



The University of the State of New York

The State Education Department

State Review Officer

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No. 21-073

Application of a STUDENT WITH A DISABILITY, by his parents, for review of a determination of a hearing officer relating to the provision of educational services by the NEW YORK CITY DEPARTMENT OF EDUCATION

Appearances:

Thivierge & Rothberg, P.C., attorneys for petitioners, by Randi M. Rothberg, Esq.

Judy Nathan, Interim Acting General Counsel, attorneys for respondent, by Theresa Crotty, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioners (the parents) appeal from the decision of an impartial hearing officer (IHO) which denied their request to be reimbursed for their son's tuition costs at Yeshiva Prep High School (Yeshiva Prep) for the 2019-20 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 student attended Sinai Academy located within Kushner Hebrew Academy for fifth through eighth grades (see Parent Ex. G at p. 1). He entered Yeshiva Prep as a ninth-grade student at the start of the 2017-18 school year (Parent Ex. R at p. 2).¹ The student's diagnoses include attention deficit hyperactivity disorder (ADHD), for which he took prescribed medication, an

¹ The principal of Yeshiva Prep described the school as a small special education program for students in grades 9-12 (Parent Ex. R at p. 1). For the 2019-20 school year, approximately 27 students attended the Yeshiva Prep program (id. at p. 3).

anxiety disorder, and specific learning disorders with impairments in reading, math, and written expression (Parent Exs. C at pp. 1, 4; G at p. 6; K at p. 1; Q at p. 1; R at p. 3).

A CSE convened on March 19, 2019 for an annual review, and found the student remained eligible for special education as a student with an other health impairment, (Parent Ex. C at pp. 1, 11, 13).² In attendance at the March 2019 CSE meeting were a district special education teacher, a district social worker who served as the district representative, a district school psychologist, and the student's father and an associate principal from Yeshiva Prep who both participated via telephone (*id.* at p. 13; Dist. Ex. 4 at p. 1). In order to identify the student's needs and then-current performance, the CSE considered a December 2016 neuropsychological report, noted the student's diagnoses, included a report of a parent interview from a vocational assessment, and reviewed February 2019 school provider reports (Parent Ex. C at pp. 1-3). The March 2019 CSE recommended a 10-month 15:1 special class placement in a community school for five periods per week for each core academic subject, including: mathematics, ELA, social studies, and science (*id.* at p. 8). In addition, the CSE recommended related services, including: two 30-minute individual sessions per week of counseling and one 30-minute individual session per week of occupational therapy (OT) (*id.*). The March 2019 CSE identified the student's management needs "based on parent, teacher, and team discussion" (*id.* at p. 4). The CSE detailed post-secondary goals and the student's transition needs in the recommended IEP, as well as counseling, mathematics, ELA, and transitional and OT annual goals (*id.* at pp. 5-7). Additionally, the March 2019 CSE recommended several testing accommodations, a coordinated set of transition activities, and noted that the student "may be mainstreamed for all other subjects at the school's discretion" (*id.* at pp. 9-11).

The March 2019 CSE meeting minutes, dated March 19, 2019, summarized the meeting content, identified the attendees, and included the recommendations for special education services (Dist. Ex. 4 at p. 1). The district's prior written notice and school location letter, both dated May 22, 2019, included the March 2019 CSE's recommendations for the student for the 2019-20 school year as well as the location of the school the student was assigned to attend (Dist. Ex. 5 at pp. 1-5).

On July 31, 2019, the parents enrolled the student at Yeshiva Prep for the 2019-20 school year (Parent Ex. M).

² Each party submitted its own copy of the March 2019 IEP into evidence (Parent Ex. C; Dist. Ex. 2). The IEPs submitted into the hearing record indicated the date of the CSE meeting was February 27, 2019; however, both attendance sheets indicated the CSE meeting date as March 19, 2019 (compare Parent Ex. C at p. 11; Dist. Ex. 2 at pp. 18, 19, with Parent Ex. C at p. 13; Dist. Ex. 7). In the district's prior written notice, the date of the CSE meeting is indicated as February 27, 2019, while the district's CSE meeting minutes are dated March 19, 2019 (Dist. Exs. 4 at p. 1; 5 at p. 1). Further, the representative for the district during the hearing, noted the date of the IEP meeting as March 19, 2019 (Tr. pp. 18, 104). In the student's father's affidavit, he noted that he participated in the March 2019 CSE meeting to develop the student's IEP for the 2019-20 school year (Parent Ex. Q at p. 1). For purposes of this decision, the CSE meeting date and its resulting IEP will be referred to as the March 2019 CSE meeting or March 2019 IEP. Additionally, for purposes of this decision, only parent exhibits are cited in instances where both a parent and district exhibit are identical or similar, unless the district's exhibit is more legible or complete.

