The University of the State of New York

The State Education Department
State Review Officer
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No. 20-144

Application of a STUDENT WITH A DISABILITY, by her parents, for review of a determination of a hearing officer relating to the provision of educational services by the New York City Department of Education

Appearances:

The Law Firm of Tamara Roff, P.C., attorneys for petitioners, by Felipe Rendón, Esq. and Lauren A. Goldberg, Esq.

Howard Friedman, Special Assistant Corporation Counsel, attorneys for respondent, by Gail M. Eckstein, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioners (the parents) appeal from the decision of an impartial hearing officer (IHO) which determined that respondent (the district) failed to offer their daughter an appropriate educational program but denied their request to be reimbursed for their daughter's tuition costs at the Yaldeinu School (Yaldeinu) for the 2018-19 school year. The appeal must be dismissed.

II. Overview—Administrative Procedures

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

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

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

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

III. Facts and Procedural History

The parties' familiarity with the detailed facts and procedural history of the case and the IHO's decision is presumed and will not be recited in detail here. Briefly, the student presented with deficits across the developmental spectrum (see Dist. Exs. 1 at pp. 1-7; 4 at p. 3). Results of a psychoeducational evaluation administered to the student in September 2017 when she was nine years old indicated that she demonstrated overall cognitive abilities in the extremely low range on formal testing, reading skills at the first grade level, and math skills at the kindergarten level on formal tests of achievement (Dist. Ex. 4). The student also presented with deficits in receptive, expressive, and pragmatic language skills, social and play skills, self-care skills, fine and gross

motor skills and significant sensory processing/regulation deficits that interfered with her ability to learn, communicate, engage in tasks, attend and focus (see Dist. Ex. 1 at pp. 1-5). She exhibited behaviors including screaming, yelling, throwing objects, tantrum behaviors and noncompliance that required a behavioral intervention plan (BIP) (Dist. Exs. 1 at p. 7; 4 at pp. 1, 2). The student was also reported to have a limited food repertoire (Dist. Ex. 1 at p. 6).

The hearing record is relatively sparse regarding the student's early educational history. According to the parent, at three years of age the student exhibited limited speech, an inability to make eye contact, and a lack of safety awareness (Parent Ex. O at p. 1). The student subsequently received a diagnosis of autism, was evaluated by the district's Committee on Preschool Special Education (CPSE) and attended a special education program that included related services (id.). From age five until eight, the student attended a general education program at a nonpublic school with the support of a special education itinerant teacher (SEIT) provided by the CSE (id.). However, the student displayed academic difficulties and behavioral issues such that school staff determined that her needs could not be met in a mainstream school with support (id.). Therefore, in July 2016, the student began attending Yaldeinu, a small, private special education school that primarily serves students on the autism spectrum (Parent Exs. O at p. 1; Q at p. 1; see Dist. Ex. 4 at p. 1).[1] The student continued to attend Yaldeinu for the 2017-18 school year in a 6:1+1 class and received speech-language therapy and occupational therapy (OT) (Dist. Ex. 4 at p. 1).

The CSE convened on October 18, 2017, to formulate the student's IEP for the remainder of the 2017-18 school year and the beginning of the 2018-19 school year (see generally Dist. Ex. 1). The CSE determined that the student was eligible for special education as a student with autism and recommended a 12-month program consisting of a 6:1+1 special class placement in a specialized school together with OT, speech-language therapy, and parent counseling and training (id. at pp. 22-23, 27).[2] In letters to the district dated June 19, 2018 and August 20, 2018, the parents disagreed with the recommendations contained in the October 2017 IEP, as well as with the particular public school site to which the district assigned the student to attend for the 2018-19 school year and, as a result, notified the district of their intent to unilaterally place the student at Yaldeinu and seek public funding (Parent Exs. B; C at pp. 1-2; see Dist. Ex. 3 at pp. 1, 5).

On November 28, 2018, the CSE convened to conduct an annual review and create an IEP for the remainder of the 2018-19 school year (Dist. Ex. 5).[3] The resultant IEP continued to recommend a 12-month program consisting of a 6:1+1 special class placement in a specialized school together with OT, speech-language therapy, and parent counseling and training (id. at p. 14). Both before and after the November 28, 2018 CSE meeting, the student attended Yaldeinu for the duration of the 2018-19 school year and received instruction using applied behavioral

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

[2] The student's eligibility for special education programs and related services as a student with autism is not in dispute (see 34 CFR 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

[3] The IEP document reflects an "IEP Meeting" date of October 19, 2018 (Dist. Ex. 5 at p. 19). However, the hearing record shows that the CSE meeting at which this IEP was developed occurred on November 28, 2018 (Dist. Exs. 6: 7 at pp. 2-3; see Parent Ex. A at pp. 3-4).

analysis (ABA) methods, OT services, and speech-language therapy (see Parent Exs. F; G at p. 1; H at p. 1; I at p. 1).

A. Due Process Complaint Notice

As related to the issues in this appeal, in a due process complaint notice dated April 12, 2019, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2018-19 school year (see Parent Ex. A).[4] With regard to both the October 2017 and November 2018 CSE meetings, the parents specifically asserted, among other things, that the CSE failed to obtain and consider sufficient evaluative data, lacked a district representative that was appropriately qualified, and predetermined recommendations, precluding the parents from fully participating in the decision-making process (id. at p. 2). Regarding the October 2017 IEP and November 2018 IEP, the parents alleged, among other things that the present levels of performance were insufficient, the annual goals were inappropriate, vague and unmeasurable, the IEP lacked a BIP and failed to provide instruction using the ABA methodology in particular, and the 6:1+1 special class placement was not appropriate and lacked sufficient 1:1 instruction and supports (id. at pp. 2-5). The parents argued that the district failed to provide them with sufficient prior written notices and school location letter, and that the public school site the district assigned the student to attend for the 2018-19 school year was inappropriate and insufficient to meet her needs and could not provide a suitable functional peer group (id. at p. 3). As relief the parents requested direct funding or tuition reimbursement for their unilateral placement of the student at Yaldeinu for the 2018-19 school year.

B. Impartial Hearing Officer Decision

An impartial hearing convened on February 4, 2020 and concluded on June 5, 2020 after six days of proceedings (Tr. pp. 1-221). In a decision dated July 20, 2020, the IHO determined that the district offered the student a free appropriate public education (FAPE) for the 2018-19 school year, although also went on to find in the alternative that Yaldeinu was an appropriate unilateral placement for the student (IHO Decision at p. 13). With regard to the parents' claims, the IHO referenced the October 2017 IEP in her decision and concluded that the CSE had adequate evaluative information, the present levels of performance, annual goals and short term objectives and the 6:1+1 special class provided an appropriate setting with adequate opportunities for individualized instruction at times in a 2:1 or 1:1 basis both when other students were pulled out for related services, and twice per day for 20 to 30 minutes with the teacher (id. at pp. 6-8). The IHO addressed the evidence regarding the parents' FBA and BIP claims and found that they did not prevail on those matters (id. at pp. 8-11). Addressing the October 2017 IEP, the IHO also determined that the district was not required to specify ABA as the methodology that must be employed on the student's IEP, concluding that there was "no reason to suppose that ABA is the only approach – or even the most appropriate approach – for the Student to access learning" (id. at pp. 11-13). Because she concluded that the district offered an appropriate program for the

[4] The April 12, 2019 due process complaint notice also includes claims regarding a November 28, 2018 CSE meeting and IEP; however, on appeal the parents assert that the district only defended the October 18, 2017 CSE IEP (see Req. for Rev. fn. 1 at p. 2). Issues related to the November 2018 IEP will be discussed below.

student, the IHO denied the parents' request to be reimbursed for the cost of the student's tuition at Yaldeinu for the 2018-19 school year (id. at p. 13).

IV. Appeal for State-Level Review

The parties' familiarity with the particular issues for review on appeal in the parents' request for review and the district's answer thereto is presumed and every facet of the parents' arguments will not be recited here; however, they are discussed to a greater degree below. Briefly, the parents challenge the IHO's rulings on the adequacy of the evaluation of the student, the development of appropriate annual goals, the adequacy of the student's FBA and BIP (and the conduct of the hearing related thereto), and the lack of 1:1 instruction and ABA methodology on the student's IEP. The parents also allege that the IHO failed to rule on their parental participation and prior written notice claims, as well as the inability to implement claim related to the October 2017 IEP. The parents further contend that the IHO erred in failing to make a finding that the evidence showed that equitable considerations favored the parents. As relief, the parents seek to reverse the IHO's decision insofar as it denies funding/reimbursement for the student's placement at Yaldeinu for the 2018-19 school year. In an answer, the district denies the parents' allegations on appeal, and requests that the undersigned affirm the IHO's decision.

V. Applicable Standards

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

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

Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245).

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

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).[5]

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

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

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

VI. Discussion

A. Conduct of Impartial Hearing

I will first address a preliminary issue regarding how the impartial hearing was conducted. In their request for review, the parents assert that the IHO "allowed the district to circumvent the '5 day' disclosure rule" and "impermissibly circumvented [S]tate regulations governing disclosure and inexcusably prolonged an already protracted hearing" by, over the parents' objections, scheduling a hearing date after the parents had rested their case to allow the district to timely disclose the student's October 2017 functional behavioral assessment (FBA) and the behavioral intervention plan (BIP).

State regulations set forth the procedures for conducting an impartial hearing and address, in part, minimal process requirements that shall be afforded to both parties (8 NYCRR 200.5[j]). Among other process rights, each party shall have an opportunity to present evidence, compel the attendance of witnesses, and to confront and question all witnesses (8 NYCRR 200.5[j][3][xii]). However, federal and State regulations provide that a party has the right to prohibit the introduction of evidence that has not been disclosed to that party at least five business days in advance of the impartial hearing (34 CFR 300.512[a][3]; 8 NYCRR 200.5[j][3][xii]). Further, State regulation provides that the IHO "shall exclude any evidence that he or she determines to be irrelevant, immaterial, unreliable, or unduly repetitious" or issue a subpoena if necessary (8 NYCRR 200.5[j][3][xii][c]; see 8 NYCRR 200.5[j][3][iv]).

However, courts have not enforced absolute adherence to the five-day rule for disclosure but have upheld the discretion of administrative hearing officers who consider factors such as the conditions resulting in the untimely disclosure, the need for a minimally adequate record upon which to base a decision, the effect upon the parties' respective right to due process, and the effect upon the timely, efficient, and fair conduct of the proceeding (see New Milford Bd. of Educ. v. C.R., 431 Fed. App'x 157, 161 [3d Cir. June 14, 2011]; L.J. v. Audubon Bd. of Educ., 2008 WL 4276908, at *4-*5 [D.N.J. Sept. 10, 2008], aff'd, 373 Fed. App'x 294 [3d Cir. 2010]; Pachl v. Sch. Bd. of Indep. Sch. Dist. No. 11, 2005 WL 428587, at *18 [D. Minn. Feb. 23, 2005]; Letter to

Steinke, 18 IDELR 739 [OSEP 1992]; see also Dell v. Bd. of Educ., 32 F.3d 1053, 1061 [7th Cir. 1994] [noting the objective of prompt resolution of disputes]).

Under the IDEA, the burden of persuasion in an administrative hearing challenging an IEP is on the party seeking relief (see Schaffer v. Weast, 546 U.S. 49, 59-62 [2005] [finding it improper under the IDEA to assume that every IEP is invalid until the school district demonstrates that it is not]). However, under State law, even if the parent initiates due process, the burden of proof has been placed 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 Hardison v. Bd. of Educ. of the Oneonta City Sch. Dist., 773 F.3d 372, 386 [2d Cir. 2014]; C.F. v. New York City Dep't of Educ., 746 F.3d 68, 76 [2d Cir. 2014]; R.E., 694 F.3d at 184-85).

Unless specifically prohibited by regulations, IHOs are provided with broad discretion, subject to administrative and judicial review procedures, with how they conduct an impartial hearing, in order that they may "accord each party a meaningful opportunity" to exercise their rights during the impartial hearing (Letter to Anonymous, 23 IDELR 1073 [OSEP 1995]; see Impartial Due Process Hearing, 71 Fed. Reg. 46704 [Aug. 14, 2006]). At the same time, the IHO is expected to ensure that the impartial hearing operates as an effective method for resolving disputes between the parents and district (id.). State and federal regulations balance the interests of having a complete hearing record with the parties having sufficient opportunity to prepare their respective cases and review evidence.

