school year program at the McCarton School—"as a component of [the student's] educational program—as well as reimbursement or funding for the costs of the following services for the 2013-14 school year: nine hours per week of "supplemental 1:1" applied behavior analysis (ABA) therapy, three 45-minute sessions per week of 1:1 "PROMPT" speech-language therapy, round-trip transportation services, "up to" four hours per month of individualized parent counseling and training, and six 45-minute sessions per month of "Feldenkrais therapy" (id.).[3]

By letter dated June 25, 2013, the parents advised the district that they received the FNR (see Parent Ex. F at p. 2). However, while the FNR reflected that the "IEP team" made the "placement" set forth in the FNR, the parents indicated that because they were "not part of any IEP team that made this recommendation" the district deprived them of the opportunity to participate in the "site selection or a discussion on that topic" (id.). While noting the intention to visit the assigned public school site "as soon as possible," the parents requested answers to a list of 23 questions to assist them in making an "informed decision" (id. at pp. 2-3).

On June 26, 2013, the parents visited the assigned public school site (see Parent Ex. G at p. 1).

[2] The student's eligibility for special education programs and related services as a student with multiple disabilities is not in dispute (see 34 CFR 300.8[c][7]; 8 NYCRR 200.1[zz][8]).

[3] "PROMPT" refers to "Prompts for Restructuring Oral Muscular Phonetic Targets" (Dist. Ex. 11 at p. 2).

A. Due Process Complaint Notice

In a due process complaint notice dated June, 27, 2013, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2013-14 school year based upon approximately 116 separately enumerated allegations (see Parent Ex. A at pp. 1-13). Relevant to this appeal, the parents alleged that the May 2013 CSE failed to conduct a triennial evaluation or any of its own evaluations of the student, and the CSE failed to conduct an appropriate FBA and develop an appropriate BIP for the student "despite [his] interfering behaviors" (id. at pp. 3-4, 10). Next, the parents asserted that the May 2013 CSE failed to recommend "individualized" parent counseling and training and failed to recommend adequate "levels and frequencies" of related services (id. at pp. 5-6). With regard to the recommended 6:1+1 special class placement, the parents alleged that the student would not receive sufficient support to meet his "need for intensive teaching in order to acquire and maintain new skills," and further, that the May 2013 IEP failed to offer "consistent 1:1 teaching throughout the school day" (id. at p. 6 [emphasis in original]). The parents further alleged that the recommended 1:1 paraprofessional was "inadequate and inappropriate" because a paraprofessional could not provide the student with the "intensive level of 1:1 teaching" he required (id. [emphasis in original]). In addition, while noting that the student required "'individualized instruction'" in the May 2013 IEP, the IEP failed to "adequately address and accommodate" the student's need for intensive "1:1 teaching" (id.). Next, the parents alleged that the May 2013 CSE did not meaningfully consider the student's need for assistive technology, and the CSE failed to "properly support" the student's "existing 'assistive technology'" (id. at p. 7). The parents further alleged that the May 2013 CSE did not "meaningfully consider what, if any, educational methodologies and approaches" would promote the student's progress (id.). With respect to the annual goals, the parents alleged that the May 2013 CSE incorporated annual goals into the May 2013 IEP that were "specifically designed to be implemented" in a "1:1 teaching program" (id. at pp. 9-10 [emphasis in original]). In addition, the parents asserted that the annual goals required 1:1 instruction, which the May 2013 CSE did not offer in the IEP (id. at p. 10). The parents also asserted that for summer 2013, the student must attend a school site different from the assigned public school site identified in the FNR, and the methodology used at the assigned public school site was not appropriate to meet the student's needs (id. at pp. 7-8).

Turning to the unilateral placement, the parents alleged that the McCarton School's school-based services, together with home-based services, were reasonably calculated to provide the student with educational benefit to meet his needs (Parent Ex. A at pp. 13-14). Finally, the parents asserted that there were no "equitable circumstances" that would bar or diminish the requested relief (id.). As relief, the parents sought reimbursement or funding for the costs of the student's tuition at the McCarton School for the 2013-14 school year, as well as for the costs of the following: nine hours per week of "supplemental 1:1 ABA therapy," three 45-minute sessions per week of 1:1 "PROMPT" speech-language therapy, round-trip transportation services, "up to" four hours per month of individualized parent counseling and training, and six 45-minute sessions per month of "Feldenkrais therapy" (id.).

B. Events Post-Dating the Due Process Complaint Notice

By letter dated July 2, 2013, the parents rejected the district's "proposed IEP" for the same reasons set forth in the June 14, 2013 letter, and added that the "proposed IEP" failed to meet the student's "individualized needs" (compare Parent Ex. D at p. 2, with Parent Ex. G at p. 2). In addition, the parents rejected the assigned public school site for the following reasons: due to

renovations, the student would attend two different school sites for summer 2013 and the remainder of the school year and the student would need to transition to a "new teaching staff;" the assigned public school site did not use an ABA approach for instruction; the paraprofessionals were not "required to have a bachelor's degree;" the "special needs classes" were located on the fifth floor; it was unclear whether the assigned public school site had a "seat" available for the student or whether the student would receive all of the recommended related services; and the student would only receive 20 to 30 minutes of "1:1 instruction a day" (Parent Ex. G at p. 2). The parents also indicated that the assigned public school site did not offer "individualized" parent counseling and training or "parent training at home," the assigned public school site was "very large," and "[n]o transition planning" took place to assist the student's transfer from his "current school" to the assigned public school site (id. at p. 3). Consequently, the parents notified the district that they would seek reimbursement or funding for the costs of a 12-month school year program at the McCarton School—"as a component of [the student's] educational program—as well as reimbursement or funding for the costs of the following services for the 2013-14 school year: nine hours per week of "supplemental 1:1" ABA therapy, three 45-minute sessions per week of 1:1 "PROMPT" speech-language therapy, round-trip transportation services, "up to" four hours per month of individualized parent counseling and training, and six 45-minute sessions per month of "Feldenkrais therapy" (id.).

C. Impartial Hearing Officer Decision

On September 4, 2013, the IHO conducted a prehearing conference, and on September 17, 2013, the parties proceeded to an impartial hearing, which concluded on February 25, 2014 after seven days of proceedings (see Tr. pp. 1-918). In a decision dated May 22, 2014, the IHO concluded that the district failed to offer the student a FAPE for the 2013-14 school year, and thus, the IHO ordered the district to reimburse the parents for the costs of the student's tuition at the McCarton School for the 2013-14 school year and for the costs of the student's home-based program (see IHO Decision at pp. 13-20).

In support of the conclusion that the district failed to offer the student a FAPE for the 2013-14 school year, the IHO found that the recommended 6:1+1 special class placement would not provide the student with the "required level of 1:1 instruction," the May 2013 CSE failed to conduct a triennial evaluation of the student, the FBA and BIP failed to sufficiently address the student's behavioral needs, the May 2013 IEP failed to sufficiently describe the student's assistive technology needs, and the May 2013 IEP failed to include sufficient related services' mandates (IHO Decision at pp. 16-18).[4] Given the student's "severe academic, social, and [activities of daily living] deficits"—as well as behaviors that interfered with the student's ability to learn—the IHO further determined that the student required "full-time 1:1 behaviorally-based instruction, intense supervision throughout the day, and a highly-structured program" with a "detailed" behavior plan (id. at p. 16). In addition, the IHO indicated that the recommended 6:1+1 special class placement did not offer the student "sufficient 1:1 attention" to receive educational benefits, and furthermore, neither the classroom paraprofessional nor the recommended full-time, 1:1 crisis management paraprofessional could provide the student with the "appropriate 1:1 instruction, as opposed to behavioral supports" (id. at pp. 16-17 [internal citations omitted]).

[4] Notably, the IHO found that the "lack of sufficient 1:1 instruction in the program recommendation by itself result[ed] in a denial of FAPE" (IHO Decision at p. 17).

In addition to the lack of sufficient 1:1 instruction, the IHO described the BIP as "grossly inadequate," noting that it failed to include "provisions to prevent or address" the student's interfering behaviors despite the May 2013 CSE's reliance upon a McCarton School behavior reduction plan (BRP) and "ample information" from McCarton staff (IHO Decision at p. 17). The IHO further noted that the district failed to evaluate the student for five years, and the IHO expressly rejected the rationale provided for this failure, which indicated that the student was "'not testable'" (id.). However, the IHO also explained that while the failure to evaluate the student was a "serious error," such error was "mitigated" because the McCarton School provided the May 2013 CSE with "sufficient information to develop an IEP" (id.). Next, the IHO faulted the May 2013 CSE for failing to provide sufficient "guidance or goals regarding implementation" of the assistive technology the student required, as well as for failing to "identify the required device" in the May 2013 IEP (id. at pp. 17-18). With respect to related services, the IHO found no evidence to support the May 2013 CSE's decision to recommend 30-minute sessions as opposed to 45-minute sessions for the student (id. at p. 18). Additionally, the IHO concluded that the annual goals in the May 2013 IEP were appropriate (id.). However, the IHO further found that because the May 2013 CSE derived the annual goals from "McCarton School reports and verbal information," the annual goals "were intended to be implemented in a 1:1 setting by behaviorally-trained staff using ABA and other specific methods"—therefore, the student would not "make meaningful progress" if implemented in another manner and the annual goals could not be implemented in the recommended 6:1+1 special class placement (id.).

With regard to the assigned public school site, the IHO determined it was not appropriate (see IHO Decision at pp. 18-19). In particular, the IHO found that the student would only receive 20 to 30 minutes per day of 1:1 instruction, and the "site offered" was not available during summer 2013 (id. at p. 18). As a result of the foregoing, the IHO concluded that the district failed to offer the student a FAPE for the 2013-14 school year (id. at p. 19).