In a letter to the district, dated August 16, 2019, the student's father indicated that he had reached out to the assigned school and left messages for the parent coordinator to try to set up a time to visit but had not heard back from the assigned school (Parent Ex. E at p. 1). He further indicated that he would continue to follow up with the high school, including when school resumed in September, if he was unable to reach anyone before then (id.). Additionally, the student's father notified the district that, until he was able to visit the assigned school and determine whether it was appropriate for the student, the student would continue to attend Yeshiva Prep for the 2019-20 school year and the parents reserved the right to look to the district for the tuition, costs, and expenses of the student's programming and services (id.). The parent further requested special education transportation for the student (id.).

In a letter to the district dated October 7, 2019, the parents informed the district that the student's father visited the assigned school, met with the assistant principal of instructional support services, and observed a 15:1 special class (Parent Ex. F at p. 1). The letter indicated that based on their visit, the parents did not believe that the district's program and placement were appropriate for the student and they did not wish to accept a spot for the student at the assigned school for the 2019-20 school year (id.). First, the parents asserted that the student would not receive the level of individualized and small group instruction that he required in the 15:1 special class (id.). In doing so they noted that the student frustrated easily and could lose his focus and attention quickly during academic instruction and that he needed reminders, prompts and other supports "during his work" (id.). The parents noted that the other students in the 15:1 special class had varying levels of special education needs, abilities, and classifications and went on to opine that the class was too large for the student and the program would not be able to address all of his management needs (id. at pp. 1-2). The parents further expressed that the size of the assigned school, as well as the number of students in it, would overwhelm the student (id. at p. 2). In addition, the parents expressed concern that the assigned school would not have sufficient behavioral supports for the student, noting that the district did not develop a behavioral intervention plan (BIP) for the student, and indicating that the assigned school "used quiet rooms (time out rooms) for students" who were upset, which would be insufficient for the student "who could become even more upset and frustrated in a quiet room" (id.). The parents indicated that subject to an appropriate recommendation from the district, the student would remain at Yeshiva Prep for the 2019-20 school year and the parents reserved the right to look to the district for tuition, costs, and expenses of the student's programming, as well as, special education transportation (id.).

The student attended Yeshiva Prep for the 2019-20 school year (Parent Exs. H; I; L).

A. Due Process Complaint Notice

In a due process complaint notice dated May 5, 2020, the parents alleged that the district failed procedurally and substantively to offer the student a free appropriate public education (FAPE) for the 2019-20 school year; that Yeshiva Prep was an appropriate unilateral placement for the student for the 2019-20 school year; and that there were no equitable considerations that would preclude or diminish any award to the student or his family (Parent Ex. A at pp. 1-2).

The parents requested that the district pay for the student's pendency placement at Yeshiva Prep based on an unappealed April 4, 2020 IHO decision, which found the student's program at Yeshiva Prep appropriate for the student for the 2017-18 school year and ordered the district to

pay for 85% of the costs of the student's tuition (representing the nonreligious portion of his schedule) (Parent Ex. A at p. 2; see Parent Ex. B).

Next, the parents listed a number of procedural and substantive allegations that the parents contended denied the student a FAPE (Parent Ex. A at pp. 3-5). The parents alleged that the CSE was not properly composed, noting that a proper district representative was not present and that a regular education teacher should have been present as the CSE was considering integrated co-teaching services for the student (id. at p. 3). The parents asserted that the district failed to conduct updated assessments including any age-appropriate transition assessments and failed to fully and accurately report the student's present levels of performance and individual needs (id.). In addition, the parents alleged that the district failed to consider the full continuum of programming for the student including continued placement at Yeshiva Prep and that the district failed to conduct a functional behavioral assessment (FBA), develop a behavioral intervention plan (BIP), or offer sufficient behavioral supports, services and strategies (id. at pp. 3-4). The parents stated that the district's recommendation for a 15:1 special class was inappropriate and insufficient, was recommended without regard for the student's individual needs, and would be too large and unsupportive (id. at p. 4). The parents further claimed that the district's program would not be able to implement all of the management needs listed in the proposed IEP, that the management needs were vague and insufficient, and that the district failed to offer the student sufficient supports and services (id.). Additionally, the parents asserted that the student's post-secondary goals were vague, not objectively measurable, and insufficient, and that the statement of transition needs was also vague and insufficient (id.). The parents alleged that the March 2019 IEP lacked sufficient goals for the student, that the academic goals were limited to mathematics and ELA, that the IEP lacked goals in key areas of need for the student, and that many of the goals were vague, not objectively measurable, or inappropriate (id.). The parents further contended that the CSE failed to offer the parents any parent counseling and training; that the IEP lacked any supports for school personnel on the student's behalf; that the coordinated set of transition activities was vague and insufficient; and that the CSE failed to recommend any special education transportation (id. at pp. 4-5). The parents stated that the March 2019 IEP lacked information about promotion criteria; that the CSE failed to meaningfully consider the parents' and Yeshiva Prep's requests and recommendations in developing the IEP; that the proposed IEP reflected impermissible policy and predetermination; and that the overall IEP was inappropriate and insufficient to offer the student a FAPE (id. at p. 5). Finally, with respect to the public school to which the student was assigned for the 2019-20 school year, the parents repeated their claims from their October 2019 letter to the district, in which the parents expressed their belief that the school was not appropriate for the student (id. at pp. 5-6; see Parent Ex. F).