Review of the hearing transcript reveals that on May 28, 2020 a discussion regarding the October 2017 FBA and BIP arose during the testimony of the special education teacher who had attended the October 2017 CSE meeting (see Tr. pp. 77-78; Dist. Ex. 2). At that time, counsel for the district asked to enter the BIP as an additional exhibit "if the [p]arent does not have an objection" (Tr. p. 79). Counsel for the parents indicated that the exhibit would first need to be disclosed to her, as she had not received it "five days in advance of today's hearing," and therefore she objected based on the "five-day rule" (id.). The IHO suggested to the district's counsel that she send the BIP to the parents' counsel, "and then we can address it at some point and figure out what to do" (Tr. pp. 80-81). The district's attorney indicated that she was "sending it over right now" (Tr. p. 81).

At the conclusion of proceedings that day, after the parents had rested their case, the IHO asked the parties how they wanted to proceed with addressing the FBA and BIP (Tr. p. 171). The district's attorney asked to enter them as exhibits, at which point the parents' attorney objected once more to the inclusion of the documents based upon the five-day disclosure rule (id.). Upon further discussion, it became apparent that the district's attorney had also erroneously sent to the parents' counsel the wrong BIP, which was dated November 2018, rather than the October 2017 BIP that she had intended to forward to parents' counsel (Tr. pp. 171-72). The IHO suggested that the district forward to parents' counsel the October 2017 FBA and BIP and then asked the parties how they would like to proceed (Tr. pp. 172-74). The parents' attorney advised that she would most likely object to the admittance of the documents as the district had "multiple chances to disclose prior to the hearing today" (Tr. p. 174). However, she continued that if the documents were admitted into evidence, she would "certainly want to call a rebuttal witness," "[s]o it may be best to keep the record open," at which point the IHO set June 3, 2020 as a date to get an update from the parties, and June 5, 2020 as a hearing date to accommodate the probability that the parents

would call a witness and the district would recall the special education teacher (see Tr. pp. 174-81). The district's attorney confirmed that she forwarded the FBA and the BIP to parents' counsel for her review (Tr. p. 175).

The impartial hearing resumed on June 3, 2020 (Tr. p. 185). Counsel for the parents stated that the October 2017 FBA and BIP were "disclosed in a timely fashion" for the June 5, 2020 hearing date, at which time the parents would call their witness (Tr. pp. 190-91). The hearing proceeded on June 5, 2020 and the IHO entered the FBA and BIP into evidence without objection from the parents' attorney (Tr. pp. 195-96). The Yaldeinu BCBA proceeded to provide testimony regarding the district's October 2017 FBA and BIP (see Tr. pp. 199-204, 210-13).

Turning to the parents' contention on appeal regarding the delay of the hearing process, the district argues that "any alleged delay" was due to the scheduling difficulties of all parties rather than solely the fault of the district, and that the late submission of the FBA and BIP into evidence did not prejudice the parents. The district also asserts that the parents did not allege that they had never seen the documents before so it was unlikely that the documents came as a surprise, and that in offering an additional hearing date so that the parents had sufficient time to review and address the documents, the IHO acted appropriately in fully developing the hearing record.[6]

Hearing officers are charged with the responsibility of making a determination of whether the student received a FAPE based on substantive grounds (20 U.S.C. § 1415[f][3][E][i]; 8 NYCRR 200.5[j][4][i]), and, if necessary, they must take steps to ensure that an adequate hearing record has been completed upon which to base a decision (see 8 NYCRR 200.5 [j][3][vii]). In this case, however, any error related to the IHO's approach to addressing the five-day disclosure rule for the hearing was sufficiently remedied when the IHO scheduled an additional hearing date for the parties to present additional evidence and the parents' witness. As noted above, the IHO admitted the FBA and BIP into evidence and the Yaldeinu BCBA proceeded to provide testimony. The parents have failed to articulate sufficient basis to conclude that the impartial hearing failed to adequately comport with due process as a result of the IHO's discretionary determination to allow the district's documents into the hearing record as evidence (34 CFR 300.512[a][3]; 8 NYCRR 200.5[j][3][xii]; see Jusino v. New York City Dep't of Educ., 2016 WL 9649880, at *6 [E.D.N.Y. Aug. 8, 2016], aff'd, 700 F. App'x 25 [2d Cir. 2017] ["Like all procedural rules and deadlines, those set in this sort of administrative proceeding were set to ensure a fair and expedited process, not a summary 'gotcha' game. No prejudice from the failure to notice [the assistant principal's] testimony five days before the hearing (as opposed to the four days' notice given before her testimony) was articulated"]). Moreover, the IHO's decision to enlarge the record and continue the hearing by entering into evidence the FBA and BIP documents on June 5, 2020, which was eight calendar days after the May 28, 2020 hearing date did not—contrary to the parents' assertion on appeal—"inexcusably prolong[]" the impartial hearing.

[6] The district states in its answer that the date was June 3, 2020, but that was an "update" or status conference regarding the June 5, 2020 hearing date (Tr. pp. 180, 185). The hearing record shows that the IHO issued her FBA and BIP admission ruling when the evidentiary phase of the hearing was continued on June 5, 2020 (Tr. pp. 195-96).

B. FAPE

Turning to the remainder of the parties' Burlington/Carter dispute, on appeal the parents argue that the IHO erred by not finding that the district's procedural and substantive violations related to the October 2017 CSE meeting and resultant IEP denied the student a FAPE for the 2018-19 school year.[7]

1. October 2017 CSE Meeting

a. Parent Participation and Prior Written Notice

The parents argue that the IHO failed to issue a ruling that they were precluded from participating in the educational decision making process because the district's prior written notice did not provide a rationale for its refusal to mandate the use of 1:1 ABA instruction in the student's October 2017 IEP.

The IDEA sets forth procedural safeguards that include providing parents an opportunity "to participate in meetings with respect to the identification, evaluation, and educational placement of the child" (20 U.S.C. § 1415[b][1]). Federal and State regulations governing parental participation require that school districts take steps to ensure that parents are present at their child's IEP meetings or are afforded the opportunity to participate (34 CFR 300.322; 8 NYCRR 200.5[d]). Although school districts must provide an opportunity for parents to participate in the development of their child's IEP, mere parental disagreement with a school district's proposed IEP and placement recommendation does not amount to a denial of meaningful participation (see F.L. v. Bd. of Educ. of Great Neck Union Free Sch. Dist., 735 Fed. App'x 38, 40 [2d Cir. Aug. 24, 2018] [noting that "'[a] professional disagreement is not an IDEA violation'"], quoting P.K. v. Bedford Cent. Sch. Dist., 569 F. Supp. 2d 371, 383 [S.D.N.Y. 2008]; T.F. v. New York City Dep't of Educ., 2015 WL 5610769, at *5 [S.D.N.Y. Sept. 23, 2015]; A.P. v. New York City Dep't of Educ., 2015 WL 4597545, at *8, *10 [S.D.N.Y. July 30, 2015]; E.F. v. New York City Dep't of Educ., 2013 WL 4495676, at *17 [E.D.N.Y. Aug. 19, 2013] [stating that "as long as the parents are listened to," the right to participate in the development of the IEP is not impeded, "even if the [district] ultimately decides not to follow the parents' suggestions"]; Sch. for Language & Commc'n Dev. v. New York State Dep't of Educ., 2006 WL 2792754, at *7 [E.D.N.Y. Sept. 26, 2006] ["Meaningful participation does not require deferral to parent choice"]). When determining whether a district complied with the IDEA's procedural requirements, the inquiry focuses on whether the parents "had an adequate opportunity to participate in the development" of their child's IEP (Cerra, 427 F.3d at 192). Moreover, "the IDEA only requires that the parents have an opportunity to participate in the drafting process" (D.D-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at *11 [E.D.N.Y. Sept. 2, 2011], aff'd, 506 Fed. App'x 80 [2d Cir. Dec. 26, 2012], quoting A.E. v. Westport Bd. of Educ., 463 F. Supp. 2d 208, 216 [D. Conn. 2006]; see T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 420 [2d Cir. 2009] [noting that the IDEA gives parents the right to

[7] The October 18, 2017 IEP was to be implemented beginning on November 1, 2017 and as such would continue to be in effect for one year from then (Tr. pp. 59-61; Dist. Ex. 1 at p. 1). Therefore, the October 18, 2017 IEP spanned portions of two school years; the 2017-18 school year beginning on November 1, 2017 through June 30, 2018, and the 2018-19 school year from July1, 2018 to November 1, 2018.

participate in the development of their child's IEP, not a veto power over those aspects of the IEP with which they do not agree]).

The hearing record shows that the student's mother, classroom teachers, speech therapist, occupational therapist, Yaldeinu director, and parent advocate participated in the October 2017 CSE meeting by telephone (Parent Ex. P; Dist. Ex. 2). The October 2017 IEP reflected information provided by Yaldeinu staff, and the parent's concerns about the student's speech and communication skills, her need for 1:1 instruction and supports including reinforcement, fading strategies, and behavior modifications (Dist. Ex. 1 at pp. 1-6). The IEP also indicated that the parent reported the student had difficulty communicating her needs, that she struggled to express herself, that she had few friends although she enjoyed playing (id. at p. 3). According to the IEP, the parent expressed concerns that the student was not able to play appropriately with her peers (id. at p. 5). Further, the IEP stated that the parent reported the student was in good general physical health, although at that time she was going to begin to take medication to address hyperactivity; otherwise, the parent did not report any physical development concerns (id. at pp. 5-6). Review of the student's mother's affidavit reflects a recitation of the events of the CSE meeting; how Yaldeinu staff discussed the student's then-current level of functioning, her need for 1:1 instruction, and a program developed to meet the student's academic needs using ABA methods (Parent Ex. P). According to the parent, during the CSE meeting Yaldeinu staff discussed the student's behavioral and sensory processing needs, and the progress she had made in OT and speech-language therapy (id.).

Among the procedural requirements in State and federal regulations is the requirement that a district provide parents of a student with a disability with prior written notice "a reasonable time before the school district proposes to or refuses to initiate or change the identification, evaluation, educational placement of the student or the provision of a free appropriate public education to the student" (34 CFR 300.503[a]; 8 NYCRR 200.1[oo]; 200.5[a][1). Pursuant to State and federal regulation prior written notice must include a description of the action proposed or refused by the district; an explanation of why the district proposed or refused the action; a description of the other options that the CSE considered and the reasons why those options were rejected; a description of each evaluation procedure, assessment, record, or report the CSE used as a basis for the proposed or refused action; and a description of the other factors relevant to the CSE's proposal or refusal (34 CFR 300.503[b]; 8 NYCRR 200.5[a][3]).

The student's mother testified that "[d]espite [the student's] need for 1:1 instruction in a program that utilizes ABA, the CSE recommended that [she] attend a 12 month 6:1+1 special education program in a district 75 public school; they said they could not promise the [specialized school] program would utilize ABA" (Parent Ex. P). On appeal, the parents assert that the district violated State and federal regulations as the October 2017 CSE's rationale for its refusal to mandate 1:1 ABA instruction "does not appear in the district's prior written notice." Review of the June 21, 2018 prior written notice reveals that the parents are correct to a point insofar as the district's failure to provide prior written notice to the parents in compliance with State and federal regulations constitutes a procedural violation. Given the fact that IEPs must be revisited on an annual basis,

it could almost be said that a prior written notice issued some eight months after the revision of an IEP to which it pertains might as well not be issued at all.[8]

However, the parents' argument in this case does not lead to a per se procedural denial of a FAPE insofar as the evidence shows that they were aware of and disagreed with the October 2017 CSE's recommendation that did not include ABA and/or 1:1 instruction before the district issued the June 2018 prior written notice, and as described above, the parent and Yaldeinu staff actively participated during the October 2017 CSE meeting (see Parent Ex. B; Dist. Exs. 1 at pp. 1-6; 3 at pp. 1-2). There is also no evidence that the parents were unaware of the evaluative information relied upon by the CSE that was listed in the prior written notice, much of which was listed or described in the October 2017 IEP itself (Dist. Ex. 1 at pp. 1-6). Consequently, there is no indication in the hearing record in this case that the lack of a timely prior written notice was a procedural violation that rose to the level of a denial of FAPE as it did not impede the student's right to a FAPE, significantly impede the parents' opportunity to participate in the decision-making process, or cause a deprivation of educational benefits (see 20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]). Nonetheless, going forward, the district should provide the parents with prior written notice in a timely fashion in compliance with State and federal regulations (see 34 CFR 300.503; 8 NYCRR 200.5[a]). School authorities may fairly be expected to "be able to offer a cogent and responsive explanation for their decisions that shows the IEP is reasonably calculated to enable the child to make progress appropriate in light of his circumstances" (Endrew F., 137 S. Ct. at 1002).

b. Sufficiency of Evaluative Information

With respect to the October 2017 CSE meeting, the parents assert that the IHO erroneously excused the district's failure to assess the student in all areas of suspected disability, specifically with respect to her speech-language, sensory processing, and motor needs, within three years prior to the October 2017 CSE meeting.