Turning to the unilateral placement, the IHO found that the McCarton School was appropriate because the program offered the student a "supportive, structured, small class environment, with intensive 1:1 instruction, a detailed IEP, behavior plan, and other supports" the student required in order to make progress (IHO Decision at p. 19). The IHO also concluded that the student's "severe deficits" required a home-based program to "foster generalization of skills across different environments and people, and to prevent regression" (id. at p. 20). Therefore, finding no equitable considerations that would reduce or otherwise bar an award, the IHO directed the district to reimburse the parents for the costs of the student's tuition at the McCarton School for the 2013-14 school year and to reimburse the parents for the costs of the following home-based services: six hours per week of "ABA therapy" and four hours per month of parent counseling and training (at a rate of $115.00 per hour), and two 45-minute sessions per week of speech-language therapy (at a rate of $150.00 per hour) (id. at p. 20).[5]

IV. Appeal for State-Level Review

The district appeals and asserts that the IHO erred in concluding that the district failed to offer the student a FAPE for the 2013-14 school year. The district argues that the absence of a triennial evaluation of the student in this case did not result in a failure to offer the student a FAPE.

[5] The IHO reduced the total amount of home-based services awarded to the parents based upon the actual amount of services provided to the student (see IHO Decision at p. 20 n.1).

In addition, the district asserts that the May 2013 CSE properly conducted an FBA and developed a BIP that appropriately addressed the student's behaviors. Next, the district alleges that the recommendations in the May 2013 IEP offered the student sufficient 1:1 support to meet his needs, the IEP sufficiently addressed the student's assistive technology needs, the IEP included appropriate recommendations for related services, and the absence of a particular methodology did not invalidate the May 2013 IEP. Moreover, the district argues that certain issues raised in the due process complaint notice—while not addressed by the IHO—would also not result in a determination that the district failed to offer the student a FAPE for the 2013-14 school year. Regarding the assigned public school site, the district asserts that the IHO erred in finding the student would not receive sufficient 1:1 instruction, and the specific site was not available for the student to attend during summer 2013. Finally, the district contends that the IHO erred in finding that the parents were entitled to reimbursement for the costs of home-based services; alternatively, if the home-based services were necessary, the district seeks a finding that the McCarton School was not appropriate since it did not provide the student with services he required.

In an answer, the parents respond to the district's allegations and generally argue to uphold the IHO's decision in its entirety.[6] Additionally, the parents request a finding of futility regarding the parties' efforts to seek this administrative appeal.[7,8]

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. 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; 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

[6] As noted above, the parents' due process complaint notice included approximately 116 separately enumerated allegations in support of the contention that the district failed to offer the student a FAPE for the 2013-14 school year (see Parent Ex. B at pp. 1-13). The IHO's decision—while addressing several issues—did not address all 116 allegations (compare Parent Ex. B at pp. 1-13, with IHO Decision at pp. 1-20). To the extent that the parents do not appeal or now advance arguments related to issues in the due process complaint notice that the IHO did not address as a basis upon which to conclude that the district failed to offer the student a FAPE for the 2013-14 school year, these unaddressed issues are deemed abandoned and will not be considered in this appeal (compare Parent Ex. B at pp. 3-13, with IHO Decision at pp. 13-20, and Answer ¶¶ 1-42).

[7] Although the IHO reduced the total amount of home-based services awarded to the parents, the parents do not challenge the IHO's reduced award (compare IHO Decision at p. 20, with Answer ¶¶ 1-42).

[8] Neither party challenges the IHO's conclusion that the annual goals in the May 2013 IEP were appropriate (compare IHO Decision at p. 18, with Pet. ¶ 7 n.3, and Answer ¶¶ 1-42).

way of substantive content in an IEP'" (Walczak v. Florida 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]). 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., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at *10 [S.D.N.Y. Feb. 9, 2007]). 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; A.H. v. Dep't of Educ., 394 Fed. App'x 718, 720, 2010 WL 3242234 [2d Cir. Aug. 16, 2010]; E.H. v. Bd. of Educ., 2008 WL 3930028, at *7 [N.D.N.Y. Aug. 21, 2008], aff'd, 361 Fed. App'x 156, 2009 WL 3326627 [2d Cir. Oct. 16, 2009]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007], aff'd, 293 Fed. App'x 20, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). The 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]; Perricelli, 2007 WL 465211, at *15). 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 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; G.B. v. Tuxedo Union Free Sch. Dist., 751 F. Supp. 2d 552, 573-80 [S.D.N.Y. 2010], aff'd, 486 Fed. App'x 954, 2012 WL 4946429 [2d Cir. Oct. 18, 2012]; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

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]; Tarlowe v. New York City Bd. of Educ., 2008 WL 2736027, at *6 [S.D.N.Y. July 3, 2008] [noting that a CSE must consider, among other things, the "results of the initial evaluation or most recent evaluation" of the student, as well as the "'academic, developmental, and functional needs'" of the student]), 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]; see also Application of the Dep't of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-059; Application of the Dep't of Educ., Appeal No. 06-029; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9).

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).

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; M.P.G. v. New York City Dep't of Educ., 2010 WL 3398256, at *7 [S.D.N.Y. Aug. 27, 2010]).

VI. Discussion

A. May 2013 CSE Process

1. Evaluative Information

The parties dispute whether the district was required to conduct a triennial reevaluation of the student prior to the May 2013 CSE meeting. A district must conduct an evaluation of a student where the educational or related services needs of a student warrant a reevaluation or if the student's parent or teacher requests a reevaluation (34 CFR 300.303[a][2]; 8 NYCRR 200.4[b][4]); however, a district need not conduct a reevaluation more frequently than once per year unless the parent and the district otherwise agree and at least once every three years unless the district and the parent agree in writing that such a reevaluation is unnecessary (8 NYCRR 200.4[b][4]; see 34 CFR 300.303[b][1]-[2]). A reevaluation of a student shall be sufficient to determine the student's "individual needs, educational progress and achievement, the student's ability to participate in instructional programs in regular education and the student's continuing eligibility for special education" (8 NYCRR 200.4[b][4]).

Crediting the parents' testimony that the district failed to evaluate the student for five years, the IHO concluded that the district failed to conduct a triennial evaluation of the student (see IHO Decision at p. 17). Upon review, the evidence in the hearing record demonstrates, however, that prior to the May 2013 CSE meeting the district completed an updated social history of the student in January 2013 as part of a "re-evaluation" and a classroom observation of the student in February 2013 (Dist. Exs. 5 at p. 1; 6 at pp. 1-2). While these two documents strongly suggest that the district initiated a triennial evaluation—or reevaluation process—of the student prior to the May 2013 CSE meeting, the hearing record does not include evidence that the district conducted any further assessments or evaluations as part of a reevaluation (see generally Dist. Exs. 1-20; Parent Exs. A-P; R-V; AA-BB; DD-EE). In particular, the district did not conduct an updated psychoeducational evaluation of the student, and instead, relied, in part, upon an August 2010 psychoeducational evaluation of the student completed on August 6, 2010, in order to develop the May 2013 IEP (see Tr. pp. 116-18, 123; Dist. Ex. 5 at p. 1). When asked why the district did not conduct an updated psychoeducational evaluation of the student, the district school psychologist testified that given the student's "severe" delays, he could not sustain his attention for the "duration of a standardized instrument, even a nonverbal one" (Tr. p. 123). In light of the fact that neither the State nor the federal regulations set forth above require any particular assessments or evaluations of a student as part of a triennial or reevaluation process, but rather focus on the sufficiency of the assessments or evaluations utilized by the district to identify the student's needs, the district's mere failure to conduct specific evaluations or tests, without more, does not constitute a more general failure to conduct an appropriate triennial evaluation or reevaluation of the student.

Moreover, the evidence in the hearing record demonstrates that the May 2013 CSE considered and relied upon the following evaluative information to develop the May 2013 IEP: an August 2010 psychoeducational evaluation report (see Dist. Ex. 7 at pp. 1-3); May 2012 McCarton School OT goals (see Dist. Ex. 16 at pp. 1-2); a June 2012 McCarton School educational progress report (see Dist. Ex. 9 at pp. 1-8 [reporting on the student's learning style, communication skills, cognition skills, gross motor and fine motor skills, activities of daily living (ADL) skills, social and play skills, and progress]; a June 2012 McCarton School speech-language progress report (see Dist. Ex. 12 at pp. 1-4); a June 2012 speech-language progress report (see Dist. Ex. 13 at pp. 1-2 [regarding the student's home-based speech-language therapy sessions]); a July 2012-June 2013 McCarton School BRP (McCarton School BRP) (see Dist. Ex. 10 at pp. 1-4); a July 2012 McCarton School OT progress report (see Dist. Ex. 15 at pp. 1-6); July 2012 McCarton School speech-language therapy goals (see Dist. Ex. 17 at pp. 1-4); a July 2012 ABA home therapy program progress report (July 2012 ABA progress report) (see Dist. Ex. 19 at pp. 1-5); an amended October 2012 McCarton School integrated IEP (see Dist. Ex. 18 at pp. 1-27); a December 2012 McCarton School educational progress report (see Dist. Ex. 8 at pp. 1-10 [reporting on the student's learning style, communication skills, cognition skills, gross motor and fine motor skills, ADL skills, social and play skills, and progress]); a January 2013 McCarton School speech-language progress report (see Dist. Ex. 11 at pp. 1-4); a January 2013 McCarton School OT progress report (see Dist. Ex. 14 at pp. 1-6); a January 2013 social history update (see Dist. Ex. 5 at pp. 1-2); and a February 2013 classroom observation (see Dist. Ex. 6 at pp. 1-2; see also Tr. pp. 115-22).