As relief, the parents requested that the district be ordered to reimburse/fund the tuition, costs, and expenses of the student's program at Yeshiva Prep including all services and supports (Parent Ex. A at p. 6).

B. Impartial Hearing Officer Decision

A prehearing conference took place on June 8, 2020 to discuss the parent's application for an order for pendency and possible consolidation of this proceeding with a prior proceeding regarding the 2018-19 school year (Tr. pp. 1-14). In a decision dated June 8, 2020, the IHO ordered the district to fund, pursuant to pendency, the student's placement at Yeshiva Prep for the 2019-20

school year, including related services as were provided during the 2017-18 school year, "less 15 percent for religious instruction" (June 8, 2020 IHO Pendency Order). On June 9, 2020, the IHO consolidated this proceeding with a due process complaint notice filed by the parents concerning the student's 2018-19 school year (June 9, 2020 IHO Order of Consolidation).³

An impartial hearing convened and concluded on November 2, 2020 (Tr. pp. 15-119). At the start of the hearing, the representative for the district framed the issue in front of the IHO as concerning whether the district offered the student a FAPE for the 2019-20 school year (Tr. pp. 19-21).⁴

In a decision, dated January 27, 2021, the IHO determined that the district offered the student a FAPE for the 2019-20 school year (IHO Decision at pp. 4-10). Prior to reaching this conclusion, the IHO included a brief background of the student's history noting that the student was unilaterally placed in a private high school for the 2019-20 school year; that he was classified as a student with an other health impairment; and that the student had been diagnosed with ADHD, an anxiety disorder, and a specific learning disorder with impairments in reading, math, and written expression (*id.* at p. 4).

The IHO reviewed the members in attendance at the March 2019 CSE meeting and found that the lack of a regular education teacher did not amount to a procedural violation, and that the parents meaningfully participated at the CSE meeting despite the absence of a regular education teacher (IHO Decision at pp. 5-6). The IHO noted that the March 2019 CSE considered placement in a 12:1+1 special class and an ICT class and ultimately recommended a 15:1 special class, and determined that none of these programs was a general education program that required the participation of a regular education teacher at the CSE meeting (*id.*). Further, the IHO found that there was no evidence in the hearing record suggesting that the lack of a regular education teacher at the CSE meeting somehow impeded the student's right to a FAPE or resulted in a deprivation of educational benefits (*id.* at p. 6).

With respect to class size, the IHO noted that although the private school witness testified as to the progress the student made in a 5:1 setting and how he increased his level of independent work, there was no specific testimony as to why the student could not function in a 15:1 setting other than that it was too large (IHO Decision at p. 7). Further, the IHO noted that the March 2019 IEP included several supports and interventions in its management needs section that were similar to those that the student received at Yeshiva Prep along with individual counseling (*id.*). Ultimately, the IHO found that the March 2019 CSE's recommendation of a 15:1 special class was consistent with the student's needs as identified; that the CSE rejected the larger ICT placement to better meet the student's needs; and that the parents' testimony regarding the proposed public school placement was speculative (*id.* at p. 8).

³ A copy of the due process complaint notice regarding the 2018-19 school year was not included in the hearing record submitted by the district, although, it is a required part of the hearing record (8 NYCRR 200.5[j][5][vi][a]).

⁴ Although the IHO consolidated the parents' due process complaint notices regarding the 2018-19 and the 2019-20 school years, it appears that the two matters were tried separately and the IHO issued separate decisions for each school year. The IHO issued her decision regarding the 2018-19 school year on December 3, 2020 and an appeal of that decision was brought to the Office of State Review.

Turning to behavioral supports, the IHO found that none of the evaluative data or witness testimony reflected that the student exhibited behaviors that impeded his learning or that of others to the degree that an FBA was required (IHO Decision at p. 7). The IHO opined that even assuming the failure to conduct an FBA was a procedural violation, it would not rise to the level of a denial of a FAPE because the March 2019 IEP otherwise identified and addressed the student's problem behaviors with appropriate supports and strategies (id.). As further support that an FBA was not indicated, the IHO noted that Yeshiva Prep did not have a formal behavioral intervention plan for the student—and the student responded well to teacher interventions (id.).

Next, the IHO determined the student did not need modified promotion criteria, noting that students whose IEPs did not specify a modified promotion standard would be held to the promotion criteria applied to English proficient regular education students in their grade level (IHO Decision at p. 8).