Federal and State regulations make clear that 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 CSE may direct that additional evaluations or assessments be conducted in order to appropriately assess the student in all areas related to the suspected disabilities (8 NYCRR 200.4[b][3]). Any evaluation of a student with a disability must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parent, that may assist in determining, among other things, the content of the student's IEP (20 U.S.C. § 1414[b][2][A]; 34 CFR 300.304[b][1][ii]; see S.F., 2011 WL 5419847 at *12 [S.D.N.Y. Nov. 9,

[8] It appears to me that the driving force for issuing a prior written notice in June 2018 was the accompanying school location letter that identified the public-school site to which the district had assigned the student (Dist. Ex. 3 at p. 5). It almost goes without saying that unlike many districts in this state, this particular district with approximately a million students would need a process to notify families of where the IEP services for a particular student would be obtained.

2011]; see Letter to Clarke, 48 IDELR 77 [OSEP 2007]). In particular, a district must rely on technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors (20 U.S.C. § 1414[b][2][C]; 34 CFR 300.304[b][3]; 8 NYCRR 200.4[b][6][x]). A district must ensure that a student is appropriately assessed in all areas related to the suspected disability, including, where appropriate, social and emotional status (20 U.S.C. § 1414[b][3][B]; 34 CFR 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]). An evaluation of a student must be sufficiently comprehensive to identify all of the student's special education and related services needs, whether or not commonly linked to the disability category in which the student has been classified (34 CFR 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]; see Application of the Dep't of Educ., Appeal No. 07-018).

According to the CSE meeting attendance sheet, the participants at the October 2017 CSE meeting included the district school psychologist who had conducted the student's recent psychoeducational evaluation and who also served as the district representative, and a district special education teacher (Dist. Exs. 2; 4 at p. 3; see Tr. p. 56). The parent and an advocate participated in the meeting by telephone, as did the Yaldeinu classroom teachers, speech therapist, occupational therapist, and school director (Dist. Ex. 2). The hearing record indicated that the October 2017 IEP was based upon May 2017 OT and speech-language progress reports, a June 2017 teacher report, a September 27, 2017 district psychoeducational evaluation report, and teacher statements provided during the meeting (Tr. pp. 66-67; Dist. Exs. 3 at p. 2; 4).

The September 27, 2017 psychoeducational evaluation report reveals that the evaluation "was conducted as part of the student's mandated three year review" (Dist. Ex. 4 at p. 1). According to the report, the student's cognitive ability was assessed using the Kaufman Brief Intelligence Test Second Edition (KBIT-2), which resulted in a KBIT-2 composite IQ of 63, indicating extremely low overall cognitive abilities (id. at pp. 1, 3). The report noted that the student's verbal reasoning skills appeared to be much less developed than her nonverbal reasoning skills and that higher potential was indicated in all areas due to the student's behaviors (id. at pp. 1-2). Behavioral observations during testing included that the student required constant prompting, reinforcement, and promise of rewards in order to complete tasks, often spoke about things out of context, refused to continue as soon as she felt somewhat challenged, often stood up, walked around the room, at times attempted to walk out, often stated she did not want to do any more, put her head down and refused to work, had difficulty understanding directions and needed repetition, was fidgety, restless, and inattentive, often responded impulsively without giving the questions much thought, and gave up quickly (id. at p. 1).

The student's academic skills were assessed using selected subtests of the Woodcock-Johnson IV Tests of Achievement (WJ-IV ACH) (Dist. Ex. 4 at p. 2). Although a broad reading measure could not be obtained due to the student's inattention and lack of complete participation in the assessment, the student performed at an early first grade level on measures of decoding and comprehension with higher potential indicated, given her behaviors (id.). According to the report, she demonstrated "fairly good phonetic skills" when sounding out words and "good reading ability" on measures of reading comprehension that included pictures (id.). With regard to mathematics, while a broad math measure was not obtained, the student performed on a kindergarten level on the tasks she completed (id.). She was able to solve simple single-digit addition problems (i.e., 6 +1) by counting on her fingers but then tired quickly and answered randomly (id.). Additionally, regarding word problems, the student appeared to have limited understanding of math applications, was confused by word problems even those with pictures, and

did not know when to add or subtract (id.). In the area of written language, the student demonstrated mid first grade spelling skills, easily wrote two to three letter words and was able to correctly write three four-letter words given prompting and encouragement, but abruptly refused to continue the task and walked toward the door (id.). When writing simple sentences, the student's letter formation was reported to be generally good although somewhat large, and "immature but legible" (id. at p. 3).

The psychoeducational report further indicated that a student interview was conducted as part of the evaluation (Dist. Ex. 4 at p. 1). The report noted that the student was friendly and social although she made many comments that were out of context (id. at p. 3). While the student reportedly stated that she had friends and enjoyed playing with them, the report reflected that her mother indicated that the student struggled with maintaining appropriate social skills and that she was concerned with the student's behavior (id. at pp. 1, 3). The parent reported that the student easily became frustrated when demands were placed on her and that it was usually difficult to get the student to sit and complete assignments (id. at p. 1). The evaluator similarly noted that during the evaluation, the student would often only continue when tasks were presented as a game and even then, tired easily and refused many times to complete a subtest (id. at p. 3).

The October 18, 2017 IEP present levels of performance, of which I can find no plausible dispute in the parents remaining allegations of error in the IHO's determination, reflected that "[a]ssessment results from 9/27/17" indicated that the student exhibited delays in all areas measured, and that her scores suggested extremely low verbal reasoning, low average nonverbal reasoning, first grade reading, and kindergarten level math skills (Dist. Ex. 1 at p. 1; see Dist. Ex. 4 at p. 3).[9] The October 2017 IEP also reflected the student's behaviors reported during the evaluation: that she was fidgety, restless, inattention and impulsive; she frustrated quickly and gave up easily; she needed a great deal of prompting, encouragement, and positive reinforcement; and would continue only after the examiner presented the task as a game, although she tired easily and many times refused to complete a subtest (compare Dist. Ex. 1 at p. 1, with Dist. Ex. 4 at p. 3).

The October 2017 IEP also included information provided in several progress reports from the student's current teacher and providers at Yaldeinu (Dist. Ex. 1 at pp. 1-6). The district special education teacher testified that the October 2017 CSE relied on the progress reports from Yaldeinu when developing the student's IEP because Yaldeinu teachers and providers "knew her best" (Tr. p. 85). Although those reports were not included in the hearing record, the district's special education teacher testified that as opposed to doing a summary, the CSE "transfer[red] everything"

[9] Regarding the October 2017 IEP, the IHO determined that "the present levels of performance, in conjunction with the annual goals, the short term objectives provide detailed information as to the Student's [] academic levels of performance to guide a teacher or provider, or a Parent" (IHO Decision at p. 8). Review of the parents' request for review does not show that the October 2017 IEP present levels of performance findings of the IHO were appealed (see generally Req. for Rev.). To the extent that in their memorandum of law the parents allege that the October 2017 IEP OT annual goals were insufficient because they failed to address the full range of the student's needs, "including self-regulation and ocular motor skills (needs also overlooked in the present levels of performance)," as discussed below this assertion is not supported by the evidence in the hearing record and is otherwise insufficient to challenge the October 2017 IEP present levels of performance as fatally insufficient (see Parent Mem. of Law at p. 29).

from the progress reports to the IEP "because [they] don't want any misinterpretation about the progress report[s]" (Tr. p. 98).

Specifically, the present levels of performance and individual needs section of the October 2017 IEP reflected information from a June 6, 2017 education report including that the student had difficulty sustaining attention and focus due to visual and auditory distractions during 1:1 instruction and group activities, that her strength was in concrete learning, and that her learning was enhanced given visual support (Dist. Ex. 1 at p. 1). With regard to academics, the IEP reflected information from this report including details regarding what the student was working on and her related progress in reading and math; for example, that she had increased her sight word repertoire, mastered the first grade Dolch sight word list and was working on the second grade word list, and that she was not yet able to spell her mastered sight words (id.). The IEP reflected that the report indicated the student was able to decode and encode CCVC (consonant, consonant, vowel, consonant) words with diagraphs, as well as with initial and end of word blends and could encode words that contained the "FSZL rule" (id. at pp. 1-2).[10] According to the IEP, the report reflected that the student was working on answering reading comprehension questions based on a "level D" book, by creating a schema using her prior knowledge before reading a leveled book, and responding to simple WH questions with teacher prompts but requiring support to respond to higher level WH questions (where, when, why) (id. at p. 2). Additionally, the IEP reflected report information including that the student was learning to retell a story including the beginning, middle, and end and its setting, and was able while looking at a two scene picture sequence, to retell an event using sequence markers (i.e., first, then), using complete sentences and given moderate support (id.). However, information from the report and included in the IEP indicated that the student needed continued improvement to understand that words carry meaning and that the visualizing aspect of reading was challenging to the student and directly affected her overall comprehension (id.).

The June 6, 2017 education report also provided information in the October 2017 IEP regarding the student's problem behaviors including tantrum behaviors (spitting, hitting, kicking, scratching, screaming and biting), physical aggression (hitting, slapping), elopement, resistance-dropping to the floor, pushing her body into her teacher and non-compliance or verbal refusal (Dist. Ex. 1 at p. 4). The IEP reflected that in the absence of problem behavior, the student was reinforced with verbal praise and earned tokens to earn a desired item or activity (id.). When the student eloped she was redirected back to the area she had left and when she was physically aggressive or noncompliant she was prompted to complete the task (id.). Information from the report reflected in the IEP indicated that continued improvement was needed for the student to transition from one location to another or from one activity to another (id.). The IEP reflected the report which indicated that the Social Thinking Curriculum was utilized to increase the student's awareness of expected and unexpected behaviors and to help facilitate her ability to connect behavior, emotions and consequences throughout her day and that the use of social thinking vocabulary was necessary to maintain attention and motivation across daily activities (id.). According to the IEP, the report also noted that the student was working on her observation skills,

[10] The FSZL rule is generally known as a spelling rule wherein those letters are doubled after a short vowel sound, for example, in the words cliff, kiss, buzz and hill.

her ability to follow an eye gaze to make predictions, and to identify others' perceptions by determining what someone was "'thinking'" about (id.).

With regard to self-care skills, information from the June 6, 2017 education report that was included in the present levels of performance section of the October 2017 IEP indicated that the student was able to wash her hands with soap appropriately with minimal verbal prompts and described the specific skills the student was learning related to proper table manners, such as using eating utensils appropriately, and moving her chair close to the table (Dist. Ex. 1 at p. 5). The IEP noted that the student had a limited food repertoire and was encouraged to try new foods by first smelling, touching, licking and eventually eating them but that her current tolerance included scrambled eggs, gluten free bread, and apples (id.). The student was reported to require more progress to build greater independence in self-care tasks (id.).

The October 2017 IEP also contained information provided by a June 6, 2017 teacher report (Dist. Ex. 1 at pp. 3, 4).[11] This report provided information regarding the student's play skills, noting that she was working on improving her ability to interact with peers appropriately, to initiate a play activity, to participate in an activity even when it is not preferred, and to increase her repertoire of games (id. at p. 4). The student was reported to show interest in engaging with adults and peers, was able to utilize toys functionally during independent, interactive and parallel play activities, and to demonstrate appropriate symbolic play skills during independent play (id.). She had shown improvement in her ability to take turns with peers but required adult models and prompts to improve her overall play skills (id.).

With regard to social skills, the June 6, 2017 teacher report reflected in the October 2017 IEP indicated that the student demonstrated an improved awareness of those around her, was aware of and sought verbal praise and approval, was able to gain attention of others by calling their names, and could respond to her own name given minimal reminders (Dist. Ex. 1 at p. 3). The student was also reported to follow one step directions given verbal prompts, request desired items and activities, and respond to basic WH questions with prompting (id.). In addition to her social skills and following directions the student's conversation skills were also being addressed as she tended to engage in self-directed conversation, often spoke to herself aloud, spoke about herself in the third person, and demonstrated fleeting eye contact (id.). With regard to group settings, according to the IEP the student was reported to require prompting to actively participate and engage, with maximal prompting needed to engage in choral responses (id.). The report as reflected in the IEP indicated that the student demonstrated the ability to raise her hand and with minimal prompting could wait for the teacher to call on her (id.). She had improved her ability to follow directions given to a group of students and was working to ask questions or comment to her peers during a group lesson (id.).