Based upon the foregoing, the evidence in the hearing record demonstrates—as the IHO ultimately concluded—that the May 2013 CSE had sufficient evaluative information without an updated psychoeducational evaluation of the student or a reevaluation of the student upon which to determine the student's functional, developmental, and academic information and his individual needs to enable the May 2013 CSE to develop the student's IEP (see D.B. v. New York City Dep't

of Educ., 2011 WL 4916435, at *8 [S.D.N.Y. Oct. 12, 2011]; Application of a Student with a Disability, Appeal No. 11-041; Application of a Student with a Disability, Appeal No. 10-100; Application of a Student with a Disability, Appeal No. 08-015; Application of the Dep't of Educ., Appeal No. 07-098; Application of a Child with a Disability, Appeal No. 94-2).

B. May 2013 IEP

1. Annual Goals

The parties dispute whether the IHO erred in finding that the annual goals in the May 2013 IEP—as written—could only be implemented in a "1:1 setting by behaviorally-trained staff using ABA and other specific methods." In this case, a review of the annual goals and short-term objectives in the May 2013 IEP together with the evidence in the hearing record does not support the IHO's conclusion, and therefore, the IHO's finding must be reversed.

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]). Short-term instructional objectives or benchmarks—described as "measurable intermediate steps between the student's present levels of performance and the measurable annual goal"—are required for students who participate in alternate assessment (8 NYCRR 200.4[d][2][iv]; see 20 U.S.C. §1414[d][1][A][i][I][cc]; 34 CFR 300.320[a][2][ii]). Additionally, under the IDEA and State and federal regulations a determination of the appropriateness of a particular set of annual goals for a student turns, not upon their suitability within a particular classroom setting or student-to-teacher ratio or a particular methodology, but rather on whether the annual goals and short-term objectives are consistent with and relate to the identified needs and abilities of the student (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]).[9]

Here, a review of the May 2013 IEP reveals that the CSE incorporated approximately 25 annual goals with approximately 95 short-term objectives to address the student's needs in the following areas: sensory processing skills, self-regulation skills, and interacting with the environment; motor planning skills, trunk control skills, body awareness skills, and balance skills; fine motor and perceptual skills; self-care skills and ADL skills (eating, drinking, table skills,

[9] To hold otherwise would suggest that CSEs or CPSEs should preselect an educational setting on the continuum of alternative placements and/or related services and then draft annual goals specific to that setting; however, that is, idiomatically speaking, placing the cart before the horse (see generally, "Guide to Quality Individualized Education Program [IEP] Development and Implementation," at pp. 38-39, Office of Special Educ. [Dec. 2010], available at http://www.p12.nysed.gov/specialed/publications/iepguidance/ IEPguideDec2010.pdf [stating, among other things that "[t]he recommended special education programs and services in a student's IEP identify what the school will provide for the student so that the student is able to achieve the annual goals and to participate and progress in the general education curriculum (or for preschool students, age-appropriate activities) in the least restrictive environment] [emphasis added]).

personal hygiene); pre-academic skills (matching, colors, counting); following directions; receptive identification and vocabulary skills; understanding of linguistic concepts and word relationships; expressive language skills; length of utterances; expressive vocabulary skills; imitating initial sounds upon request; responding to questions; communication skills; requesting and protesting skills; articulation skills; oral sensory-motor skills; leisure activity skills; play skills; and following general classroom routines (see Dist. Ex. 1 at pp. 4-12).

Upon further review, nothing in the plain language of the annual goals or short-term objectives required the use of any particular methodology in order to work on the skills identified; moreover, the hearing record contains little, if any, evidence to support a conclusion that the annual goals in the May 2013 IEP could not be implemented without using an ABA approach (id.; cf. R.B. v. New York City Dep't of Educ., 589 Fed. App'x 572, 575-76 [2d Cir. 2014]; A.D. v. New York City Dep't of Educ., 2013 WL 1155570, at *12 [S.D.N.Y. Mar. 19, 2013]). In addition, neither the IHO nor the parents cited any authority for the proposition that a CSE cannot incorporate annual goals into a student's IEP that were developed by the student's nonpublic school teachers or providers (see IHO Decision at p. 18; C.L.K. v. Arlington Sch. Dist., 2013 WL 6818376, at *13 [S.D.N.Y. Dec. 23, 2013]; A.M. v. New York City Dep't of Educ., 964 F. Supp. 2d 270, 284 [S.D.N.Y. 2013] [noting that the parent cited "no authority for the proposition that drawing goals from a teacher's progress report [was] a violation of the statute or regulations"]). Notably, the district school psychologist testified that although the May 2013 CSE derived the annual goals from the McCarton School reports and through discussions about the student's progress related to those annual goals at the CSE meeting, the annual goals in the May 2013 IEP targeted skills the student needed to "master in order to move through the curriculum" and did not require the use of any particular methodology (see Tr. pp. 110-11, 113, 121-22, 138-43, 158-69, 213-16, 275; Dist. Exs. 16-18).[10] Finally, with regard to the IHO's finding that the annual goals could only be implemented in a "1:1 setting," approximately 19 of the 25 annual goals—as written in the May 2013 IEP—were designed to be implemented through either OT or speech-language therapy (Dist. Ex. 1 at pp. 4-12). Here, in light of the May 2013 CSE's recommendations for five 30-minute sessions per week of 1:1 OT services and five 30-minute session per week of 1:1 speech-language therapy services, the student would be working on a majority of the annual goals and short-term objectives within a 1:1 setting; however, the IHO did not appear to weigh this as a factor in reaching the determination (compare Dist. Ex. 1 at pp. 4-12, with IHO Decision at p. 18).

Overall, the evidence in the hearing record supports a finding that the annual goals and short-term objectives in the May 2013 IEP targeted and appropriately addressed the student's identified areas of need (see, e.g., D.A.B. v. New York City Dep't of Educ., 973 F. Supp. 2d 344, 359-60 [S.D.N.Y. 2013]).

2. Consideration of Special Factors—Interfering Behaviors

Next, while the parties do not dispute that the student engaged in behaviors that impeded his learning or that of others, the district contends that it conducted an appropriate FBA and developed a proper BIP to address the student's behaviors. Upon review, the evidence in the

[10] According to the district school psychologist, the May 2013 CSE meeting lasted approximately two hours (see Tr. p. 143).

hearing record does not support the district's contentions; therefore, IHO's findings will not be disturbed.

Under the IDEA, a CSE may be required to consider special factors in the development of a student's IEP. Among the special factors in the case of a student whose behavior impedes his or her learning or that of others, the CSE shall consider positive behavioral interventions and supports, and other strategies, to address that behavior (20 U.S.C. § 1414[d][3][B][i]; 34 CFR 300.324[a][2][i]; see 8 NYCRR 200.4[d][3][i]; see also E.H. v. Bd. of Educ., 2009 WL 3326627, at *3 [2d Cir. Oct. 16, 2009]; A.C., 553 F.3d at 172; J.A. v. East Ramapo Cent. Sch. Dist., 603 F. Supp. 2d 684, 689 [S.D.N.Y. 2009]; M.M. v. New York City Dep't of Educ., 583 F. Supp. 2d 498, 510 [S.D.N.Y. 2008]; Tarlowe, 2008 WL 2736027, at *8; W.S. v. Rye City Sch. Dist., 454 F. Supp. 2d 134, 149-50 [S.D.N.Y. 2006]). To the extent necessary to offer a student an appropriate educational program, an IEP must identify the supplementary aids and services to be provided to the student (20 U.S.C. § 1414[d][1][A][i][IV]; 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v][a], [b][3]; Piazza v. Florida Union Free Sch. Dist., 777 F. Supp. 2d 669, 673 [S.D.N.Y. 2011]; Gavrity v. New Lebanon Cent. Sch. Dist., 2009 WL 3164435, at *30 [N.D.N.Y. Sept. 29, 2009] [discussing the student's IEP which appropriately identified program modifications, accommodations, and supplementary aids and services]; P.K., 569 F. Supp. 2d at 380).

State procedures for considering the special factor of a student's behavior that impedes his or her learning or that of others may also require that the CSE consider having an FBA conducted and a BIP developed for a student (8 NYCRR 200.4[d][3][i], 200.22[a], [b]). State regulation defines an FBA as the process of determining why a student engages in behaviors that impede learning and how the student's behavior relates to the environment" and

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

(8 NYCRR 200.1[r]).

According to State regulations, an FBA shall be based on multiple sources of data and must be based on more than the student's history of presenting problem behaviors (8 NYCRR 200.22[a][2]). An FBA must also include a baseline setting forth the "frequency, duration, intensity and/or latency across activities, settings, people and times of the day," so that a BIP (if required) may be developed "that addresses antecedent behaviors, reinforcing consequences of the

behavior, recommendations for teaching alternative skills or behaviors and an assessment of student preferences for reinforcement" (8 NYCRR 200.22[a][3]).[11]

If the CSE determines that a BIP is necessary for a student the BIP shall identify: (i) the baseline measure of the problem behavior, including the frequency, duration, intensity and/or latency of the targeted behaviors . . . ; (ii) the intervention strategies to be used to alter antecedent events to prevent the occurrence of the behavior, teach individual alternative and adaptive behaviors to the student, and provide consequences for the targeted inappropriate behavior(s) and alternative acceptable behavior(s); and (iii) a schedule to measure the effectiveness of the interventions, including the frequency, duration and intensity of the targeted behaviors at scheduled intervals (8 NYCRR 200.22[b][4]).