With respect to transition services, the IHO found that the post-secondary goals listed on the IEP were measurable and not so generic that they failed to constitute a plan for the student (IHO Decision at pp. 8-9). Further, the IHO noted the student was not in attendance at the public school thus it was speculative that the guidance counselor would not have been able to assist the student; the IHO concluded that the district complied with its statutory requirements to establish appropriate postsecondary goals (id. at p. 9). The IHO noted that the parents' issue with respect to special education transportation was deemed abandoned (id.). In addition, the IHO found that given that the student did not attend the public school, the lack of parent counseling and training on the IEP did not rise to a denial of FAPE (id. at p. 10).

Finally, because the IHO found that the March 2019 IEP was neither substantively nor procedurally defective, the IHO determined that the district did not deny the student a FAPE (IHO Decision at p. 10). Further, given that the IHO determined that FAPE was offered by the district, he declined to consider the appropriateness of Yeshiva Prep for the student for the 2019-20 school year and whether equitable considerations weighed in favor of granting relief were not required and the IHO denied the parents' request for funding or reimbursement for the cost of the student's tuition at Yeshiva Prep for the 2019-20 school year (id.).

IV. Appeal for State-Level Review

The parents appeal and assert that the IHO erred by finding that the district offered the student a FAPE for the 2019-20 school year. More specifically, the parents allege that the IHO erred in finding a regular education teacher was not a required member of the CSE as it was recommended that the student be placed in general education for non-core classes. The parents further contend that the failure to include a regular education teacher denied the parents meaningful participation as no one was available "to explain modifications, curricula, and supports which could be implemented in the mainstream class or ICT." The parents also assert that the district did not conduct a required reevaluation of the student and that the district did not conduct its own assessments, including a vocational assessment, of the student. The parents further allege that the IHO erred in finding a 15:1 special class was sufficient to meet the student's needs. According to the parents, the district did not present sufficient evidence that a 15:1 class would have met the student's needs, noting that the professionals familiar with the student "recommended a small class size similar to the one he was attending, due to his inattention, and academic and emotional needs."

The parents assert that the IHO erred by excusing the district's failure to recommend appropriate behavioral supports for the student, and by excusing the district's failure to recommend appropriate transition services and post-secondary goals for the student. The parents also assert that the IHO erred by failing to consider that the district's assigned school placement was not appropriate and that the program could not implement the student's IEP. Additionally, according to the parents', the IHO erred in not addressing the district's failure to develop appropriate annual goals.⁵

In addition, the parents assert that their placement of the student at Yeshiva Prep for the 2019-20 school year was appropriate, and that equitable considerations weigh in favor of granting the parents' request for relief.

With respect to relief, the parents request that the IHO's determination that the district offered the student a FAPE be reversed and further request an order that the district reimburse/fund the costs and expenses of the student's program and services at Yeshiva Prep for the 2019-20 school year.

In an answer, the district responds to the parents' allegations and contends that the IHO properly found that the district offered the student a FAPE for the 2019-20 school year.

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

⁵ The parent also generally indicates, without specificity, that the IHO did not address all of the allegations contained in the parents' due process complaint notice. This allegation is insufficient. State regulation governing practice before the Office of State Review requires that the parties set forth in their pleadings "a clear and concise statement of the issues presented for review and the grounds for reversal or modification to be advanced, with each issue numbered and set forth separately," and further specify that "any issue not identified in a party's request for review, answer, or answer with cross-appeal shall be deemed abandoned and will not be addressed by a State Review Officer" (8 NYCRR 279.8[c][2], [4]; see 8 NYCRR 279.4[a]). Further, an IHO's decision is final and binding upon the parties unless appealed to a State Review Officer (34 CFR 300.514[a]; 8 NYCRR200.5[j][5][v]). The generic assertion contained in the request for review does not meet the standards of Part 279, particularly in light of the specificity of issues included in both the due process complaint notice and the IHO decision. It is not an SRO's role to research and construct the appealing parties' arguments or guess what they may have intended (see, e.g., Gross v. Town of Cicero, 619 F.3d 697, 704 [7th Cir. 2010][appellate review does not include researching and constructing the parties' arguments]; Fera v. Baldwin Borough, 2009 WL 3634098, at *3 [3rd Cir. Nov. 4, 2009][a party on appeal should at least identify the factual issues in dispute]; Garrett v. Selby Connor Maddux & Janer, 425 F.3d 836, 841 [10th Cir. 2005][generalized assertion of error on appeal is not sufficient]). Further, to the extent the parents assert that the IHO did not conduct "a meaningful substantive review of the hearing record," this allegation need not be addressed specifically as I have conducted a full review of the hearing record, at least with respect to the parties' allegations raised on appeal, on this appeal.