Information regarding the student's then-current skills was also reported during the CSE meeting by the student's teacher and "speech teacher" (Dist. Ex. 1 at p. 1). Consistent with progress reports, the student's teacher stated that the student knew her letters, was currently working on diagraphs and blends, and spelling; however, had great difficulty with comprehension, which

[11] The IEP also contained information in the present levels of performance section from a teacher report dated May 22, 2017 (Dist. Ex. 1 at p. 4). This report provided similar information to the June 6, 2017 teacher report, with less detail (see Dist. Ex. 1 at p. 4).

affected all subject areas (id.). She further reported that the student was performing on a first grade level in reading, math, and spelling (id.). The speech teacher reported that the student had deficits in receptive, expressive, and pragmatic language, that her intelligibility was low, and that she needed constant reinforcement due to significant difficulty remaining focused (id.).

Additional academic information provided in the present levels of performance of the October 2017 IEP included that the student was very good at rote tasks and worked well with visual stimuli (Dist. Ex. 1 at p. 3). This section of the IEP reflected that the student was making progress in math and demonstrated understanding of part to whole strategy, could compute basic addition problems for sums up to 20, was practicing computing addition problems to increase her fluency, could compute subtraction problems for numbers 1-10, and was practicing problem solving skills (id.). The IEP reflected that the student's money skills had increased during the school year and that she could sort, label and state the value for all coins, count a given amount of pennies, nickels and dimes, and give a specific amount of money up to a dollar (id.). The student was also learning to tell time by one-minute increments (id.).

One of the parents' particular criticisms of the IHO's determination was that the IHO should have found that the reevaluation of the student was inadequate because the CSE did not direct new evaluations such as an OT evaluation. For example the parents point to testimony from the special education teacher who attended the CSE meeting and indicated that at the time of her testimony, she did not recall offhand when the previous speech-language, sensory motor or OT assessments of the student had been conducted prior to the October 2017 CSE meeting (Tr. pp. 86-87).

When conducting a mandatory reevaluation, a CSE is not simply required to conduct all possible evaluations of a student. Instead federal regulations explain that the CSE is charged with reviewing existing evaluation data and

> "[o]n the basis of that review, and input from the child's parents, identify what additional data, if any, are needed to determine—
>
> (i) (A) Whether the child is a child with a disability, as defined in § 300.8, and the educational needs of the child; or
>
> (B) In case of a reevaluation of a child, whether the child continues to have such a disability, and the educational needs of the child;
>
> (ii) The present levels of academic achievement and related developmental needs of the child;
>
> (iii) (A) Whether the child needs special education and related services; or
>
> (B) In the case of a reevaluation of a child, whether the child continues to need special education and related services; and
>
> (iv) Whether any additions or modifications to the special education and related services are needed to enable the child to meet the measurable annual goals set out in the IEP of the child and to participate, as appropriate, in the general education curriculum.

(34 CFR 300.305[a][2]). While the parents have argued throughout this case that the district should have provided their daughter with more robust, intensive services along the lines of what Yaldeinu was providing to the student, there is no indication in evidence that the parents were in disagreement with the other members of the CSE about the evaluations of the student or that they objected to or asked the CSE to perform specific evaluations during the reevaluation of the student (R.B. v. New York City Dep't of Educ., 589 F. App'x 572, 575 [2d Cir. 2014] [noting that the parent did not object, during or after the CSE meeting, to the evaluative information the CSE reviewed, or request that the CSE perform testing to obtain additional information about the student's educational needs]). Instead, as further described below, considerable information was provided to the CSE by the student's then-current providers at Yaldeinu.

The student's performance with regard to receptive and expressive language skills was reflected in the October 2017 IEP via a May 22, 2017 speech progress report provided by the student's private school (Dist. Ex. 1 at p. 2). Information included in the IEP from this progress report indicated that the student had increased her receptive repertoire to include various items from at least five basic categories, such as items that belong to different rooms of a house, as well as basic actions by "identifying and sorting targets" (id.). The IEP stated that the student was able to identify the function of those categories independently and was strengthening her understanding of higher level prepositions and attributes, given fading prompts (id.). Information from the report reflected in the IEP indicated the student was also able to follow one step novel instructions given verbal prompts and comprehend the concept of first/last in pictures with minimal assistance, but further noted that the student's consistency was affected by her self-stimulatory behaviors and difficulties with sensory integration (id.).

With regard to expressive language skills, information from the May 22, 2017 speech progress report included in the October 2017 IEP indicated the student's expressive language goals focused on increasing the student's use of verbal language for a variety of communicative purposes and that she had shown significant gains throughout the year (Dist. Ex. 1 at p. 2). The student was reported to request desired objects and activities using complete sentences, respond to basic "wh" questions, and greet familiar adults and peers given verbal prompts (id.). She had made significant progress in labeling and stating the category of various items for at least five categories although required assistance to state the function of those items (id.). The IEP reflected that the student continued to make progress in describing agent+action+object in the environment and pictures in agent+action+object formulation (id.). The student used mastered propositions to describe the location of an object and was able to retell an event using sequence markers (i.e., first, then) using complete sentences when looking at a two scene picture and provided with moderate support (id.). She required support to respond to higher level "wh" questions such as where, when and why, to describe how items were alike based on feature, and to make associations between two items (id.). The IEP also noted that the student referred to herself by name and that she required support to use correct first person and second person pronouns (id.).

Regarding pragmatic language skills, information from the May 22, 2017 speech progress report reflected in the IEP indicated the student had made "tremendous progress" in her social abilities since the start of the school year, specifically that the student was currently able to call a person's name to gain their attention, maintain brief eye contact, and use full sentences to request items and actions (Dist. Ex. 1 at p. 2). The student demonstrated interest in engaging with adults, desired verbal recognition, responded positively to verbal praise, and was present and regulated especially after receiving her sensory diet in OT (id. at pp. 2-3). The IEP further noted the use of

the "Social Thinking" vocabulary from the curriculum described in the June 2017 educational report to increase the student's awareness of expected/unexpected behaviors in social situations and problem solving abilities, as well as to improve her understanding of the correlation between behavior and others' perceptions (id. at pp. 3, 4). According to the IEP, the student demonstrated emerging abilities to follow eye gaze to make predictions and determine what another person was thinking about (id. at p. 3).

The October 2017 IEP also included information from an OT progress report dated May 1, 2017 (Dist. Ex. 1 at p. 5). The student was reported to have made great progress in all fine motor areas and used a functional alternate tripod grasp; performing well when manipulating small beads or pegs, using tongs, lacing, translating and performing opposition hand tasks (id.). Dissociation of her forearm and wrist had greatly improved as well as her ability to maintain her wrist in slight extension for writing tasks (id.). The student was also reported to have made great gains in visual perceptual/visual motor/graphomotor skills, demonstrating the ability to assemble a 24 piece puzzle with ease, copy a complex pegboard or parquetry design, and cut complex shapes on a line (id.). At that time, the IEP indicated that she demonstrated great graphomotor skills and was able to print her own sentences with 90 percent accuracy in letter formation, sizing and spacing (id.). The IEP indicated the student needed continued work on improving her use of capitalization and punctuation (id.).

The May 1, 2017 OT progress report information reflected in the October 2017 IEP briefly referred to the student's gross motor coordination/rhythm skills, noting the student had made improvements in that domain as shown by her ability to practice coordinated movements according to a beat and a rhythm, perform cross pattern movement with a reciprocal pattern and jumping jacks, and to cross country ski (Dist. Ex. 1 at p. 5). The IEP indicated the student required further work on coordinated movements using a beat or metronome (id.).

With regard to sensory processing/self-regulation skills, the October 2017 IEP reflected information from the May 1, 2017 OT report that the student presented with low arousal sensory modulation dysfunction, which significantly affected the student's readiness to learn and ability to communicate, engage in tasks, and her attention/focusing skills (Dist. Ex. 1 at p. 5). The student participated in a sensory diet for 15 minutes twice per day in the OT sensory gym to address her individual sensory needs, and also received individual OT sessions, four sensory motor groups per day, and walked on a treadmill 15 minutes per day (id. at pp. 5-6). She was reported to have shown much improvement in regulation throughout the day, as her attention to tabletop tasks had improved such that she was able to perform a graphomotor, fine motor, or other learning task for 20 minutes before her attention decreased (id. at p. 6). The student also demonstrated less movement-seeking behaviors, bumping into others, escape and non-compliant behaviors, as well as an improvement in tactile defensive behaviors, as she allowed others to touch her to provide massage and no longer jumped or acted aggressively when touched lightly such as when tapped on the arm (id.).

The October 2017 IEP further reflected via the May 1, 2017 OT report that the student exhibited auditory sensitivity that was addressed by participation in the Integrated Listening System, which helped decrease her sensitivity, promoted a calm state of arousal, improved her auditory processing, and triggered the self-organizing capacities of the nervous system (Dist. Ex. 1 at p. 6). The student was reported to utilize the program for 30 minutes per day and enjoy the input it provided her (id.). The student was also reported to exhibit decreased vestibular processing

and lacked presentation of a post-rotary nystagmus (id.). To address these difficulties the student was provided with sensory motor activities including spinning, inversions, and head movements; however, end of year testing showed the need for continued intense vestibular input as her post-rotary nystagmus had not improved (id.). With regard to reflex integration, although the IEP reflected the OT report that indicated the student had made gains in this area, end of year testing showed the student exhibited nonintegrated Babinsky, Palmar, ATNR, and Landau reflexes and that the lack of reflex integration and delayed postural reflex development negatively impacted the student's movement, attention, and learning (id.). To address this, the student participated in a movement-based, primitive (infant or neo natal) reflex integration program called Rhythmic Movement Training, that utilized developmental movement, gentle isometric pressure, and self-awareness to rebuild the foundations necessary for development in that area (id.).

According to the October 2017 IEP, the May 1, 2017 OT progress report provided information regarding the student's activities of daily living (ADL) skills that was consistent with the June 6, 2017 education report regarding the student's poor eating habits, limited food repertoire, and difficulty exploring foods as well as her deficits in table manners and use of utensils (Dist. Ex. 1 at pp. 5, 6).

In addition to the information provided in the Yaldeinu progress reports, the October 2017 IEP reflected that with regard to the student's academic, developmental and functional needs, the parent was concerned about the student's speech in that she wanted to see her "speak more clearly and be able to communicate better" (Dist. Ex. 1 at p. 3). The parent also felt the student required 1:1 instruction with supports including reinforcement, prompting, fading strategies, and behavior modification (id.). With regard to the social development needs of the student, the IEP indicated that the parent was concerned that the student was not able to play appropriately with her peers (id. at pp. 4-5). The parent reported no concerns related to the student's physical development (id. at p. 6).

As noted above, the CSE was not required to conduct every type of evaluation from an initial evaluation during a subsequent reevaluation. In view of the forgoing evidence, I am not convinced by the parents' argument that the IHO erred in relying on the student's progress reports from among the sources of data that were provided to the October 2017 CSE during the reevaluation in 2017. In the absence of any indication of substantial changes in the student's academic performance or disabling condition or eligibility for special education services, like the IHO, I find that at the time of the CSE meeting, there was sufficient information upon which to base the IEP at the time of the reevaluation of the student. Thus even if there was a procedural error, it did not rise to the level of a denial of a FAPE,[12] and it did not help the parents' case when, during the CSE process, there was no evidence of some kind of objection from the parents or a request made to the CSE for further evaluation of the student. Instead it appears that the CSE considered the input of the parent and the student's then-current providers. Even on appeal, the parents do not assert the progress reports or the October 2017 IEP present levels of performance

[12] I would have preferred that the reports be made part of the hearing record rather relying on them being recounted in the IEP, but as the parents do not challenge the contents of the reports, especially those that were generated by the placement they chose for their daughter, it is not fatal in this case.

did not accurately reflect the student's needs, or that contradictory evaluative information existed, and I find their contentions of reversable error to be without merit.

2. October 2017 IEP

a. Annual Goals

Next I will turn to the parents' argument on appeal that the IHO erred in finding that the October 2017 IEP provided annual goals for the student that included sufficient measurement criteria given her rate of progress and addressed all of her areas of need, review of the evidence in the hearing record supports the IHO's conclusion that the goals were "measurable and specific."