At the impartial hearing, the district school psychologist testified that the May 2013 CSE relied upon the McCarton School BRP as a "starting point in creating" the FBA and the BIP (Tr. pp. 119-20, 125-26; see Dist. Ex. 2 at pp. 1-3; 10 at pp. 1-3). The McCarton staff attending the May 2013 CSE meeting and the parents also shared information about the student's behaviors based upon their observations, including the frequency of the behaviors, areas of concern, and how to address the behaviors (see Tr. pp. 152, 154). However, even a cursory comparison of the McCarton School BRP with the FBA and BIP developed at the May 2013 CSE meeting supports the IHO's finding that CSE failed to include—among other things—"provisions to prevent or address" the student's interfering behaviors despite relying upon the McCarton School BRP and "ample information" from McCarton staff (IHO Decision at p. 17; compare Dist. Ex. 2 at pp. 1-3, with Dist. Ex. 10 at pp. 1-3).

Generally, the McCarton School BRP indicated that the student would "increase his social behavior skills" as evidenced by a "reduction in self-stimulatory and aggressive behaviors" (Dist. Ex. 10 at p. 1). As short-term objectives, the McCarton School BRP listed the following: "[r]eduction in dropping to the floor ([d]efined as attempts to bend his knees to sit on the floor in an effort to escape or delay demands)," "[r]eduction in grabbing/pulling hair ([d]efined as reaching out and holding, with a tight fist, another person's shirt or hair)," and "[r]eduction in kicking others ([d]efined as making contact with his feet on another person's body)" (id.). Here, State regulations require an FBA to identify the problem behaviors and define the behaviors in concrete terms, and in this instance, the FBA—while identifying the problem behaviors consistent with the information in the McCarton School BRP—did not include language defining the behaviors as noted in the McCarton School BRP (see 8 NYCRR 200.1[r], 200.22[a][3] ; compare Dist. Ex. 10 at p. 1, with Dist. Ex. 2 at pp. 1-3). Notwithstanding this inconsistency, overall the information reflected in the FBA was consistent with State regulations and provided a baseline of the student's behaviors with regard to the "frequency, duration, intensity and/or latency across activities, settings, people and times of the day" in sufficient detail to "form the basis for a [BIP] for the student that addresse[d] antecedent behaviors, reinforcing consequences of the behavior, recommendations for teaching alternatives skills or behaviors and an assessment of student preferences for reinforcement" (8 NYCRR 200.22[a][3]; see Dist. Ex. 2 at pp. 1-2). However, although the FBA generally complied

[11] Although State regulations call for the procedure of using an FBA when developing a BIP, the Second Circuit has explained that, when required, "[t]he failure to conduct an adequate FBA is a serious procedural violation because it may prevent the CSE from obtaining necessary information about the student's behaviors, leading to their being addressed in the IEP inadequately or not at all" (R.E., 694 F3d at 190). The Court also noted that "[t]he failure to conduct an FBA will not always rise to the level of a denial of a FAPE," but that in such instances particular care must be taken to determine whether the IEP addresses the student's problem behaviors (id.).

with State regulations, the BIP, as explained more fully below and as the IHO specifically found, did not.

Initially, a review of the BIP indicates that the May 2013 CSE identified those responsible for implementing the BIP as the special education teacher, the related services' providers, and the "1:1 [p]araprofessional" (Dist. Ex. 2 at p. 3). In addition, the student's progress toward "achieving the targeted behavior" was scheduled to be assessed "10 weeks after [the student] first attend date in a public school" (id.). With regard to the target behaviors, the district school psychologist testified that the May 2013 CSE selected the "targeted behaviors" ultimately identified on the BIP because those behaviors—dropping to the floor, grabbing or pulling hair, and kicking or biting others—were the "most interfering with his ability to learn" (Tr. p. 153; see Dist. Ex. 2 at p. 3). However, for each target behavior identified on the BIP, the May 2013 CSE simply repeated the same "expected behavior changes" ("decrease target behavior and move toward extinction") and "methods/criteria for outcome measurement" ("[t]eacher, provider and paraprofessional observations and checklists of target behavior on a graph to determine frequency and duration and a gradual decreasing the behavior until extinction") (Dist. Ex. 2 at p. 3). Significantly, the BIP failed to include or identify—as required by State regulations—the baseline measure of the problem behavior, including the frequency, duration, intensity and/or latency of the targeted behaviors; (ii) the intervention strategies to be used to alter antecedent events to prevent the occurrence of the behavior, teach individual alternative and adaptive behaviors to the student, and provide consequences for the targeted inappropriate behavior(s) and alternative acceptable behavior(s); and (iii) a schedule to measure the effectiveness of the interventions, including the frequency, duration and intensity of the targeted behaviors at scheduled intervals (8 NYCRR 200.22[b][4]). And while the May 2013 CSE relied upon the McCarton School BRP in creating the FBA and BIP, the CSE did not incorporate the detailed intervention strategies for each target behavior from the McCarton School BRP into either the FBA or the BIP (see Tr. pp. 119-20, 125-26; compare Dist. Ex. 2 at pp. 1-3, with Dist. Ex. 10 at pp. 2-3).[12] For example, with regard to dropping to the floor the McCarton School BRP identified the following intervention to be used "immediately" with the student:

> Attempt to block non-contextual knee bending, which is a precursor to dropping to the floor. If [the student] drops to the floor, provide him with a partial physical prompt to stand up. If he doesn't stand up pick him up and transition him to the net activity. Avert eye contact and refrain from any verbal interaction, comment, or redirection. Continue with task demands and reinforce when there is complete absence of the maladaptive behavior.

(Dist. Ex. 10 at p. 2).

The McCarton School BRP included similarly detailed intervention strategies for the two remaining target behaviors—grabbing or pulling hair and kicking (id. at pp. 2-3). In addition, the McCarton School BRP included several preventative strategies to be used throughout the school day with the student, which the May 2013 CSE also did not incorporate into either the FBA or BIP

[12] In addition, the May 2013 CSE did not include the information regarding the McCarton School BRP intervention strategies in the May 2013 IEP (compare Dist. Ex. 10 at pp. 2-3, with Dist. Ex. 1 at pp. 1-18).

(compare Dist. Ex. 10 at pp. 1-2, with Dist. Ex. 2 at pp. 1-3).[13] Therefore, even assuming—as the district school psychologist testified and as the district now argues—that the FBA and BIP should be read together, neither the FBA nor the BIP include sufficient information to adequately and appropriately address the student's behaviors (see Tr. pp. 203, 206-07, 281; Dist. Ex. 2 at pp. 1-3; see also Tr. p. 392). Consequently, the May 2013 CSE's failure to produce a BIP sufficient to address the student's behaviors—or to otherwise address the student's behaviors in the May 2013 IEP—constitutes a procedural violation, which as noted, may only result in a finding that the district failed to offer the student a FAPE if such violation impeded the student's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]). However, rather than considering the deficient BIP in isolation, when considered together with the failure to sufficiently address the student's need for 1:1 instruction and his related services' needs as described more fully below, such violations cumulatively contributed to the conclusion that the district failed to offer the student a FAPE for the 2013-14 school year.

3. Consideration of Special Factors—Assistive Technology

Next, the district contends that, contrary to the IHO's findings, the May 2013 IEP sufficiently addressed the student's assistive technology needs. The parents argue that the IHO properly concluded that the May 2013 IEP failed to include any recommendations for assistive technology and failed to include any annual goals regarding the "existing assistive technology." A review of the evidence in the hearing record supports the district's contentions, and the IHO's findings must be reversed.

One of the special factors that a CSE must consider in developing a student's IEP is whether the student "requires assistive technology devices and services, including whether the use of school-purchased assistive technology devices is required to be used in the student's home or in other settings in order for the student to receive a [FAPE]" (8 NYCRR 200.4[d][3][v]; see 20 U.S.C. § 1414[d][3][B][v]; 34 CFR 300.324[a][2][v]). Accordingly, the failure to recommend specific assistive technology devices and services rises to the level of a denial of a FAPE only if such devices and services are necessary for the student to access his educational program (see, e.g., Application of the Bd. of Educ., Appeal No. 13-214; Application of a Student with a Disability, Appeal No. 11-121).

Initially, it must be noted that of the approximately 116 separately enumerated allegations in the due process complaint notice, the parents only asserted two such allegations with respect to assistive technology: first, the parents alleged that the May 2013 CSE did not meaningfully consider the student's need for assistive technology, and second, the CSE failed to "properly support" the student's "existing 'assistive technology'" (Parent Ex. B at p. 7). In the decision, the IHO did not directly address either allegation; rather, the IHO found that the failure to "specify the assistive technology device and provide any information or goals regarding implementation" constituted a "serious procedural violation" (IHO Decision at pp. 17-18). In addition, the IHO

[13] In addition, the May 2013 CSE did not include the information regarding the McCarton School BRP preventative strategies in the May 2013 IEP (compare Dist. Ex. 10 at pp. 1-2, with Dist. Ex. 1 at pp. 1-18).

noted that "[i]t would be impossible for any provider to determine from the IEP what, how and why an assistive technology device should be used" (id. at p. 18).

Here, it is undisputed that the May 2013 CSE denoted in the IEP that the student needed a "particular device or service to address his communication needs" as well as an "assistive technology device and/or service" (Dist. Ex. 1 at p. 4). It is also undisputed that the May 2013 IEP did not identify a particular assistive technology device within the "assistive technology devices and/or services" section of the May 2013 IEP (id. at pp. 12-13). However, while the IHO may have correctly noted that the failure to specify the assistive technology device in the IEP constituted a "serious procedural violation," the parents neither allege nor point to sufficient evidence in the hearing to support a conclusion that this procedural violation impeded the student's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]). Additionally, as explained more fully below, the evidence in the hearing record does not support the IHO's findings that the May 2013 IEP failed to provide "any information or goals regarding implementation" of assistive technology, or that "[i]t would be impossible for any provider to determine from the IEP what, how and why an assistive technology device should be used" (id. at p. 18).