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]).⁶

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. Evaluations

On appeal, the parents assert that the district failed to conduct a timely triennial evaluation, stating that the student last underwent a private neuropsychological evaluation in December 2016. Further, the parents allege that the district failed to conduct any updated evaluations of the student, failed to conduct any transition assessments or vocational assessments with the student directly, and instead produced a brief, unsigned vocational assessment conducted via parent interview at the CSE meeting.

Turning to the merits of the parents' appeal, 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

⁶ 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).

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, 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).

With respect to their claims related to evaluations and assessments of the student conducted by the district, for the first time on appeal the parents allege specifically that the district failed to conduct a timely reevaluation of the student (within three years from the previous evaluation), asserting that the student was last evaluated in a private December 2016 neuropsychological evaluation. Here, the hearing record shows that the March 2019 CSE considered the December 2016 private neuropsychological report, and memorialized the results of cognitive and academic testing from the evaluation in the March 2019 IEP (see Parent Ex. C at p. 1). As noted by the district in its answer, the CSE meeting at issue in this matter was held in March 2019, within three years of the December 2016 neuropsychological evaluation (Parent Exs. C; G). Accordingly, the evaluation was still current, and without a request for a reevaluation or, at least, a more detailed complaint indicating a reason why the CSE should not have relied on the December 2016 neuropsychological evaluation, the district was not obligated to conduct a reevaluation of the student at the time of the March 2019 CSE meeting.

Turning to the parents' general claim that the district failed to conduct any updated assessments of the student, the hearing record supports finding that the March 2019 CSE had sufficient evaluative information to develop an IEP for the student. As noted above, the March 2019 CSE considered the December 2016 neuropsychological evaluation; additionally, the March 2019 CSE reviewed and considered February 2019 provider update reports from Yeshiva Prep for mathematics, reading, written expression, language comprehension, social/emotional development, and interpersonal relationships, as well as "OT Provider Reports" (see Parent Ex. C at pp. 1-3). Although the progress reports are not included in the hearing record, they are reflected in the present levels of performance in the March 2019 IEP (id.). For example, with respect to math, the present levels of performance indicated that the student was able to solve two-step equations and plot coordinates on a graph while needing reminders and prompts to help him convert standard form linear equations into y-intercept form (id. at p. 1) With respect to reading, the present levels of performance indicated that the student decoded below grade level, read

quickly and in a monotone voice, sometimes ignored punctuation, and enjoyed reading out loud in class (*id.* at pp. 1-2). The student could answer basic comprehension questions but struggled with inferential reasoning and higher order comprehension questions (*id.* at p. 2). Further, with respect to writing skills, the present levels of performance noted that the student was able to write a very basic paragraph with prompts and support and benefited from using graphic organizers and any aids to help him write (*id.*). In terms of language comprehension and usage, the present levels of performance indicated that the student was at times distracted, especially in class, and needed directions or ideas repeated (*id.* at p. 2). The student was able to communicate his ideas but did so with few words and was not expressive unless upset (*id.*). In addition, the March 2019 present levels of performance reflected a school provider report that highlighted the student's social/emotional skills, specifically noting that the student had a charming disposition and was cooperative and polite, but also that he was oftentimes unfocused and disinterested in class work, demonstrated a low tolerance for frustration, and either shut down or lashed out when upset (*id.*). The OT provider report reflected in the March 2019 IEP indicated, among other things, that the student received OT services at Yeshiva Prep to address delays within the areas of bilateral development, eye-hand coordination skills, visual-perceptual/motor skills, reading comprehension, graphomotor skills, and problem solving (*id.* at p. 3).

The district special education teacher, who attended the student's March 2019 CSE meeting, testified that the recommendations and the present levels of educational performance, as well as the annual goals, were based on the results of the 2016 neuropsychological report, the progress reports, and Yeshiva Prep's associate principal's report at the CSE meeting (Tr. pp. 26-28).

Based on the above, although the district did not conduct its own assessments of the student, the March 2019 CSE had sufficient, current information to develop the student's IEP.

B. CSE composition

The parents assert that the IHO erred in finding that the March 2019 CSE was properly composed, due to the failure to include a regular education teacher. The parents further assert that the lack of a regular education teacher denied the parents meaningful participation in the development of the student's IEP and denied the student educational benefits.

The IDEA requires that a CSE include not less than one regular education teacher of the student, if the student is or may be participating in the regular education environment (20 U.S.C. § 1414[d][1][B][ii]; Educ. Law § 4402[1][b][1][a][ii]; 34 CFR 300.321[a][2]; 8 NYCRR 200.3[a][1][ii] *see* E.A.M. v. New York City Dep't of Educ., 2012 W.L. 4571794, at *6 [S.D.N.Y. Sept. 29, 2012]). The regular education teacher "shall, to the extent appropriate, participate in the development of the IEP of the child, including the determination of appropriate positive behavioral interventions and supports and other strategies and supplementary aids and services, program modifications, and support for school personnel" (20 U.S.C. § 1414[d][3][C]; 34 CFR 300.324[a][3]; 8 NYCRR 200.3[d]). Furthermore, in the event that the absence of a regular education teacher resulted in a procedural violation, that procedural violation only results in a denial of FAPE if the procedural inadequacy (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]).