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

In this case, review of the 12 annual goals and corresponding short-term objectives contained in the October 2017 IEP reveals they were designed to address the student's needs related to mathematics, English language arts (ELA), writing, executive functioning, sensory processing, emotional regulation, handwriting, fine motor and visual motor skills, ADL skills, and receptive, expressive, and pragmatic language skills—deficits described in the IEP present levels of performance (compare Dist. Ex. 1 at pp. 1-7, with Dist. Ex. 1 at pp. 9-20). The CSE determined that the student would participate in alternate assessments of achievement and therefore, consistent with State regulations, each of the annual goals included corresponding short-term objectives detailing the specific intermediate steps or skills between the student's present level of functioning and mastery of the goal (see Dist. Ex. 1 at pp. 9-20, 25).[13] Each of the annual goals also included the criteria used to measure whether the goal has been achieved (e.g. 75 percent accuracy over four consecutive trials, three out of five trials), the method of measurement (e.g. teacher made materials, class activities, observations), and the schedule of when the student's progress would be measured (e.g. one time per month, one time per quarter) (id. at pp. 9-20). For example, one of the student's ELA goals required the student to gather information from text in order to demonstrate her understanding and interpretation of the text (id. at p. 11). The corresponding short-term objectives related to mastering this goal included that the student would orally relate information from printed text; explain information represented in pictures; relate information gained from text with that of personal experience; connect a picture or illustration to a story; and dramatize or retell stories using pictures and other props (id.). The criteria for mastery of the goal and objectives was 75 percent accuracy over four consecutive trials and the methods of measurement included the use of teacher

[13] Pursuant to State regulations, for students who take a New York State alternate assessment the IEP shall include a description of the short-term instructional objectives and/or benchmarks that are the measurable intermediate steps between the student's present level of performance and the measurable annual goal (8 NYCRR 200.4[d][2][iv]).

made materials, the student's participation in class activities, teacher and/or provider observations of the student, check lists, and verbal explanation (id.). The goal further indicated that the student's progress would be measured one time per month (id.). This exemplifies the specificity and measurability of each of the annual goals and short-term objectives in the student's October 2017 IEP, in accordance with State regulation. As such, the parents' claim that the annual goals lacked sufficient measurability is without merit.[14]

Moreover, with regard to the parents' allegations that the district failed to develop annual goals in all areas of need for the student, specifically social/emotional and self-regulation skills, I note that the student's social/emotional functioning was addressed by short-term objectives corresponding to an annual goal designed to improve the student's "emotional regulation to maturely cope with challenging activities in the school" in which the student would implement a coping skill activity and use sensory information to understand and effectively interact with people in school (Dist. Ex. 1 at p. 14). Her social/emotional functioning was also addressed by the pragmatic language annual goal developed to improve the student's ability to work in small groups and her play skills, via the corresponding short-term objectives whereby the student was to use appropriate language to ask for help when frustrated, to initiate play with a peer, to interact or participate with a peer, demonstrate turn taking skills during play, and use appropriate eye contact with peers and adults (id. at p. 20). In addition, self-regulation skills were also addressed in the annual goal related to emotional regulation by short-term objectives in which the student was to demonstrate improved organization of multisensory input by remaining seated and calm in class amid sounds and participate in various sensory activities in order to decrease her high sensitivity to her environment (id. p. 14).[15] Moreover, the October 2017 IEP provided the student with management strategies such as a multisensory approach to learning and consistent praise and encouragement as well as speech-language therapy and OT services to support her social/emotional and regulatory needs (id. at pp. 7, 22).

With regard to the parents' claim that there were no specific goals addressing optical-motor skills, review of the IEP reveals an annual goal designed to improve the student's "fine and visual motor skills for greater success in the classroom" and provides short-term objectives that require the student to successfully complete a multi-directional maze with cues to stay within a given path, copy a five step picture, copy a multi-block design from a model, and complete an interlocking puzzle (Dist. Ex. 1 at p. 16). Further, even if the IEP had lacked an optical-motor annual goal, the present levels of performance reflected a report that the student had made great gains in visual perceptual/visual motor/graphomotor skills, demonstrating the ability to assemble a 24 piece

[14] To the extent the parents' allegation that the student required a more robust schedule to measure progress given her rate of progress arose from the testimony of the board certified behavior analyst (BCBA) from Yaldeinu, there is no indication in the hearing record that she participated in the October 2017 CSE meeting, and therefore, her opinion on this matter was not available to the October 2017 CSE (see Parent Ex. Q at p. 6; Dist. Ex. 2). Furthermore, review of the evidence in the hearing record does not otherwise support a finding that the student's progress toward her annual goals and short-term objectives needed to be assessed more frequently than once per month in order for her to receive a FAPE.

[15] As with the parents' goal measurability allegation, to the extent the parents' claim on appeal that the October 2017 IEP lacked sufficient social/emotional and self-regulation goals arose from the testimony of the Yaldeinu BCBA, as discussed above that opinion was not available to the October 2017 CSE, and the parents do not otherwise identify what student needs went unaddressed (see Parent Ex. Q at p. 6; Dist. Ex. 2).

puzzle with ease, copy a complex pegboard or parquetry design, and cut complex shapes on a line (id. at p. 5). At that time, the IEP indicated that she demonstrated "great" graphomotor skills and was able to print her own sentences with 90 percent accuracy in letter formation, sizing and spacing (id.). The IEP indicated the student needed continued work on improving her use of capitalization and punctuation and the CSE recommended that the student receive OT services to address these deficits (id. at pp. 5, 22). Additionally, an IEP does not need to identify annual goals for every one of a student's deficits in order to offer a FAPE (see R.B. v. New York City Dep't of Educ., 2013 WL 5438605, at *14 (S.D.N.Y. Sept. 27, 2013), aff'd, 589 Fed. App'x 572 (2d Cir. Oct. 29, 2014).

Based on the above, review of the evidence in the hearing record supports the IHO's determination that the annual goals on the student's October 2017 IEP were both measurable and specific, and any deficiency did not result in a denial of a FAPE to the student.

b. Special Factors: FBA and BIP

Next, the parents assert the IHO's rulings that the FBA was properly conducted and the BIP substantively sufficient were not based upon the totality of the evidence, but rather largely on her mischaracterizations of witness testimony, namely the Yaldeinu BCBA.

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 [2d Cir. Oct. 16, 2009]; A.C., 553 F.3d at 172; J.A. v. E. 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]; Application of a Student with a Disability, Appeal No. 09-101; Application of a Student with a Disability, Appeal No. 09-038; Application of a Student with a Disability, Appeal No. 08-028; Application of the Dep't of Educ., Appeal No. 07-120). 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., 2011 WL 1458100, at *1 [S.D.N.Y. Apr. 7, 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. v. Bedford Cent. Sch. Dist., 569 F. Supp. 2d 371, 380 [S.D.N.Y. 2008]; see also Schreiber v. E. Ramapo Cent. Sch. Dist., 700 F. Supp. 2d 529, 556 [S.D.N.Y. 2010] [noting that when defending a unilateral placement as appropriate under the IDEA, a parent in some circumstances may also be required to demonstrate that appropriate "supplementary aids and services" are provided to the student]).

In New York State, policy guidance explains that "the IEP must include a statement (under the applicable sections of the IEP) if the student needs a particular device or service (including an intervention, accommodation or other program modification) to address one or more of the following needs in order for the student to receive a [FAPE]" ("Guide to Quality Individualized Education Program [IEP] Development and Implementation, " at pp. 25-26, Office of Special

Educ. [Dec. 2010], available at http://www.p12.nysed.gov/specialed/publications/iepguidance/IEPguideDec2010.pdf). "The behavioral interventions and/or supports should be indicated under the applicable section of the IEP," and if necessary, "[a] student's need for a [BIP] must be documented in the IEP" (id. at p. 25). 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 in certain non-disciplinary situations (8 NYCRR 200.4[d][3][i], 200.22[a]-[b]). State regulations define 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]). Although State regulations call for the procedure of using an FBA when developing a BIP, the failure to comply with this procedure does not automatically render a BIP deficient (A.H. v. New York City Dep't of Educ., 2010 WL 3242234, at *2 [2d Cir. Aug. 16, 2010]).

The attendance page of the October 18, 2017 CSE meeting reflects that staff from Yaldeinu including two classroom teachers, a speech therapist, an occupational therapist, and the school director participated in the CSE meeting via telephone (Dist. Ex. 2 at p. 1; see Parent Ex. P at p. 1).[16] The October 2017 IEP indicated that the student required a BIP, noting that Yaldeinu reported that she screamed, yelled, threw objects, and had tantrums (Dist. Ex. 1 at p. 7). Accordingly, the hearing record shows that an FBA and a BIP were developed at the October 2017 CSE meeting and that the district staff who participated in their development were the district school psychologist and the special education teacher (Tr. pp. 70, 77-78, 81; Dist. Exs. 9; 10). The special education teacher testified that the "general practice" in developing BIPs at CSE meetings was that the BIP would have been prepared during an open discussion with the parent as well as the student's Yaldeinu teacher because she knew the student best, and that a lot of the information was taken from what the teacher said (Tr. pp. 70, 77, 92).

[16] The October 2017 CSE attendance form shows that the student's Yaldeinu classroom teacher's name was indicated on the line for the "Speech Teacher" (compare Dist. Ex. 2, with Parent Ex. P at p. 1; see Parent Exs. F; G at p. 1).

In her analysis of the district's FBA, the IHO referenced information regarding the cause of the student's behavior from the Yaldeinu BCBA's affidavit indicating that the student's behavior during the 2018-19 school year was a result of avoidance of nonpreferred tasks and her poor sensory regulation and rigidity, and compared it to the cause of behavior reflected in the district's October 2017 FBA, that the student exhibited behaviors when presented with a challenging task or when she had difficulty expressing herself (IHO Decision at p. 10; compare Parent Ex. Q at pp. 4-5, with Dist. Ex. 10 at p. 3). Although the IHO was not persuaded by the BCBA's rationales for the student's behavior, the BCBA's opinion regarding the cause of her behavior at the start of the 2018-19 school year was not available to the October 2017 CSE and as such, should not be used as a comparison when analyzing the appropriateness of the district's FBA (see IHO Decision at p. 10). Similarly, in her affidavit, the BCBA referred to the Yaldeinu BIP for the 2018-19 school year for a detailed description of the behaviors addressed, the multiple functions of those behaviors, and the strategies used to address them (Parent Ex. Q at pp. 4-5; see Parent Ex. J). Although the IHO determined that the student's Yaldeinu BIP was similar in some respects to the district's October 2017 BIP, a comparison of the two BIPs is not appropriate here, nor is any consideration of the Yaldeinu BIP for the 2018-19 school year, as there is no suggestion in the hearing record that the Yaldeinu BIP had been written at the time of the October 2017 CSE meeting or the information it included was available to that CSE for consideration (IHO Decision at pp. 10-11; see Parent Exs J; Q at pp. 4-5).[17] Therefore, an appropriate analysis of the adequacy of the district's October 2017 FBA and BIP is based on information that was available to the CSE at the time of the October 2017 meeting and the information included in the resultant documents (see Tr. pp. 70, 77; Dist. Exs. 1 at pp. 1, 4, 7; 9; 10).

Review of the October 2017 FBA shows that it included information from indirect data sources including staff interviews and the IEP present levels of performance, and identified the response class of the student's behaviors as aggressive behavior, consisting of screaming, yelling, grabbing objects, kicking and tantrums (Dist. Exs. 1 at pp. 1, 4, 7; 10 at pp. 1-2). According to the FBA, the student exhibited skill/performance deficits as an influencing factor (setting events that increased the likelihood of the problem behaviors) noting that the student displayed academic and social delays related to her diagnosis of autism (id. at p. 3). The FBA further reflected that the antecedents that occurred before and triggered the targeted behavior included when a demand or request was made of the student, a difficult task or a non-preferred activity was presented, and when the student was transitioning from a preferred to a non-preferred activity; noting that the student had difficulty expressing herself verbally and would display behaviors when she could not express her needs and wants (id.). The consequences immediately following the targeted problem behavior included providing the student with redirection and prompts to use her words (id.).

With regard to the function of the targeted behavior, the district's FBA indicated that the student gained sensory/stimulation and avoided/escaped a non-preferred activity/task or a difficult task (Dist. Ex. 10 at p. 4). The FBA indicated with regard to baseline data, that the student displayed behaviors across all domains and environments, approximately 10 times per day, for

[17] Although undated, the Yaldeinu BIP indicated that it was "Valid for: 2018-19 School Year" (Parent Ex. J). Additionally, the Yaldeinu BCBA testified that at the beginning of the 2016-17 school year she had conducted an FBA of the student and developed a corresponding BIP, which she had been "tracking and updating" "ever since"; however, she did not further describe the contents or results of that FBA and BIP, nor are those documents included in the hearing record in this matter (Parent Ex. Q at p. 2; see Parent Exs. A-R; Dist. Exs. 1-7, 9-10).

varied duration, with an intensity level indicating that the student's behavior could impact the entire class, with varied latency (id. at p. 4). Finally, the functional hypothesis stated in the FBA indicated that when the student was presented with a demand or task that she felt was challenging she would yell, scream, grab objects, kick or tantrum, within minutes, at an approximate rate of 10 times per week, varying in duration, and would then be given redirection and prompting to use her words in order to avoid nonpreferred tasks (id. at pp. 5-6).[18] The FBA reflected behavioral supports and interventions previously tried included that the student was prompted with words to express herself and was also taught proactive strategies to self-regulate, further noting that current behavioral supports and interventions included that the student was given a sensory diet to assist in regulation at her current school (id. at p. 6). The student's interests were reported to include participating in arts and crafts or any activity that is hands on; activities she found reinforcing or motivating included playing with dolls, blocks, stickers, and drawing activities; and activities she found non reinforcing included any activity where she was required to express herself verbally (id.). The FBA indicated that a replacement behavior that served the same function as the student's targeted behaviors included using her words to express her thoughts, needs, and frustrations (id. at p. 7). Lastly, the FBA also indicated that the student would be taught to use a checklist to assist her with words and activities as an alternative skill that would replace the targeted behavior (id.).