In developing the May 2013 IEP, the CSE relied, in part, upon a February 2013 classroom observation report (see Tr. pp. 115-18; Dist. Ex. 6 at pp. 1-2). The classroom observation lasted approximately 30 minutes, and during that time, the observer documented the student's use of an iPad (see Dist. Ex. 6 at pp. 1-2). For example, the observation report noted that after looking through illustrated pages in a book, the student used the iPad screen to "point to 'I want' and a picture of an [iPod]" and he then "verbalize[d]" iPod in a "very low voice" (id. at p. 1). In another example during lunch, the student's "teacher photograph[ed] the food items to add them to the [iPad] options," and the student then immediately used the iPad options for "'I want'" and 'drink'" (id. at p. 2). The student continued to use the iPad to identify items on the screen for eating, and when identifying the item for "drink," the student also used a "slight verbalization of 'cup'" (id.).

In addition to the February 2013 classroom observation, the May 2013 CSE also relied upon a July 2012 ABA progress report (see Tr. pp. 116-17, 122; Dist. Ex. 19 at pp. 1-5). According to the progress report, the student demonstrated "remarkable" "growth and aptitude" during the year related to his use of "all of his electronic devices" (Dist. Ex. 19 at p. 1). The progress note indicated that the student could "navigate [iPods], [iPads], and his computer to find a preferred song or music video or to look at family photos" (id.). In addition, the progress report noted that the student enjoyed "all of these devices and the independence it [gave] him" (id.). As a result, the ABA provider indicated that they "continued to rely on technology as it still present[ed] as the most powerful reinforcer" for the student (id.).

At the impartial hearing, the district school psychologist testified that although the May 2013 CSE discussed the student's use of an iPad throughout the two hour meeting, the CSE did not include information in the May 2013 IEP regarding how the parents or how a teacher "might program an iPad" because the parents, themselves, provided the student with the iPad and "he was utilizing it already" and "it was working for him" (Tr. p. 277; see Tr. pp. 187-88). In addition, the district school psychologist explained that she "didn't see the need to extend this" information, as most people were "pretty familiar with iPads now" (id. at 277). The district school psychologist further testified that although she considered an iPad as a form of assistive technology, the May

2013 CSE did not think the student required "any form of other assistive technology" (Tr. pp. 171-72, 174; 188-89). The district school psychologist also acknowledged that if "warranted," the district could provide "programming of the device" or a "consultative" service when denoted in the IEP (Tr. pp. 188-90). Finally, when asked why the May 2013 CSE did not recommend assistive technology within the "recommended special education programs and services" section of the May 2013 IEP—and more specifically, within the "assistive technology devise and/or services" section—the district school psychologist testified that the iPad was "certainly throughout" the IEP and there was no particular reason why the CSE did not put down "iPad" within this section of the IEP (Tr. pp. 246-47; see Dist. Ex. 1 at pp. 12-13).

A review of the May 2013 IEP reveals that in the present levels of performance and individual needs section of the May 2013 IEP, the May 2013 CSE described the student as "nonverbal" and as using "multiple augmentative communication systems" (Dist. Ex. 1 at p. 1). More specifically, the May 2013 CSE indicated that the student communicated through the use of an iPad with a "voice output app[lication]" (id.). At that time, the student was working on "requesting assistance using an electronic output button" and although the student used a picture exchange communication system (PECs) in the past, the iPad had been "most successful" (id.).[14] The student was also working on his ability to request "food, toys, [and the] bathroom" using the voice output program on the iPad (id. at p. 2). However, the student had not "reached independence" in these skills (id.). The May 2013 CSE also indicated in the IEP that the student was motivated by "certain iPad games" (id.).[15] In addition, the May 2013 IEP indicated that the student was "working on sound imitations/approximations within the classroom" (id.).

The May 2013 CSE also created an annual goal with approximately six corresponding short-term objectives using the iPad to improve the student's expressive language skills (id. at p. 8; see Tr. pp. 162-63). In particular, the district school psychologist testified that the annual goal targeted the student's ability to use the "voice output path on an iPad" to "communicate" and to improve his ability to "express his wants and needs to others" (Tr. p. 163). The May 2013 CSE also incorporated the use of an iPad in two additional short-term objectives related to improving the student's receptive identification skills and ADL skills (see Dist. Ex. 1 at pp. 6-7, 10-11).

In sum, based upon the information presented to the May 2013 CSE regarding the student's assistive technology needs and his ability to use an iPad, the May 2013 IEP adequately and appropriately address the student's assistive technology needs such that the failure to identify a specific device within a particular section of the IEP did not contribute to the conclusion that the district failed to offer the student a FAPE for the 2013-14 school year.

4. 6:1+1 Special Class Placement with a 1:1 Paraprofessional

The district argues that the May 2013 IEP offered the student sufficient 1:1 support to meet his needs. The parents contend that the May 2013 CSE impermissibly predetermined the 6:1+1 special class placement recommendation, and the CSE did not consider all reports and discussions

[14] The district school psychologist described PECs as a "means of communication for individuals who [were] not verbal" and a more "[l]ow tech" form of assistive technology (Tr. pp. 149, 218-19).

[15] The district school psychologist testified that the student was "most successful" with the iPad because he was "motivated by electronics" and the student "found [the iPad] more engaging" (Tr. pp. 149-50). She also characterized the iPad as a more "high tech" form of assistive technology (Tr. p. 219).

about the student's need for "1:1 instruction, not merely 1:1 support." In addition, the parents assert that the May 2013 IEP was not reasonably calculated because May 2013 CSE failed to recognize and make provision for the student's need for 1:1 instruction and "merely provided 1:1 support." A review of the evidence in the hearing record does not support the district's contentions; therefore, I concur with the IHO's finding that the 6:1+1 special class placement, together with the services of a full-time, 1:1 crisis management paraprofessional, was not sufficient to meet the student's needs.

In order to address the student's needs, the May 2013 CSE recommended a 6:1+1 special class placement at a specialized school, together with related services; adapted physical education; annual goals with corresponding short-term objectives; strategies to address the student's management needs; an FBA and a BIP; and the services of a full-time, 1:1 crisis management paraprofessional (see Dist. Ex. 1 at pp. 3-15). State regulations provide that a 6:1+1 special class placement is designed for students "whose management needs are determined to be highly intensive, and requiring a high degree of individualized attention and intervention, . . . , with one or more supplementary school personnel assigned to each class during periods of instruction" (8 NYCRR 200.6[h][4][ii]). According to the May 2013 IEP, the CSE recommended "[i]ndividual and small group instruction" as one strategy to address the student's management needs (Dist. Ex. 1 at p. 3). The May 2013 CSE also noted in the IEP that in addition to a BIP, the student required "1:1 support . . . throughout the school day" (id. at p. 4).

In reaching the decision to recommend a 6:1+1 special class placement with the services of a full-time, 1:1 crisis management paraprofessional, the May 2013 CSE considered but rejected a special class placement at a community school because it would not provide the student with a 12-month school year program (see Dist. Ex. 1 at pp. 16-17). With respect to an 8:1+1 special class placement and a 12:1+1 special class placement at a specialized school, the May 2013 CSE considered but rejected these options as "too large and insufficiently supportive to meet [the student's] specific constellation of needs" (id.). According to the IEP, the May 2013 CSE recommended a 6:1+1 special class placement at a specialized school because the "6:1:1 program, individual support, in the form of a 1:1 paraprofessional [was] warranted due to [the] high level of distractibility and attention seeking behaviors which impede[d] learning" (id. at p. 17). However, the May 2013 CSE also documented the parents' concerns in the IEP, which specifically identified the "level of education and tools the paraprofessional may have to address [the student's] needs" (id. at p. 16). Further noting that the student required "constant redirection and attention" and that his "challenges may vary depending upon his health," the parents indicated that the paraprofessional should have "specific training and tools to address his needs" (id.). Finally, the parents expressed concerns about the "social aspect" of a 6:1+1 special class placement, as well as the "functional grouping" of the students in the 6:1+1 special class placement (id.).

At the impartial hearing, the district school psychologist described the 6:1+1 special class placement as a "very small, supportive program" and as an "intensive program," noting that the student demonstrated "very significant needs" that required "individual support through the school day"—and therefore, the May 2013 CSE recommended the services of a full-time, 1:1 paraprofessional to "address those concerns" (Tr. pp. 127-28). She further testified that the teacher in the 6:1+1 special class placement determined "how the paraprofessionals exactly w[ould] be utilized in terms of what role and capacity;" however, it remained the teacher's obligation to implement the student's IEP (Tr. p. 129). With regard to the "classroom paraprofessional," the district school psychologist testified that May 2013 CSE envisioned this paraprofessional's role as

supporting the student's "intensive management needs" and that the full-time, 1:1 crisis management paraprofessional—although ultimately up to the classroom teacher's discretion—would provide the student with individual support throughout the day to address his attention and focus needs (Tr. pp. 129-31). The district school psychologist testified that the 6:1+1 special class placement, together with the 1:1 crisis management paraprofessional and related services' recommendations, met the student's need for "intensive support throughout the school day" (Tr. p. 132). In response to the parents' concerns expressed regarding the paraprofessional's education and training, the district school psychologist explained that the "special education teacher" ran the classroom and "to some degree dictate[d] what the paraprofessional d[id]" (Tr. p. 133-34).[16]

When asked whether the student—due to the "severity" of his needs—required a "great deal of one-to-one instruction," the district school psychologist testified that the student "certainly" required "[o]ne-to-one support" (Tr. pp. 264-65). However, she clarified that "[o]ne-to-one instruction" was "another discussion" and depended upon "how" the term "instruction" was defined (Tr. p. 265). The district school psychologist questioned whether the student required a teacher or a paraprofessional to learn a "functional activity," such as pulling his pants up after using the restroom, and whether the individual who assisted the student with such a task provided the student with "instruction or support" (Tr. pp. 265-66). She further testified that at the time of the May 2013 CSE meeting, the student was "more learning to wash his hands" or to "identify what a fork [was]"—namely, ADL skills and functional life skills (Tr. p. 266).