In this instance, it is undisputed from the evidence in the hearing record that a regular education teacher did not attend the June 2017 CSE meeting. Additionally, as noted by the parent, the CSE considered placement of the student in a general education class with the support of ICT services, and the student was only recommended for a special class for academics (Parent Ex. C at pp. 8, 11).⁷ Accordingly, the failure to include a regular education teacher as a part of the March 2019 CSE constitutes a procedural violation. However, as noted by the IHO, the parents were not seeking ICT services for the student and there is nothing in the hearing record to indicate that the presence of a regular education teacher at the CSE meeting would have provided the CSE with additional information such that the parent was impeded from participating in the decision-making process.

The March 2019 IEP reflected concerns expressed by the student's father, notably that he wanted the student to be more focused, motivated, and willing to learn in the classroom and that public school placement was a consideration (Parent Ex. C at p. 2). As memorialized in the IEP, the district explained to the parent that it took into account not only the student's academic needs but also his social/emotional needs in terms of making any academic recommendations; and the team notified the parent that all academic goals were being produced in accordance with New York State standards (*id.*). The March 2019 IEP stated that the parent actively participated in the IEP meeting and was part of all discussions regarding recommendations, management needs, goals, promotional criteria, classification of disability, and other considerations such as testing accommodations wherever applicable (*id.*). In addition, the IEP noted that the "team encouraged the parent to express thoughts and opinions in regard to the team's recommendations" (*id.*).

Moreover, the parents do not contend that they were unable to ask questions during the CSE meeting, or that they did not understand the modifications or supports recommended for the student, but only pose a vague assertion that a regular education teacher was not available to "explain modifications, curricula, and supports which could be implemented in the mainstream class" (Req. for Rev. ¶22). Absent an assertion that the parents sought information more specific than that identified in the request for review concerning the general education component of the CSE's recommendations for the student, the failure of the CSE to include a regular education teacher at the CSE meeting does not rise to the level of a denial of a FAPE (see J.F. v. New York City Dep't of Educ., 2012 WL 5984915, at *7 [S.D.N.Y. Nov. 27, 2012] [concluding that, even if a regular education teacher was a required CSE member, the lack of such a teacher did not render an IEP inappropriate when there was no evidence of any concerns during the CSE meeting that the regular education teacher was required to resolve and "no reason to believe" that such teacher was required to advise on lunch and recess modifications or support]).

⁷ The Second Circuit has described a general education environment with the support of ICT services as being "somewhere in between a regular classroom and a segregated, special education classroom" (M.W. v. New York City Dep't of Educ., 725 F.3d 131, 144 [2nd Cir. 2013]).

C. Annual Goals

On appeal, the parents assert that the IHO did not address their claim that the district failed to develop appropriate annual goals for the student; that the district failed to tailor the goals to the student's needs; that the goals were not objectively measurable; and that the March 2019 IEP lacked goals in several key areas of need, including behavioral issues.⁸

An IEP must include a written statement of measurable annual goals, including academic and functional goals designed to meet the student's needs that result from the student's disability to enable the student to be involved in and make progress in the general education curriculum; and meet each of the student's other educational needs that result from the student's disability (see 20 U.S.C. § 1414[d][1][A][i][II]; 34 CFR 300.320[a][2][i]; 8 NYCRR 200.4[d][2][iii]). Each annual goal shall include the evaluative criteria, evaluation procedures and schedules to be used to measure progress toward meeting the annual goal during the period beginning with placement and ending with the next scheduled review by the committee (8 NYCRR 200.4[d][2][iii][b]; see 20 U.S.C. § 1414[d][1][A][i][III]; 34 CFR 300.320[a][3]). Short-term instructional objectives or benchmarks—described as "measurable intermediate steps between the student's present levels of performance and the measurable annual goal"—are required for students who participate in alternate assessment (see 8 NYCRR 200.4[d][2][iv]; see 20 U.S.C. §1414[d][1][A][i][I][cc]; 34 CFR 300.320[a][2][ii]).

In order to determine whether the March 2019 CSE developed appropriate annual goals to address the student's needs as indicated on the March 2019 IEP, a discussion of the student's needs is necessary.

As noted above, the March 2019 IEP reflected testing results from the December 2016 neuropsychological evaluation and the student's then-current educational performance as described in school provider reports (see Parent Ex. C at p. 1). According to the evaluation results, the student's full scale IQ assessed by the WISC-V (cognitive functioning) was in the low average range (SS=88); and his academic skills assessed by the KTEA-3 ranged from a grade equivalent of 4.0 (nonsense word decoding) to 7.2 (math concepts and applications) (id.).⁹ The IEP indicated that the associate principal at Yeshivah Prep, who participated in the CSE meeting, reported that while the student was doing well with her, his grades were poor, and some were marked as "incomplete" or having failed (id.).