On appeal, the parents allege that the district's October 2017 FBA was not properly conducted and the IHO disregarded the BCBA's concerns that the district's FBA was based upon only indirect data, engaged in circular reasoning, and "conflated" setting events and antecedents (see IHO Decision at pp. 8-10; Tr. pp. 199-201, 203-04).[19] As to the first claim, the FBA was developed using staff interviews and information from the present levels of performance, which in turn were based on information from Yaldeinu, the student's then current learning environment in which the behaviors were occurring (Dist. Exs. 1 at pp. 1, 4, 7; 10 at p. 1). Review of the evidence in the hearing record supports the IHO's conclusion that Yaldeinu staff had previously conducted an FBA of the student and "taken data and developed an understanding of the [s]tudent's behaviors" such that it was "reasonable under the circumstances for the CSE to rely on the information provided from [Yaldeinu] in developing the FBA" (IHO Decision at p. 9; Parent Ex. Q at p. 2; Dist. Ex. 1 at pp. 1, 4, 7). Although the parents accurately recount that the district's FBA did not include direct sources of information, this fact alone does not provide sufficient reason to simply reject the FBA and then overturn the IHO's findings regarding the student's behavior and that the district offered the student a FAPE.

Next, the parents allege that the FBA engaged in circular reasoning, based upon the BCBA's testimony that the FBA was essentially stating "why is [the student] being aggressive, because she has autism. How do you know she has autism, because she's being aggressive," which "actually precludes the possibility of being able to determine why is the specific behavior

[18] The functional hypothesis in the FBA reflected that the student's behaviors occurred 10 times per week, whereas the baseline data section of the FBA reflected 10 times per day (Dist. Ex.10 at pp. 4, 6).

[19] The BCBA's point about the data is not well taken, because it suggests that the district personnel should have independently reached their own conclusions when formulating the FBA, which would run counter to the collaborative nature of the CSE process. More importantly, the private BCBA did not question that the data was taken or its accuracy, only the fact that information concerning the data was then relayed to the district participants indirectly when the CSE was discussing this topic. The CSE meeting participants, including the parents and Yaldeinu personnel, were the ones who were in the position to raise concerns about the data, if they had any.

happening" (Tr. p. 201). The student's autism diagnosis is not in dispute. As described above, the FBA identified that the student exhibited academic and social delays as well as difficulty expressing herself verbally (Dist. Ex. 10 at pp. 3, 5). While these difficulties may have arisen from her autism diagnosis, the FBA indicated that when presented with demands or challenging tasks, the consequence of those difficulties was that the student became anxious, could not verbalize her needs, and tried to avoid challenging tasks and transitions, resulting in aggressive behaviors (id. at pp. 1, 3, 5). Therefore, review of the FBA shows that it did provide a hypothesis as to why the student's target behavior occurred that was separate from her diagnosis of autism (id.).

The parents also assert on appeal that the FBA conflated setting events and antecedents. Review of the FBA shows that it identified setting events as influencing factors that increased the likelihood of targeted problem behaviors; for this student, her skill and performance deficits in the form of academic and social delays (Dist. Ex. 10 at p. 3). The FBA described antecedents as the situations, events, activities, and people that occur before and trigger the targeted problem behaviors (id.). For this student, the antecedents were identified as a demand of or request to the student, presentation of a difficult task or non-preferred activity, and transition from a preferred to a non-preferred activity (id.). The FBA further described the antecedents as that the student had difficulty expressing herself verbally and displayed behaviors when she could not express her needs and wants (id.). The BCBA testified that a setting event was a "slow trigger" and the antecedent was the "fast trigger or what happens right before the behavior" and therefore the BCBA's description was not inconsistent with the descriptions of those factors included in the FBA (compare Tr. pp. 203-04, with Dist. Ex. 10 at p. 3).

Notwithstanding that the district may not have fully complied with every aspect of the FBA procedures, the October 2017 FBA conformed with State regulations to the extent described above and any deficiency did not lead to a denial of a FAPE in this instance (see K.C. v. Chappaqua Cent. Sch. Dist., 2019 WL 6907533, at *14 [S.D.N.Y. Dec. 19, 2019]). Moreover, if the student returned to the district the CSE would be required to, if determined necessary, complete a new FBA to assess the student's behavior, taking into account the influences of a new and different environment on the student's behavior.

The CSE subsequently developed a BIP during the October 2017 CSE meeting (Dist. Ex. 9). With regard to a BIP, the special factor procedures set forth in State regulations further note that the CSE or CPSE "shall consider the development of a [BIP] for a student with a disability when: (i) the student exhibits persistent behaviors that impede his or her learning or that of others, despite consistently implemented general school-wide or classroom-wide interventions; (ii) the student's behavior places the student or others at risk of harm or injury; (iii) the CSE or CPSE is considering more restrictive programs or placements as a result of the student's behavior; and/or (iv) as required pursuant to" 8 NYCRR 201.3 (8 NYCRR 200.22[b][1]). Once again, "[i]f a particular device or service, including an intervention, accommodation or other program modification is needed to address the student's behavior that impedes his or her learning or that of others, the IEP shall so indicate" (8 NYCRR 200.22[b][2]). 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]). Neither the IDEA nor its implementing regulations require that the elements of a student's BIP be set forth in the student's IEP ("Student Needs Related to Special Factors," Office of Special Education [April 2011], available at http://www.p12.nysed.gov/specialed/formsnotices/IEP/training/QA-411.pdf). However, once a student's BIP is developed and implemented, "such plan shall be reviewed at least annually by the CSE or CPSE" (8 NYCRR 200.22[b][2]). Furthermore, "[t]he implementation of a student's [BIP] shall include regular progress monitoring of the frequency, duration and intensity of the behavioral interventions at scheduled intervals, as specified in the [BIP] and on the student's IEP. The results of the progress monitoring shall be documented and reported to the student's parents and to the CSE or CPSE and shall be considered in any determination to revise a student's [BIP] or IEP" (8 NYCRR 200.22[b][5]).

A review of the district's October 2017 BIP reveals that, consistent with the FBA, it identified the student's target behavior as aggressive behavior consisting of screaming, yelling, grabbing objects, kicking, and tantrums, and pursuant to State regulation, included the baseline measure of the behavior including the frequency (10 times per day), the duration (varied), the intensity of the behavior (that it could impact the entire class), and the latency or how long it takes for a behavior to begin after a specific verbal demand or event has occurred (varied) (compare Dist. Ex. 9 at pp. 1, 2, with Dist. Ex. 10 at pp. 1, 4). The intervention strategies to be used to alter antecedent events to prevent the occurrence of the behavior were that the student would be given a checklist, strategies, redirection and prompting to use her words, and the student would be taught proactive strategies to self-regulate as individual alternative and adaptive behaviors (Dist. Ex. 9 at p. 5). According to the BIP, the consequence for the targeted inappropriate behavior was that the student would be redirected and prompted to use her words, and the response to alternative acceptable behavior was that she would be allowed to choose an activity of her preference (id.).

The parents assert on appeal that the BIP conflated the setting events and antecedents. Without an indication of what section of the district's BIP she was referring to, the BCBA testified that the setting events and the antecedents were "listed as the same thing," an error that in her opinion would "cause confusion" resulting in difficulty developing "appropriate strategies" (Tr. pp. 203-04). However, as described above and with the exception of progress monitoring, the BIP included the requisite components pursuant to State regulations, including intervention strategies, and any perceived deficiency does not rise to the level of a denial of a FAPE in this instance (Dist. Ex. 9 at pp. 4-6).[20]

c. 6:1+1 Special Class Placement

The parents allege on appeal that the IHO ignored the "overwhelming weight" of the evidence in favor of "impermissible retrospective testimony" to determine that the 6:1+1 special class placement recommendation was appropriate to meet the student's needs.

[20] The progress monitoring section of the BIP was not completed, and therefore does not include a schedule to measure the effectiveness of the interventions provided in the BIP in accordance with State regulations (see Dist. Ex. 9 at pp. 5-6). However, the BIP otherwise conformed with State regulations to the extent described above and this insufficiency does not result in a denial of a FAPE (see K.C., 2019 WL 6907533, at *14).

As described in detail above, the October 2017 CSE relied on multiple sources of information, as well as a current district psychoeducational evaluation to determine the student's needs (Dist. Exs. 1 at pp. 1-6; 4). Based on the information before it, the CSE determined that the student exhibited deficits in the areas of cognition, academic achievement, expressive, receptive and pragmatic language skills, social interaction and play skills, sustaining focus and attention, sensory processing/self-regulation, ADL skills, and fine motor skills, which were reflected in detail in the present levels of performance and management needs in the IEP (Dist. Ex. 1 at pp. 1-7). The CSE also found that the student exhibited problem behaviors including tantrum behaviors, physical aggression such as hitting, slapping and throwing objects, elopement, resistance, noncompliance, and verbal refusal (id. at pp. 4, 7).

The October 2017 IEP reflects that the CSE considered both 12:1+1 and 8:1+1 special class placements in a specialized school, but rejected those options as it determined that the student "require[d] more intensive specialized instruction to address her educational needs" (Dist. Ex. 1 at p. 29). Consistent with the student's needs and State regulations, the October 2017 CSE recommended a 12-month 6:1+1 special class placement in a specialized school (id. at pp. 22-23, 27). 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]).

In conjunction with the supports inherent in a 6:1+1 special class, to address the student's needs related to sensory processing, emotional regulation, attention, fine and visual motor skills as well as ADL skills, the CSE recommended the student receive three 30-minute sessions per week of individual OT (Dist. Ex. 1 at p. 22). To address her needs related to expressive, receptive and pragmatic language skills, the CSE recommended the student receive three 30-minute sessions per week of individual speech-language therapy (id.).[21] As described above, to address her behavioral needs, the CSE also developed a BIP for the student (Dist. Exs. 1 at pp. 7; 9). Additionally, the CSE included in the IEP, management needs that the student needed in order to be successful, including a small class setting using a multisensory approach to lessons; the provision of clarification and paraphrasing of information to ensure understanding; review and repetition of learned concepts; consistent praise and encouragement; preferential seating, and breaking down of material and directions (Dist. Ex. 1 at p. 7).

In addition to the CSE's recommendation for placement in the small, highly structured environment provided in a 6:1+1 special class, related services of OT and speech-language therapy, and its provision of a BIP, the October 2017 CSE developed annual goals and short-term objectives to address the student's needs related to ELA, mathematics, writing, sensory processing, emotional regulation, fine and visual motor skills, ADL skills, and receptive, expressive and pragmatic language skills, as described above in detail (Dist. Ex. 1 at pp. 9-20). The IEP further provided the student with door to door special transportation services (id. at p. 26).

Furthermore, the special education teacher—who stated she was familiar with the district's specialized school program—testified that the CSE recommended a specialized school based upon

[21] The October 2017 CSE further recommended one 60-minute session per week for five weeks of group parent counseling and training (Dist. Ex. 1 at p. 22).

the Yaldeinu teacher's and related service providers' recommendations, and the test results that were provided for the meeting (Tr. pp. 58-59, 69). She stated that the CSE recommended a 6:1+1 special class placement because after relying on the documentation from the Yaldeinu progress reports, the CSE determined the student needed the "smallest environment" the district could provide (Tr. p. 66). The special education teacher indicated that at the time of the October 2017 CSE meeting, the team felt that a 6:1+1 special class would provide the student with "the best basis . . . to help her understanding of any academics that she would need and give her the support that she would need at the time" and that "that type of program with the related services would benefit [the student] . . . as a whole child," including academically as well as with regard to her behavior, speech, and self regulation (Tr. pp. 75-76).