Based upon the foregoing, it is unclear whether the May 2013 CSE discussed or adequately addressed the student's need for 1:1 instruction versus 1:1 support throughout the day. Similarly, the IEP generally provides for both 1:1 instruction and 1:1 support without further clarifying the student's differing needs in these two discrete categories of 1:1 assistance or how the 1:1 assistance would be provided in the recommended placement. As such, the evidence in the record supports the IHO's finding that the recommended 6:1+1 special class placement would not provide the

[16] According to the district's own website and consistent with State requirements, "teaching assistants"—who may provide "direct instructional services to students under the general supervision of a certified teacher"—hold the same qualifications as a "paraprofessional" and those titles are used interchangeably (see "Teaching Assistant (Paraprofessional) Certification" available at http://schools.nyc.gov/Offices/DHR/TeacherPrincipalSchoolProfessionals/Certification/Teaching+Assistant+Paraprofessional+Certification.htm; "Teaching Assistant Certificates: OTI: NYSED," available at http://www.highered.nysed.gov/tcert/certificate/ta.html; see also Parent Ex. U). In contrast, State guidance issued in January 2012 describes the considerations for determining if a student requires a one-to-one aide, as well as the roles and responsibilities of a one-to-one aide (see "Guidelines for Determining a Student with a Disability's Need for a One-to-One Aide," at pp. 1-5, Office of Special Educ. Mem. [Jan. 2012], available at http://www.p12.nysed.gov/specialed/publications/1-1aide-jan2012.pdf). In pertinent part, the memorandum indicates that the "assignment of a one-to-one aide may be unnecessarily and inappropriately restrictive," noting that a goal for all students with disabilities was to "promote and maximize independence" (id. at p. 1). "One-to-one aides may not be used as a substitute for certified, qualified teachers for an individual student or as a substitute for an appropriately developed and implemented behavioral intervention plan or as the primary staff member responsible for implementation of a behavioral intervention plan" (id.). In addition, while a "teaching assistant may assist in related instructional work, primary instruction must be provided to the student by a certified teacher(s)" (id.). A "teacher aide may assist in the implementation of a behavioral intervention plan, but may not provide instructional services to a student" (id.; see also "Teaching Assistants and Teacher Aides Compared," Office of Teaching Initiatives [Aug. 31, 2009], available at http://www.highered.nysed.gov/tcert/career/tavsta.html).

student with the "required level of 1:1 instruction," and contributed to the conclusion that the district failed to offer the student a FAPE for the 2013-14 school year.

5. Related Services

The district contends that the May 2013 IEP included appropriate recommendations for related services. The parents argue that the May 2013 CSE impermissibly predetermined the duration of the related services. In addition, the parents assert that the May 2013 IEP was inadequate because the CSE failed to recommend individualized parent counseling and training. A review of the evidence in the hearing record supports the district's contentions.

In developing the May 2013 IEP, the CSE relied upon several McCarton School related services' progress reports and McCarton School educational progress reports (see Tr. pp. 115-17; see generally Dist. Exs. 8-9; 11-12; 14-15). According to all of the McCarton School progress reports, the student received daily, 45-minute sessions of both 1:1 speech-language therapy and 1:1 OT services during the 2012-13 school year (see Dist. Exs. 8 at p. 1; 9 at p. 1; 11 at p. 1; 12 at p. 1; 14 at p. 1; 15 at p. 1). In addition, the student received two 45-minute sessions per week of 1:1 home-based speech-language therapy (see Dist. Ex. 13 at p. 1). However, the May 2013 CSE recommended that the student receive five 30-minute sessions per week of 1:1 OT services and five 30-minute sessions per week of 1:1 speech-language therapy (see Dist. Ex. 1 at pp. 12-13).

At the impartial hearing, the district school psychologist testified that despite knowing that the student received five 45-minute sessions per week of speech-language therapy at the McCarton School, the May 2013 CSE recommended 30-minute sessions of speech-language therapy based upon the "elementary school" periods, which were "30-minute block[s]" (Tr. pp. 238-39). The district school psychologist explained that "elementary schools divide their day" into 30-minute blocks, so the decision to recommend 30-minute related services' sessions reflected the "structure of the school day" (id.). When asked about the May 2013 CSE's basis for reducing the student's speech-language therapy services from the "roughly four hours per week" he received at the McCarton School to the "two and a half hours per week" ultimately recommended in the IEP, the district school psychologist further testified that the May 2013 CSE was not "necessarily trying to create McCarton in the public school," but rather, the May 2013 CSE looked at the student as an "individual" and created a "program that from [her] perspective c[ould] meet his needs, not to mimic what was happening at McCarton" (Tr. pp. 240-41). The district school psychologist did not recall any disagreement with the recommendation for 30-minute sessions, but she also could not recall whether the May 2013 CSE's discussions went beyond indicating that the "elementary school" had 30-minute blocks (see Tr. pp. 241-44). Generally, the district school psychologist testified to a similar process in reaching the May 2013 CSE's decision to recommend 30-minute sessions for OT services (see Tr. pp. 244-46). Overall, the district school psychologist indicated that the student—regardless of the duration of the related services—required daily speech-language therapy and daily OT services (see Tr. pp. 285-86). She further testified that an additional 15 minutes per day of speech-language therapy or OT services would not "make a major difference in his ability to make progress in that area" and that both related services' recommendations were designed to "support academics" and "make sense" within the program (id.).

The test regarding a FAPE for a student is that the educational services are appropriate, not that they are perfect. In this case, it is undisputed that the May 2013 CSE relied upon several McCarton School related services' progress reports and McCarton School educational progress reports to develop the related services portion of the student's May 2013 IEP (see Tr. pp. 115-17;

see generally Dist. Exs. 8-9; 11-12; 14-15), and that the McCarton School progress reports noted that the student received daily, 45-minute sessions of both 1:1 speech-language therapy and 1:1 OT services during the 2012-13 school year (see Dist. Exs. 8 at p. 1; 9 at p. 1; 11 at p. 1; 12 at p. 1; 14 at p. 1; 15 at p. 1). In addition, the student received two 45-minute sessions per week of 1:1 home-based speech-language therapy (see Dist. Ex. 13 at p. 1). However, while the parents may have preferred that the student continue to receive 45 minutes of these related services, as opposed to the 30-minute sessions contemplated by the May 2013 IEP, there is no evidence in the record that the student could not receive educational benefits from the 30-minute sessions (see Rowley, 458 U.S. at 206-07). Accordingly, after reviewing the evidence, I find the May 2013 CSE overall prescribed related services to meet the student's areas of need and, further, that there is no basis in the hearing record to conclude that the student could not receive a FAPE with 30-minute related service sessions. Consequently, the hearing record does not support the IHO's finding that the related services' recommendations in the May 2013 IEP did not adequately or appropriately address the student's needs and this finding must be reversed.

With respect to the district's alleged failure to offer individualized parent counseling and training, State regulations require that an IEP indicate the extent to which parent training will be provided to parents, when appropriate (8 NYCRR 200.4[d][2][v][b][5]). State regulations further provide for the provision of parent counseling and training for the purpose of enabling parents of students with autism to perform appropriate follow-up intervention activities at home (8 NYCRR 200.13[d]). Parent counseling and training is defined as: "assisting parents in understanding the special needs of their child; providing parents with information about child development; and helping parents to acquire the necessary skills that will allow them to support the implementation of their child's individualized education program" (8 NYCRR 200.1[kk]; see 34 CFR 300.34[c][8]). However, courts have held that a failure to include parent counseling and training on an IEP does not constitute a denial of a FAPE where a district provided "comprehensive parent training component" that satisfied the requirements of the State regulation (see R.E., 694 F.3d at 191; M.M., 583 F. Supp. 2d at 509). The Second Circuit has explained that "because school districts are required by [8 NYCRR] 200.13(d) to provide parent counseling, they remain accountable for their failure to do so no matter the contents of the IEP. Parents can file a complaint at any time if they feel they are not receiving this service" (R.E., 694 F.3d at 191; see M.W. v. New York City Dep't of Educ., 725 F.3d 131, 141-42 [2d Cir. 2013]). The Second Circuit further explained that "[t]hough the failure to include parent counseling in the IEP may, in some cases (particularly when aggregated with other violations), result in a denial of a FAPE, in the ordinary case that failure, standing alone, is not sufficient to warrant reimbursement" (R.E., 694 F.3d at 191).

Here, it is undisputed that the May 2013 CSE recommended one 60-minute session per month of parent counseling and training in a group in the May 2013 IEP (see Dist. Ex. 1 at pp. 12-13). To the extent that the parents argue that the district's failure to recommend "individualized" parent counseling and training constitutes a failure to offer the student a FAPE, State regulations do not require the provision of "individualized" parent counseling and training to parents (see 8 NYCRR 200.13[d]). However, if the parents continue to have concerns about the parent counseling and training recommended by the CSE, the parents and the CSE are strongly

encouraged to discuss this issue at the student's next annual review or CSE meeting.[17] Based upon the evidence in the hearing record, the May 2013 CSE's failure to recommend individualized parent counseling and training did not contribute to the conclusion that the district failed to offer the student a FAPE for the 2013-14 school year.

6. Methodology

The district contends that the absence of a specific methodology in the May 2013 IEP did not invalidate the IEP. The parents assert that the May 2013 CSE failed to meaningfully consider methodology. A review of the evidence in the hearing record supports the district's contentions.