As briefly noted above, the IEP indicated that with respect to mathematics, the student was able to solve two-step equations and plot coordinates on a graph as well as to graph linear equations in the y- intercept form with prompts and understood how to plot and read a scatterplot (Parent Ex. C at p. 1). The student required reminders and prompts to help him convert standard form linear equations into y-intercept form, had difficulty solving system of equation problems, and got easily frustrated and was quick to lose his focus (id.). The IEP indicated that the student was passing

⁸ How the March 2019 IEP, including the annual goals, addressed the student's behavioral needs is addressed below in regard to special factors.

⁹ Although not indicated in the IEP, the WISC-V is presumed to be the Wechsler Intelligence Scale for Children -Fifth Edition and the KTEA -3, the Kaufman Test of Educational Achievement – Third Edition.

mathematics with a 67, was working on multi-step problems, and was taking the "Algebra 1" class (id. at p. 2).

The March 2019 CSE developed three annual goals to address the student's mathematic needs in algebra the first related to improving his ability to solve multi-step linear equations, the second related to improving his understanding of numerical operations including those with monomials and polynomials, and the third related to improving his math problem solving ability by finding values of a variable for which an algebraic fraction is undefined (id. at p. 6). The mathematics annual goals included criteria, methods for measuring the student's progress, as well as a schedule for when the goals should be measured (id.).

With respect to the student's ELA needs, the IEP indicated that the student decoded below grade level, read quickly and in a monotone voice, mumbling some words, and sometimes ignored punctuation (Parent Ex. C at p. 2). According to the IEP the student enjoyed reading out loud in class, read on a seventh-grade level aloud, and answered basic comprehension questions on his level with prompts and reminders; however, when the student read to himself or when listening to a selection, he comprehended on sixth grade level (id.). When the student paid attention, he recalled details from a story and sometimes quoted them verbatim when the selection was on his level, however, the student was often inattentive during class (id.). The IEP noted that the student, due to his inattentiveness, fell behind in both his classwork and homework and struggled with inferential reasoning and higher order comprehension questions (id.). When taking a test, the student required a separate location where it was quiet, and he was able to process information without distraction (id.). In terms of written expression, the IEP indicated that the student was able to write a very basic paragraph with prompts and supports but had difficulty expanding ideas and bringing in supporting details in text (id.).

The March 2019 CSE developed six annual goals targeting the student's ELA needs, including one goal that targeted the student's ability to determine the meaning of words and phrases as they were used in text, two goals that targeted the student's inferential comprehension, and one goal that addressed the student's need to use strategies to identify and understand important facts and implied meaning in text and literature (Parent Ex. C at p. 6). In addition, two annual goals targeted the student's need to develop and strengthen his writing using strategies such as planning, revising, editing, rewriting, and conducting short, as well as more sustained, research projects (id. at pp. 6-7). The ELA annual goals included criteria, methods for measuring the student's progress, as well as a schedule for when the goals should be measured (id.). Additionally, one of the testing accommodations recommended by the March 2019 CSE addressed the student's need for a separate location for testing (id. at p. 9).

With respect to social/emotional development, the March 2019 IEP indicated that the student presented with a charming disposition, and when content he was cooperative and polite; however, oftentimes, the student was unfocused and disinterested in class work which resulted in him putting his head down on the desk, and, on occasion, falling asleep (Parent Ex. C at p. 2). The IEP further indicated that while this might be due to lack of sleep, it seemed most often to be the student's way of "checking out" (id.). The IEP noted that the student forgot his materials in other classes or in his locker (id.). In addition, the IEP indicated that the student acted impulsively and had a low tolerance for frustration, and he would storm out of a room or verbally lash out, which sometimes escalated an incident into something larger than it needed to be (id.). The IEP noted,

however, that to the student's credit, once he calmed, he was able to discuss the situation and even work on strategies to prevent similar outbursts (*id.*). The March 2019 IEP noted that there had been progress in this area, and with respect to interpersonal relationships, the student was popular with his peers and generally kind to schoolmates and got along with them (*id.*). The student's relationship with adults was inconsistent, and he was insulted and angered easily and could become disrespectful when that occurred; however, when the student felt respected and cared about by adults, he responded in kind (*id.*). The IEP noted that the student had "made great progress in his behavior and participation in schoolwork" (*id.*). The IEP indicated that the student could be a very charismatic youngster and was well liked by others, however he was inconsistent in terms of his mood (*id.* at p. 3). The student tended to avoid academic challenges and presented with poor coping skills when frustrated; instead of taking responsibility for his own actions, the student often shifted the blame on others when he was upset about things or was dissatisfied with certain outcomes (*id.*). The March 2019 IEP noted that the student demonstrated "specific difficulty" organizing his thoughts on paper for essays and to answer deeper comprehension level questions, for example, comparing and contrasting; and that he demonstrated difficulty following the daily structure of the classroom requiring moderate cueing and redirection to follow the organization within the classroom setting (*id.*). The IEP further indicated that the student could benefit from a "behavior plan and specific guidelines set by staff members" and that the student should be required to complete all work by a specific deadline and not be given extra time because he tended "to take advantage" (*id.*).¹⁰ The IEP noted that the student was an "extremely self-directed young male" who had "significant difficulty with following directions" and that when working one on one, the student made tremendous progress in his ability to answer questions after reading or listening to a narrative (*id.*). In addition, the IEP indicated that the student demonstrated difficulty when the questions dealt with higher level strategies and often required assistance to finish all projects pertaining to school (*id.*).