To the extent the parents assert on appeal that the student could not "learn outside of a 1:1 setting" and the October 2017 IEP failed to mandate any 1:1 instruction within the 6:1+1 special class, the evidence the parents cite to for the unanimous opinion is dated well after the October 2017 CSE meeting (Req. for Rev. at p. 8; see Parent Exs. G at p. 1; H at p. 1; I at p. 1; Q at p. 6).[22] The special education teacher testified that the 6:1+1 special class placement in a specialized school would provide the student with individualized instruction in that it "specialize[d] in different types of strategies and techniques. And one of the techniques that [could] be employed would be an individualized type of setting when there's differentiating of instruction" (Tr. pp. 68-69). Additionally, the student's six sessions of individual related services during the week could be provided "in or out of [the] classroom" (Dist. Ex. 1 at p. 22). The special education teacher stated she was aware that Yaldeinu "usually" provided students with 1:1 instruction and further opined that a 1:1 instructional setting was "so restricting to the child" and that the student had "a lot of social-emotional issues, and to just have her one-on-one with a person all day [] would not be beneficial for her, social-emotionally" (Tr. pp. 88, 102-03). According to the special education teacher, the CSE felt that, based upon the student's testing and social/emotional concerns, that 1:1 instruction would not be beneficial for her and that "she did not need that" (Tr. p. 103). In describing how a 6:1+1 special class placement was implemented, the special education teacher stated that because of the pull-out services other students in the special class received, the likelihood of the student being in the classroom with six students "all the time" was "highly unlikely" and that the ratio was "always smaller" (Tr. pp. 103-04). The 6:1+1 special class placement would have provided the student with the sense of being in the classroom with her peers and learning from them (Tr. p. 104). The special education teacher also testified that teachers and paraprofessionals in the specialized school were "specially trained" and that the program "incorporate[d] so many different types of strategies and units" and that there was "always collaboration" such that the 6:1+1 special class was an appropriate placement (Tr. pp. 69-70, 104). The parents correctly point out that the district cannot rely on after-the-fact testimonial evidence that a specific amount of time for 1:1 instruction would in fact be provided to the student because, there is no question that parents are permitted to rely upon IEPs as written, thus there is no guarantee that the student would receive a fixed amount of 1:1 instructional time under the October 2017 IEP. However, the district is permitted to demonstrate and the evidence also shows how a 6:1+1 special class and related services contained in the October 2017 IEP would work for the student, that is, all activities were not conducted strictly in a 6:1+1 ratio and that there would be

[22] In their request for review, the parents admit that at the time they decided to reject the public school placement the district offered, they were aware that the student would have received 40-60 minutes per day of 1:1 instruction at the public school the student was assigned to attend for the 2017-18 school year (Req. for Rev. at p. 8).

significant opportunities for the teacher and aide to work with the student on an individual or two-student basis in a class that was already small to begin with. Instead, it appears that the CSE was aware that the student received 1:1 instruction at Yaldeinu; however, determined that her needs could be sufficiently met within the 6:1+1 special class setting with the additional supports and services the IEP provided, and that it was the CSE's preferred approach to try working with this student in a ratio other than 1:1 instruction. The fact that there were differing opinions on the best approach to work with the student does not itself lead to the conclusion that the October 2017 IEP was deficient because it failed to adopt the parents' or private school's preferred approach that the student must be educated in a 1:1 ratio.

Accordingly, based on the above, I find that there is insufficient evidence in the hearing record to overturn the IHO's finding that the October 2017 CSE's recommendation of a 6:1+1 special class in a specialized school was reasonably calculated to provide the student with educational benefits.

d. ABA Methodology

With regard to the next issue, the parents argue that the IHO erred when she determined that the October 2017 IEP was not required to include a mandate for instruction using ABA.

The precise teaching methodology to be used by a student's teacher is usually a matter to be left to the teacher's discretion—absent evidence that a specific methodology is necessary (Rowley, 458 U.S. at 204; R.B. v. New York City Dep't of Educ., 589 Fed. App'x 572, 575-76 [2d Cir. Oct. 29, 2014]; A.S. v. New York City Dep't of Educ., 573 Fed. App'x 63, 66 [2d Cir. July 29, 2014]; K.L. v. New York City Dep't of Educ., 530 Fed. App'x 81, 86 [2d Cir. July 24, 2013]; R.E., 694 F.3d at 192-94; M.H., 685 F.3d at 257). As long as any methodologies referenced in a student's IEP are "appropriate to the [student's] needs," the omission of a particular methodology is not necessarily a procedural violation (R.B., 589 Fed. App'x at 576 [upholding an IEP when there was no evidence that the student "could not make progress with another methodology"], citing 34 CFR 300.39[a][3] and R.E., 694 F.3d at 192-94).

However, where the use of a specific methodology is required for a student to receive an educational benefit, the student's IEP should so indicate (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]). If the evaluative materials before the CSE recommend a particular methodology, there are no other evaluative materials before the CSE that suggest otherwise, and the school district does not conduct any evaluations "to call into question the opinions and recommendations contained in the evaluative materials," then, according to the Second Circuit, there is a "clear consensus" that requires that the methodology be placed on the IEP notwithstanding the testimonial opinion of a school district's CSE member (i.e. school psychologist) to rely on a broader approach by leaving the methodological question to the discretion of the teacher implementing the IEP (A.M. v. New York City Dep't of Educ., 845 F.3d 523, 544-45 [2d Cir. 2017]). The fact that some reports or evaluative materials do not mention a specific teaching methodology does not negate the "clear consensus" (R.E., 694 F.3d at 194).

As discussed above, the October 2017 IEP was based on the information that was in front of the CSE at the time of the October 2017 CSE meeting (see Tr. pp. 66-67; Dist. Exs. 3 at p. 2;

4). The parents maintain that those with personal knowledge of the student opined that she required instruction based in ABA to learn; however, they cite to documents which were dated well after the October 2017 IEP was developed (Req. for Rev. at p. 9). Specifically, the parents cite to a June 2019 educational progress report, a May 2019 speech-language annual report, a May 2019 OT progress report, affidavits by the student's father and mother dated April 27, 2020, an affidavit by the student's BCBA dated May 20, 2020, and a May 21, 2020 affidavit by the student's supervising occupational therapist (Req. for Rev. at p. 9; see Parent Exs. G at p. 1; H at p. 1; I at p. 1; O at pp. 1, 3; P at p. 1; Q at pp. 1, 6; R at pp. 1, 6). These documents were not available to the October 2017 CSE and as such, did not shed light on the student's need for ABA at the time of the October 2017 CSE meeting.

However, a review of the October 2017 IEP present levels of performance shows that multiple reports from the private school, dated just a few months before the meeting (May and June 2017), as well as teacher input reported during the meeting, were used to develop the student's IEP (Dist. Ex. 1 at pp. 1-6). As described in detail above, there is nothing in the description of the student's needs in the present levels of performance that indicated that the student required only ABA methodology in order to receive educational benefit (see id.), and the parents do not contend that those reports included other information to the contrary. The special education teacher testified that specialized school programs usually employ different types of strategies, including ABA, but that if staff feel that a student would benefit from a different type of program, that opportunity is available to incorporate different types of strategies (Tr. pp. 74-75). Additionally, the IEP provides for a BIP to address the student's behavior needs, and to meet her learning needs, a multisensory approach to lessons, clarification and paraphrasing of information to ensure understanding, review and repetition of learned concepts, consistent praise and encouragement, preferential seating, and breaking down of material and directions (Dist. Ex. 1 at p. 7). As stated above, absent some specific evidence that a particular methodology is necessary to the exclusion of other methodological approaches used by teachers, the CSE is not required to include a methodology on a student's IEP. The mere fact that the parents have placed their daughter in private schooling that employs a specific methodology—and now argue after the fact that the public school is required to defer to Yaldeinu personnel because they "know the student best"—is not a sufficient basis to require the public school staff to adopt the methodological preferences of her private teachers, especially when there is no evidence that the public school's approach has even been attempted. Based on the information about the student's skills and needs in the October 2017 IEP, the evidence in the hearing record supports the IHO's finding that at the time of the October 2017 CSE meeting, "there was no reason to suppose that ABA [was] the only approach" that was appropriate for the student (IHO Decision at p. 12).

3. Assigned Public School

The parents assert that the IHO erred in finding that the district sufficiently showed that the assigned public school site was capable of implementing the October 2017 IEP, because the district's witness on this issue lacked personal knowledge about the assigned school during the relevant time period.

Generally, the sufficiency of the program offered by the district must be determined on the basis of the IEP itself (R.E., 694 F.3d at 186-88). The Second Circuit has explained that "[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 E.H. v. New York City Dep't of Educ.,

2015 WL 2146092, at *3 [2d Cir. May 8, 2015]; R.B. v. New York City Dep't of Educ., 2015 WL 1244298, at *3 [2d Cir. Mar. 19, 2015] ["declining to entertain the parents' speculation that the 'bricks-and-mortar' institution to which their son was assigned would have been unable to implement his IEP"], quoting T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 419 [2d Cir. 2009]; R.B. v. New York City Dep't of Educ., 589 Fed. App'x 572, 576 [2d Cir. Oct. 29, 2014]).[23] However, a district's assignment of a student to a particular public school site must be made in conformance with the CSE's educational placement recommendation, and the district is not permitted to deviate from the provisions set forth in the IEP (M.O. v. New York City Dep't of Educ., 793 F.3d 236, 244 [2d Cir. 2015]; R.E., 694 F.3d at 191-92; T.Y. 584 F.3d at 419-20; see C.F., 746 F.3d at 79 [holding that while parents are entitled to participate in the decision-making process with regard to the type of educational placement their child will attend, the IDEA does not confer rights on parents with regard to the selection of a school site]). The Second Circuit has held that claims regarding an assigned school's ability to implement an IEP may not be speculative when they consist of "prospective challenges to [the assigned school's] capacity to provide the services mandated by the IEP" (M.O., 793 F.3d at 245; see Y.F. v. New York City Dep't of Educ., 2016 WL 4470948, at *2 [2d Cir. Aug. 24, 2016]; J.C. v. New York City Dep't of Educ., 643 Fed. App'x 31, 33 [2d Cir. 2016]; B.P. v. New York City Dep't of Educ., 634 Fed. App'x 845, 847-49 [2d Cir. 2015]). Such challenges must be "tethered" to actual mandates in the student's IEP (see Y.F., 2016 WL 4470948, at *2). Additionally, the Second Circuit indicated that such challenges are only appropriate, if they are evaluated prospectively (as of the time the parent made the placement decision) and if they were based on more than "mere speculation" that the school would not adequately adhere to the IEP despite its ability to do so (M.O., 793 F.3d at 244). In order for such challenges to be based on more than speculation, a parent must allege that the school is "factually incapable" of implementing the IEP (see Z.C. v. New York City Dep't of Educ., 2016 WL 7410783, at *9 [S.D.N.Y. Nov. 28, 2016]; L.B. v. New York City Dept. of Educ., 2016 WL 5404654, at *25 [S.D.N.Y. Sept. 27, 2016]; G.S. v. New York City Dep't of Educ., 2016 WL 5107039, at *15 [S.D.N.Y. Sept. 19, 2016]; M.T. v. New York City Dep't of Educ., 2016 WL 1267794, at *14 [S.D.N.Y. Mar. 29, 2016]). Such challenges must be based on something more than the parent's speculative "personal belief" that the assigned public school site was not appropriate (K.F. v. New York City Dep't of Educ., 2016 WL 3981370, at *13 [S.D.N.Y. Mar. 31, 2016]; Q.W.H. v. New York City Dep't of Educ., 2016 WL 916422, at *9 [S.D.N.Y. Mar. 7, 2016]; N.K. v. New York City Dep't of Educ., 2016 WL 590234, at *7 [S.D.N.Y. Feb. 11, 2016]).

Although review of the parents' claim that the assigned public school site was incapable of implementing the student's program shows that it is not tethered to any specific mandate in the October 2017 IEP, review of the evidence in the hearing record does not support even a general claim regarding the district's ability to implement the IEP. The unit coordinator from the public school the student was assigned to attend during the 2018-19 school year testified that unit

[23] The Second Circuit has held that a district's assignment of a student to a particular public school site is an administrative decision that must be made in conformance with the CSE's educational placement recommendation, and the district is not permitted to deviate from the provisions set forth in the IEP (R.E., 694 F.3d at 191-92; T.Y. 584 F.3d at 419-20; see C.F. v. New York City Dep't of Educ., 746 F.3d 68, 79 [2d Cir. 2014] [holding that while parents are entitled to participate in the decision-making process with regard to the type of educational placement their child will attend, the IDEA does not confer rights on parents with regard to the selection of a school site]). The district is required to implement the IEP and parents are well within their rights to compel a non-compliant district to adhere to the terms of the written plan (20 U.S.C. §§ 1401[9][D]; 1414[d][2]; 34 CFR 300.17[d]; 300.323; 8 NYCRR 200.4[e]).

coordinators "run the day-to-day operations at the site" (Tr. pp. 106-07). During the 2018-19 school year the unit coordinator explained that she worked for a public school that had multiple physical sites, and that with respect to the student, her work location was within the same school but at a different site from the particular location that the student had been assigned to (Tr. pp. 123-24). However, the unit coordinator testified that "[t]he way that unit coordinators work is that they're actually part of a larger group of quasi-administrators. So we are assigned to one site but work within all of the sites" (Tr. pp. 124, 126). She further stated that the testimony she provided regarding how the student's assigned site would have implemented the October 2017 IEP was based on her knowledge of that particular location for the 2018-19 school year (Tr. p. 124). According to the unit coordinator, there was a 6:1+1 special class consisting of students in third through fifth grade available for the student at the assigned site at the start of the 2018-19 school year, and upon review of the IEP, she testified that it could have been implemented at the assigned site (Tr. pp. 116, 135-37). Neither the evidence in the hearing record nor the parents' broad speculation that the public school would not adhere to the mandates of the October 2017 IEP provide a basis to conclude that the district denied the student a FAPE on this issue.