Generally, a CSE is not required to specify methodology on an IEP, and the precise teaching methodology to be used by a student's teacher is usually a matter to be left to the teacher (Rowley, 458 U.S. at 204; R.B. v. New York City Dep't of Educ., 2014 WL 5463084, at *4 [2d Cir. Oct. 29, 2014]; A.S. v. New York City Dep't of Educ., 573 Fed. App'x 63, 66, 2014 WL 3715461 [2d Cir. July 29, 2014]; K.L. v. New York City Dep't of Educ., 530 Fed. App'x 81, 86, 2013 WL 3814669 [2d Cir. 2013]; M.H., 685 F.3d at 257 [finding that the district was imbued with "broad discretion to adopt programs that, in its educational judgment, are most pedagogically effective"]; M.M. v. Sch. Bd. of Miami-Dade County, 437 F.3d 1085, 1102 [11th Cir. 2006]; Lachman v. Illinois State Bd. of Educ., 852 F.2d 290, 297 [7th Cir. 1988]; F.L. v. New York City Dep't of Educ., 2012 WL 4891748, at *9 [S.D.N.Y. Oct. 16, 2012], aff'd, 553 Fed. App'x 2, 2014 WL 53264 [2d Cir. 2014]; Ganje v. Depew Union Free Sch. Dist., 2012 WL 5473491, at *11-*12 [W.D.N.Y. Sept. 26, 2012], adopted at, 2012 WL 5473485 [W.D.N.Y. Nov. 9, 2012]; H.C. v. Katonah-Lewisboro Union Free Sch. Dist., 2012 WL 2708394, at *15, *17 [S.D.N.Y. May 24, 2012], aff'd, 528 Fed. App'x 64 [2d Cir. June 24, 2013]). As long as any methodologies referenced in a student's IEP are "appropriate to the [student's] needs" (34 CFR 300.39[a][3]), the omission of a particular methodology is not necessarily a procedural violation (see R.B., 2014 WL 5463084, at *4; R.E., 694 F.3d at 192-94 [upholding an IEP when there was no evidence that the student "could not make progress with another methodology"]). However, where the use of a specific methodology is required for a student to receive an educational benefit, the student's IEP should indicate this (see, e.g., R.E., 694 F.3d at 194 [finding an IEP substantively inadequate where there was "clear consensus" that a student required a particular methodology, but where the "plan proposed in [the student's] IEP" offered "no guarantee" of the use of this methodology]; see also R.B., 2014 WL 5463084, at *4; A.S., 573 Fed. App'x at 66 [finding that it could not "be said that [the student] could only progress in an ABA program"]).

At the impartial hearing, the district school psychologist testified that "it was very clear" to the May 2013 CSE that the McCarton School used an "ABA methodology" with the student (Tr. pp. 138-40). However, the district school psychologist also testified that the May 2013 CSE did not specify a particular educational methodology on the May 2013 IEP because "IEPs focus on skills, the specific skills that an individual needs to master in order to move through the curriculum" and whoever worked with the student could "then decide the best way . . . for an individual to master those skills" (Tr. p. 141). In addition, the district school psychologist testified that the CSE left the selection of a methodology to the teacher's discretion because there must be

[17] The district school psychologist testified that the parent counseling and training provided to the parents would "depend upon the needs of the parents," therefore, the recommendation in the May 2013 IEP did not include "anything specific" (Tr. p. 195; see Tr. pp. 197-98).

"some flexibility in terms of implementing the IEP" and "different people have different preferences" (Tr. pp. 141-42). Although she could not recall a discussion about methodology at the May 2013 CSE meeting, the district school psychologist testified that she also did not recall anyone bringing up the subject of a specific methodology at the meeting (see Tr. p. 142).[18] She also testified that although the "one-on-one ABA teaching intervention and behavioral support" at McCarton appeared to be an "effective teaching tool" for the student, the May 2013 CSE did not "evaluate" the student for any particular methodology because the CSE focused on the "skills, the goals, [and] what [the student] need[ed] to accomplish rather than the methodology . . . to which it should be accomplished" (Tr. pp. 214-15). Moreover, the district school psychologist testified that in order to know whether "only one" educational methodology was effective for a student required implementing different approaches "for a year" and "then track progress" (Tr. pp. 282-83). However, in this case, she did not have "any reasons to believe that using something" other than an ABA approach would not work for the student (Tr. p. 283).

Based upon the foregoing, the evidence in the hearing record does not support a finding that the May 2013 CSE's failure to recommend a specific methodology in the May 2013 IEP contributed to the conclusion that the district failed to offer the student a FAPE for the 2013-14 school year.

C. Challenges to the Assigned Public School Site

Finally, the district contends that the IHO erred in finding that the assigned public school site would not provide the student with sufficient 1:1 instruction and that the site location was not available during summer 2013. The parents continue to argue that the assigned public school site was not appropriate because the student's proposed classroom was located on the fifth floor with no elevator and the site location was not available during summer 2013.[19] For reasons explained more fully below, the IHO's findings must be reversed.

Challenges to an assigned public school site are generally relevant to whether the district properly implemented a student's IEP, which is speculative when the student never attended the recommended placement. Generally, the sufficiency of the district's offered program must be determined on the basis of the IEP itself (R.E., 694 F.3d at 186-88). The Second Circuit has explained that the parents' "[s]peculation that the school district will not adequately adhere to the IEP is not an appropriate basis for unilateral placement" (R.E., 694 F.3d at 195; see F.L. v. New York City Dep't of Educ., 553 Fed. App'x 2, 9 [2d Cir. Jan. 8, 2014]; see also K.L. v. New York City Dep't of Educ., 530 Fed. App'x 81, 87 [2d Cir. July 24, 2013]; R.C. v. Byram Hills Sch. Dist., 906 F. Supp. 2d 256, 273 [S.D.N.Y. 2012] [explaining that "[g]iven the Second Circuit's recent pronouncement that a school district may not rely on evidence that a child would have had a specific teacher or specific aide to support an otherwise deficient IEP, it would be inconsistent to

[18] The parents testified at the impartial hearing that the May 2013 CSE did discuss the student's use of ABA methodology "as his core teaching approach" (Tr. pp. 805-06). In addition, the parents specifically asked whether the assigned public school site used an ABA approach during their visit, and at that time, the parents were told that the assigned public school site used "JARS" and "TEACCH" approaches (Tr. pp. 804-05).

[19] The district correctly argues that the parents did not raise the issue of the location of the student's "proposed classroom" on the fifth floor of the assigned public school site in the due process complaint notice (see Parent Ex. B at pp. 3-13). Similar to the issue of individualized parent counseling and training, the parents and the CSE are strongly encouraged to discuss whether the student requires a barrier-free school environment at the next CSE meeting and whether the same should be indicated in the student's IEP.

require evidence of the actual classroom a student would be placed in where the parent rejected an IEP before the student's classroom arrangements were even made"]).

The Second Circuit has also clarified that, under factual circumstances similar to those in this case, in which the parents have rejected and unilaterally placed the student prior to IEP implementation, "[p]arents are entitled to rely on the IEP for a description of the services that will be provided to their child" (P.K. v. New York City Dep't of Educ., 526 Fed. App'x 135, 141, 2013 WL 2158587 [2d Cir. May 21, 2013]) and, even more clearly, that "'[t]he appropriate inquiry is into the nature of the program actually offered in the written plan,' not a retrospective assessment of how that plan would have been executed" (K.L., 530 Fed. App'x at 87, quoting R.E., 694 F.3d at 187; see C.F. v. New York City Dep't of Educ., 746 F.3d 68, 79 [2d Cir. 2014]). Thus, the analysis of the adequacy of an IEP in accordance with R.E. is prospective in nature, but the analysis of the IEP's implementation is retrospective. Therefore, if it becomes clear that the student will not be educated under the proposed IEP, there can be no denial of a FAPE due to the failure to implement the IEP (R.E., 694 F.3d at 186-88; see also Grim, 346 F.3d at 381-82 [holding that the district was not liable for a denial of a FAPE where the challenged IEP was determined to be appropriate, but the parents chose not to avail themselves of the public school program]).[20] When the Second Circuit spoke recently with regard to the topic of assessing the district's offer of an IEP versus later acquired school site information obtained and rejected by the parent as inappropriate, the Court disallowed a challenge to a recommended public school site, reasoning that "the appropriate forum for such a claim is 'a later proceeding' to show that the child was denied a free and appropriate public education 'because necessary services included in the IEP were not provided in practice'" (F.L., 553 Fed. App'x at 9, quoting R.E., 694 F.3d at 187 n.3).