Additionally, although the parents asserted in their due process complaint notice that the district's proposed program could not provide the student with a "suitable and functional peer group," this claim did not carry forward to the parents' request for review as there, the parents used the term "group" differently, for example, stating that the IHO incorrectly found that the student could be "appropriately educated in a group of 2" and stating in their memorandum of law that the "IHO's conclusion that 'instruction…provided in a 1:1 or 2:1 grouping for literacy and math' would be sufficient is flawed."

Neither the IDEA nor federal regulations require students who attend a special class setting to be grouped in any particular manner. The United States Department of Education has opined that a student must be assigned to a class based upon his or her "educational needs as described in his or her IEP" and not on "a categorical placement," such as one based on the student's disability category (Letter to Fascell, 18 IDELR 218 [OSEP 1991]). While unaddressed by federal law and regulations, State regulations set forth some requirements that school districts must follow for grouping students with disabilities. In particular, State regulations provide that in many instances the age range of students in a special education class in a public school who are less than 16 years old shall not exceed 36 months (8 NYCRR 200.6[h][5]). State regulations also require that in special classes, students must be suitably grouped for instructional purposes with other students having similar individual needs (8 NYCRR 200.1[ww][3][ii]; 200.6[a][3], [h][3]; see Walczak, 142 F.3d at 133 [approving an IEP that placed a student in a classroom with students of different intellectual, social, and behavioral needs, where sufficient similarities existed]).[24] State regulations further provide that determinations regarding the size and composition of a special class shall be based on the similarity of the individual needs of the students according to levels of academic or educational achievement and learning characteristics, levels of social development, levels of physical development, and the management needs of the students in the classroom (see 8 NYCRR 200.6[h][2]; see also 8 NYCRR 200.1[ww][3][i][a]-[d]). SROs have often referred to grouping in the areas of academic or educational achievement, social development, physical development, and management needs collectively as "functional grouping" to distinguish that set

[24] To be clear, there is no requirement in the IDEA or State regulation requiring that grouping be conducted in accordance with a student's chronological grade.

of requirements from grouping in accordance with age ranges (see, e.g., Application of a Student with a Disability, Appeal No. 17-026).

As noted above, permissible prospective challenges must be "'tethered' to actual mandates in the student's IEP" (Y.F., 659 Fed. App'x at 5); the parents "must allege that the school is 'factually incapable' of implementing the IEP" to be considered "more than speculation" (see, e.g., M.E., 2018 WL 582601, at *12); and such challenges "must be based on something more than the parents' speculative 'personal belief' that the assigned public school site was not appropriate" (see, e.g., K.F., 2016 WL 3981370, at *13). Given these parameters, even if the parents' alleged violation related to functional grouping had been included as a claim in the request for review, it does not fall within the permissible prospective challenges to a district's capacity to implement the October 2017 IEP, as the issue is neither tethered to actual mandates in the IEP, nor does the issue rise to "more than speculation" that the district was factually incapable of implementing the October 2017 IEP, thus this issue will not be addressed further.

4. November 2018 IEP

Having determined that the evidence in the hearing record shows that the October 2017 IEP offered the student a FAPE until its expiration in October 2018, I next turn to subsequent events. The evidence shows that a second IEP was developed in November 2018 that covered the remainder of the 2018-19 school year. Indeed, it was the operative IEP during much of the time for which the parents seek reimbursement and they clearly and correctly challenged the November 2018 IEP in their due process complaint notice, especially since the parents were seeking reimbursement for the entire 2018-19 school year, which spanned two different IEPs. Consequently, the events during the impartial hearing described below regarding the outcome of those claims is somewhat mystifying.

The hearing record shows that the CSE convened on November 28, 2018 for the student's annual review and to develop an IEP for the remainder of the 2018-19 school year (Dist. Exs. 6; 7 at p. 2). The November 2018 CSE continued to recommend that the student receive instruction in a 6:1+1 special class placement in a specialized school together with three 30-minute sessions per week of individual OT and three 30-minute sessions per week of individual speech-language therapy (compare Dist. Ex. 1 at p. 22, with Dist. Ex. 5 at p. 14). In their April 4, 2019 due process complaint notice, the parents alleged that the November 2018 IEP was "insufficient and inappropriate" to meet the student's needs, and specifically alleged numerous procedural and substantive violations (see Parent Ex. A at pp. 3-5).

The hearing transcript shows that on the third day of the impartial hearing the district called its first witness, the school psychologist who had attended the November 2018 CSE meeting and served as the district representative (see Tr. pp. 28, 31; see Dist. Ex. 6). However, as counsel for the district began to question the school psychologist about what had occurred at the November 2018 meeting, the IHO stated that she was "a little confused about this witness' relevance" and asked whether the relevant information was that which was discussed during the October 2017 CSE meeting, as that was related to the IEP in effect prior to the time the parents made the decision to place the student at Yaldeinu; ultimately allowing the witness to continue (see Tr. pp. 31-34). The witness proceeded to discuss the recommendations contained in the November 2018 IEP until counsel for the parents raised an objection to the witnesses' relevance, arguing that the district's obligation was to demonstrate that it offered a FAPE for the start of the 2018-19 school year and

questioning whether what was discussed at the November 2018 CSE meeting was "necessary for this impartial hearing" (Tr. pp. 34-36). A discussion on the record ensued, during which the IHO opined to the district's attorney that "the relevant information is from the 2017/2018 IEP meeting" and that "I think the witness that you need is from that original IEP meeting" (Tr. pp. 36-38). The IHO clarified that she would not prevent the district's attorney from questioning the school psychologist, but that "if you are asking to put on the correct witness on a different day, I'm going to allow that because I think that we need the correct witness" (Tr. pp. 38-39). Counsel for the district responded that the IHO allowance for the district "to put the witness on that was part of the 2017 IEP" was greatly appreciated and she decided to "reconvene with the other witness" (Tr. p. 39). At that point, the parties agreed to adjourn the hearing and the school psychologist did not testify further; nor did the district present witnesses to testify about the November 2018 IEP for the remainder of the impartial hearing (see Tr. pp. 39-220).

Thus, the hearing record includes the November 2018 IEP and CSE attendance page, and the October 2017 psychoeducational evaluation report that the November 2018 CSE relied upon (see Dist. Exs. 5; 6; 7 at pp. 2-3). However, first the IHO—and then even more critically—the parents' attorney began to impede the development of the hearing record by actively challenging the need for the district to go into matters relevant to the adequacy of the November 2018 IEP, or for that matter, the procedural processes by which the November 2018 IEP was developed by the CSE (see Parent Ex. A at pp. 3-5). Consistent with their strategy at the impartial hearing, which essentially functioned like a withdrawal of their claims regarding the November 2018 CSE meeting and IEP, the parents appear to have purposefully confined their claims of IHO error and reimbursement relief for the entire 2018-19 school year to just those matters related to the October 2017 CSE meeting and the single IEP resulting therefrom. Although I might have employed different reasoning in this situation than the parents or the IHO, it is not my decision to choose which claims should be advanced on the parents' behalf and review of the November 2018 CSE meeting and resulting IEP has now been foreclosed. Consequently, the parents' claims seeking reimbursement for Yaldeinu for the 2018-19 school year must fail because, like the IHO, I have concluded that the district did not deny the student a FAPE with respect to the October 2017 CSE meeting, the resulting IEP, or the parents' speculative claim that the district would have been incapable of implementing that IEP.

C. Unilateral Placement

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

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

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

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

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

Although the IHO determined that the October 2017 IEP offered the student a FAPE, in her decision she went on to consider the appropriateness of the student's Yaldeinu program, which is a wise choice if time permits in light of the fact that the parties may seek further review (IHO Decision at p. 13). After discussing the unilateral placement's sole use of instruction based on ABA principles and her concerns about whether it provided sufficient speech-language therapy and instruction in conceptual learning, the IHO ultimately concluded that the student's program at Yaldeinu "appear[ed] to be providing instruction in a setting which allow[ed] for progress in academic areas" such that it was appropriate (id.). Review of the evidence in the hearing record does not provide sufficient basis to overturn the IHO's finding regarding the appropriateness of Yaldeinu, and, more importantly, as the district has not appealed from the IHO's determination that Yaldeinu was an appropriate unilateral placement for the student for the 2018-19 school year, that issue has become final and binding upon the parties (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; 279.8[c][4]).

D. Equitable Considerations

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

Reimbursement may be reduced or denied if parents do not provide notice of the unilateral placement either at the most recent CSE meeting prior to their removal of the student from public school, or by written notice ten business days before such removal, "that they were rejecting the placement proposed by the public agency to provide a [FAPE] to their child, including stating their concerns and their intent to enroll their child in a private school at public expense" (20 U.S.C. § 1412[a][10][C][iii][I]; see 34 CFR 300.148[d][1]). This statutory provision "serves the important purpose of giving the school system an opportunity, before the child is removed, to assemble a team, evaluate the child, devise an appropriate plan, and determine whether a [FAPE] can be provided in the public schools" (Greenland Sch. Dist. v. Amy N., 358 F.3d 150, 160 [1st Cir. 2004]). Although a reduction in reimbursement is discretionary, courts have upheld the denial of reimbursement in cases where it was shown that parents failed to comply with this statutory provision (Greenland, 358 F.3d at 160; Ms. M. v. Portland Sch. Comm., 360 F.3d 267 [1st Cir. 2004]; Berger v. Medina City Sch. Dist., 348 F.3d 513, 523-24 [6th Cir. 2003]; Rafferty v. Cranston Public Sch. Comm., 315 F.3d 21, 27 [1st Cir. 2002]); see Frank G., 459 F.3d at 376; Voluntown, 226 F.3d at 68).

Review of the IHO's decision shows that the IHO did not address equitable considerations (see generally, IHO Decision). Because she found that the district offered the student a FAPE, contrary to the parents' assertions, it was not error for the IHO to bring her decision to a close without making all possible alternative findings, such as findings on equitable considerations. Courts routinely take this approach after addressing all of the FAPE claims and finding in favor of a school district (M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 66 [2d Cir. 2000] [noting "[o]nly if a court determines that a challenged IEP was inadequate should it proceed to the second question"]). Notwithstanding that point, and in the event it is helpful, I conclude, in the alternative, that the evidence in the hearing record as a whole shows that the parents attended and provided input at the October 2017 CSE meeting, identified concerns and provided advance notice to the

district that they intended to place the student at Yaldeinu for the 2018-19 school year and seek reimbursement at public expense, participated in the November 2018 CSE meeting, subsequently toured the assigned public school site, and timely notified the district about their concerns with both the November 2018 IEP and the assigned school, and that the student would remain at Yaldeinu for the remainder of the 2018-19 school year (Parent Exs. B; D; O; Dist. Exs. 2; 6).[25] The district asserts no argument to the contrary, and the evidence in the hearing record would not provide a basis to reduce or deny the parents' requested tuition reimbursement relief for the student's attendance at Yaldeinu during the 2018-19 school year if the issue of reimbursement turned on equitable considerations.

VII. Conclusion

The evidence in the hearing record supports the IHO's determination that the district offered the student a FAPE for the first portion of the 2018-19 school year, and that further consideration of the November 28, 2018 CSE meeting and resultant IEP that covered the remainder of the 2018-19 school year was forestalled by the parties and the IHO and arguments thereon were not advanced in this appeal.

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

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
November 18, 2020

JUSTYN P. BATES
STATE REVIEW OFFICER

[25] The January 24, 2018 date on the letter from the parents to the district advising of their rejection of the November 2018 IEP appears to be in error based upon the dates contained in the letter and as the fax journal report shows it was successfully sent on January 25, 2019 (see Parent Ex. D at pp. 1, 3).