In view of the foregoing, the parents cannot prevail on their claims regarding implementation of the May 2013 IEP because a retrospective analysis of how the district would have implemented the student's May 2013 IEP at the assigned public school site was not an appropriate inquiry under the circumstances of this case (K.L., 530 Fed. App'x at 87; R.E., 694 F.3d at 186; R.C., 906 F. Supp. 2d at 273). Here, it is undisputed that the parents rejected the assigned public school site that the student would have attended and instead chose to enroll the student in a nonpublic school of their choosing prior to the time the district became obligated to

[20] While the IDEA and State regulations provide parents with the opportunity to offer input in the development of a student's IEP, the assignment of a particular school is an administrative decision that must be made in conformance with the CSE's educational placement recommendation (T.Y., 584 F.3d 412 at 420; see K.L.A. v. Windham Se. Supervisory Union, 371 Fed. App'x 151, 154, 2010 WL 1193082 [2d Cir. Mar. 30, 2010]). A school district "may have two or more equally appropriate locations that meet the child's special education and related services needs and school administrators should have the flexibility to assign the child to a particular school or classroom, provided that determination is consistent with the decision of the group determining placement" (Placements, 71 Fed. Reg. 46588 [Aug. 14, 2006]). Once a parent consents to a district's provision of special education services, such services must be provided by the district in conformity with the student's IEP (20 U.S.C. § 1401[9][D]; 34 CFR 300.17[d]; see 20 U.S.C. § 1414[d]; 34 CFR 300.320). The Second Circuit recently reiterated that while parents are entitled to participate in the determination of the type of placement their child will attend, the IDEA confers no rights on parents with regard to school site selection (C.F., 746 F.3d at 79). However, the Second Circuit has also made clear that just because a district is not required to place implementation details such as the particular public school site or classroom location on a student's IEP, the district is not permitted to choose any school and provide services that deviate from the provisions set forth in the IEP (see R.E., 694 F.3d at 191-92; T.Y., 584 F.3d at 420 [the district does not have carte blanche to provide services to a child at a school that cannot satisfy the IEP's requirements]). The district has no option but to implement the written IEP and parents are well within their rights to compel a non-compliant district to adhere to the terms of the written plan.

implement the May 2013 IEP (see Dist. Exs. 10 at p. 2; 12 at p. 2; 73; 75; 78; 106). Therefore, the arguments asserted by the parents with respect to the assigned public school site are speculative. Furthermore, in a case in which a student has been unilaterally placed prior to the implementation of an IEP, it would be inequitable to allow the parents to acquire and rely on information that post-dates the relevant CSE meeting and IEP and then use such information against a district in an impartial hearing while at the same time confining a school district's case to describing a snapshot of the special education services set forth in an IEP (C.L.K. v. Arlington Sch. Dist., 2013 WL 6818376, at *13 [S.D.N.Y. Dec. 23, 2013] [stating that in addition to districts not being permitted to rehabilitate a defective IEP through retrospective testimony, "[t]he converse is also true; a substantively appropriate IEP may not be rendered inadequate through testimony and exhibits that were not before the CSE about subsequent events and evaluations that seek to alter the information available to the CSE"]). Based on the foregoing, the district was not obligated to present retrospective evidence at the impartial hearing regarding the execution of the student's program or to refute the parents' claims (K.L., 530 Fed. App'x at 87; R.E., 694 F.3d at 186; R.C., 906 F. Supp. 2d at 273). Accordingly, the parents cannot prevail on their claims that the assigned public school site would not have properly implemented the May 2013 IEP.[21]

However, even assuming for the sake of argument that the parents could make such speculative claims or that the student had attended the district's recommended programs at the assigned public school sites, the evidence in the hearing record does not support the conclusion that the district would have violated the FAPE legal standard related to IEP implementation—that is, that the district would have deviated from the student's IEPs in a material or substantial way (A.P. v. Woodstock Bd. of Educ., 370 Fed. App'x 202, 205, 2010 WL 1049297 [2d Cir. Mar. 23, 2010]; Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811, 822 [9th Cir. 2007]; Houston Indep. Sch. Dist. v. Bobby R., 200 F.3d 341, 349 [5th Cir. 2000]; see D.D-S., 2011 WL 3919040, at *13; A.L. v. New York City Dep't of Educ., 812 F. Supp. 2d 495, 502-03 [S.D.N.Y. 2011]).

[21] While some district courts have found that parents have a right to assess the adequacy of a particular school site to meet their children's needs, the weight of the relevant authority supports the approach taken here (see B.K. v. New York City Dep't of Educ., 12 F. Supp. 3d 343, 370-72 [E.D.N.Y. 2014]; M.L. v. New York City Dep't of Educ., 2014 WL 1301957 [S.D.N.Y. Mar. 31, 2014]; M.O. v. New York City Dep't of Educ., 996 F. Supp. 2d 269, 270-72 [S.D.N.Y. 2014]; E.H. v. New York City Dep't of Educ., 2014 WL 1224417, at *7 [S.D.N.Y. Mar. 21, 2014]; R.B. v. New York City Dep't of Educ., 2013 WL 5438605, at *17 [S.D.N.Y. Sept. 27, 2013]; E.F., 2013 WL 4495676, at *26; M.R. v New York City Bd. of Educ., 2013 WL 4834856, at *5 [S.D.N.Y. Aug. 14, 2013]; A.M. v. New York City Dep't of Educ., 964 F. Supp. 2d 270, 286; N.K., 961 F. Supp. 2d at 588-90; Luo v. Baldwin Union Free Sch. Dist., 2013 WL 1182232, at *5 [E.D.N.Y. Mar. 21, 2013], aff'd, 556 Fed. App'x 1 [2d Cir Dec. 23, 2013]; A.D. v. New York City Dep't of Educ., 2013 WL 1155570, at *13 [S.D.N.Y. Mar. 19, 2013]; J.L. v. City Sch. Dist. of New York, 2013 WL 625064, at *10 [S.D.N.Y. Feb. 20, 2013]; Reyes v. New York City Dep't of Educ., 2012 WL 6136493, at *7 [S.D.N.Y. Dec. 11, 2012]; Ganje v. Depew Union Free Sch. Dist., 2012 WL 5473491, at *15 [W.D.N.Y. Sept. 26, 2012], adopted, 2012 WL 5473485 [W.D.N.Y. Nov. 9, 2012]; see also N.S. v. New York City Dep't of Educ., 2014 WL 2722967, at *12-*14 [S.D.N.Y. June 16, 2014] [holding that "[a]bsent non-speculative evidence to the contrary, it is presumed that the placement school will fulfill its obligations under the IEP"]; but see V.S. v. New York City Dep't of Educ., 25 F. Supp. 3d 295, 300-01 [E.D.N.Y. 2014]; C.U. v. New York City Dep't of Educ., 23 F. Supp. 3d 210, 227-29 [S.D.N.Y. 2014]; Scott v. New York City Dep't of Educ., 6 F. Supp. 3d 424, 444-45 [S.D.N.Y. 2014]; D.C. v. New York City Dep't of Educ., 950 F. Supp. 2d 494, 508-13 [S.D.N.Y. 2013]; B.R. v. New York City Dep't of Educ., 910 F.Supp.2d 670, 676-78 [S.D.N.Y. 2012]; E.A.M., 2012 WL 4571794, at *11).

VII. Unilateral Placement—Applicable Standards

A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak, 142 F.3d at 129; Matrejek, 471 F. Supp. 2d at 419). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (Carter, 510 U.S. 7; Application of the Bd. of Educ., Appeal No. 08-085; Application of the Dep't of Educ., Appeal No. 08-025; Application of the Bd. of Educ., Appeal No. 08-016; Application of the Bd. of Educ., Appeal No. 07-097; Application of a Child with a Disability, Appeal No. 07-038; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-105). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ., 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement…'" (Gagliardo, 489 F.3d at 112; Frank G. v. Bd. of Educ., 459 F.3d at 364 [2d Cir. 2006] [quoting Rowley, 458 U.S. at 207 and identifying exceptions]). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). When determining whether the parents' unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether that placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see Gagliardo, 489 F.3d at 115 [citing Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] [stating "evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]]). A private placement is only appropriate if it provides education instruction specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; 34 CFR 300.39[a][1]; Educ. Law § 4401[1]; 8 NYCRR 200.1[ww]; Rowley, 458 U.S. at 188-89; Gagliardo, 489 F.3d at 114-15 [noting that even though the unilateral placement provided special education, the evidence did not show that it provided special education services specifically needed by the student]; Frank G., 459 F.3d at 365; Stevens v. New York City Dep't of Educ., 2010 WL 1005165, *9 [S.D.N.Y. Mar. 18, 2010]).

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

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

> instruction specially designed to meet the unique needs of a handicapped child, supported by such services as are necessary to permit the child to benefit from instruction.

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

A. McCarton School and Home-Based Services

Having determined that the district failed to offer the student a FAPE for the 2013-14 school year, the next issue to decide is whether the McCarton School, combined with home-based services, for the 2013-14 school year was appropriate. Upon careful review, the evidence in the hearing record supports a finding that the IHO correctly reached the conclusion that the parents' unilateral placement for the 2013-14 school year was an appropriate unilateral placement for the student (see IHO Decision at pp. 13-16, 19-20). The IHO accurately recounted the facts of the case, set forth the proper legal standard to determine whether the parents' unilateral placement was appropriate for the 2013-14 school year, and applied that standard to the facts at hand (id. at pp. 6-16, 19-20). The decision shows that the IHO carefully considered the testimonial and documentary evidence presented by both parties, and further, that he weighed the evidence and properly supported his conclusions (id.). Furthermore, an independent review of the entire hearing record reveals that the impartial hearing was conducted in a manner consistent with the requirements of due process and that there is no reason appearing in the hearing record to modify the determinations of the IHO regarding the appropriateness of parents' unilateral placement of the student (see 20 U.S.C. § 1415[g][2]; 34 CFR 300.514[b][2]). Thus, the conclusions of the IHO with respect to this issue are hereby adopted, as well as the IHO's ultimate award to the parents, which included the following: reimbursement for the costs of the student's tuition at the McCarton School for the 2013-14 school year and reimbursement for the costs of the following home-based services: six hours per week of "ABA therapy" and four hours per month of parent counseling and training (at a rate of $115.00 per hour), and two 45-minute sessions per week of speech-language therapy (at a rate of $150.00 per hour) (IHO Decision at p. 20).

VII. Conclusion

In sum, the evidence in the hearing record supports the IHO's conclusions that the district failed to offer the student a FAPE in the LRE for the 2013-14 school year, the student's unilateral placement at the McCarton School together with home-based services was an appropriate placement, and that equitable considerations weighed in favor of the parents' requested relief (see Burlington, 471 U.S. at 370; M.C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]).

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

Dated: **Albany, New York**
April 29, 2015

CAROL H. HAUGE
STATE REVIEW OFFICER