The student's father noted that the mood issue might be due to changes in the student's medication or an inappropriate dosage for ADHD (*id.* at p. 3). The student checked out when he was uninterested and fell asleep in the classroom, and his father noted that he was encouraging the student to get to bed earlier and was optimistic that with the change in medication the student would be more alert in school (*id.*). The student's father testified, agreeing with the Yeshiva Prep principal's testimony, that the area the student most needed support in by his school was "independence on working alone, doing his work more consistently and participating more in class and basically doing more work on his own" (Tr. pp. 100-101; see also Tr. pp. 90-91).

Along with recommending two 30-minute individual sessions of counseling per week, the March 2019 CSE developed four annual goals that targeted the student's social/emotional needs such as showing consistency in attendance and preparedness for class; replacing negative statements with advocacy for his academic needs; engaging others with a position of authority with a respectful tone and language despite his frustration; and displaying autonomy of behaviors

¹⁰ It is unclear whether the student had a BIP at Yeshiva Prep. The IHO found that the "private school did not have a formal behavior[al] intervention plan for [the] [s]tudent, further support that an FBA was not indicated" and that the student responded well to teacher interventions (IHO Decision at p. 7). The principal of Yeshiva Prep testified that the student responded really well to teachers' interventions and stated that if the student had "a piece of emotional frustration that may come out," the teacher "pull[ed] him aside and [talked] him down, deescalating the situation" (Tr. p. 79).

by accepting responsibility for his actions instead of blaming others (id. at p. 5). The counseling annual goals included criteria, methods for measuring the student's progress, as well as a schedule for when the goals should be measured (id. at p. 5). In addition, the March 2019 CSE recommended several supports to address the student's management needs including providing the student with encouragement and praise (id. at p. 4).

With respect to physical development, the March 2019 IEP indicated that the student received OT services at Yeshiva Prep to address delays within the areas of bilateral development, eye-hand coordination skills, visual-perceptual/motor skills, reading comprehension, graphomotor skills, and problem solving (Parent Ex. C at p. 3). In addition, the student continued to present with decreased self-regulatory abilities and limited attention span to classroom activities and fine motor tasks and became easily frustrated when presented with unfamiliar tasks which he deemed as challenging and in which he would often rather not participate (id.). The IEP noted that the student demonstrated difficulty sustaining attention and focus to activities at hand requiring maximum verbal cueing for redirection in order to complete activities; and displayed decreased verbal communication during sessions (id.). The IEP indicated that these impairments described in the student's current levels of functioning tended to interfere with the student's ability to participate and excel in age-appropriate academic assignments and fine motor activities (id.).

Along with recommending one 30-minute individual session of OT per week, the March 2019 CSE developed three annual goals to address the student's physical development needs (id. at p. 7). The first annual goal targeted the student's need to demonstrate improved visual-motor and graphomotor/handwriting skills; the next goal addressed the student's need to improve his time management skills; and the last goal targeted the student's need to improve desk, bookbag, notebook, and personal space organization (id.). The OT annual goals included criteria, methods for measuring the student's progress, as well as a schedule for when the goals should be measured (id.).

Based on the above, overall, the March 2019 CSE developed appropriate annual goals for the student that were tailored to the student's needs as indicated in the present levels of performance in the March 2019 IEP; the goals were objectively measurable and addressed the student's key areas of need.

D. 15:1 Special Class

The parents assert that the IHO improperly found that the March 2019 CSE's recommendation of a 15:1 special class was sufficient to meet the student's needs because a 15:1 class would not provide the student with required multi-sensory instruction, repetition of directions, chunking, and scaffolding of instruction with a small class.¹¹ In addition, the IHO

¹¹ In their appeal, the parents noted that the "[p]rofessionals familiar with [the student] recommended a small class size similar to the one he was attending, due to his inattention, and academic and emotional needs" citing to the December 2016 neuropsychological report, a December 2019 counseling progress report, and the principal's testimony (Request for Review at p. 5; see Parent Exs. G at p. 6; K at p. 1; R at pp. 2-4). At the time of the March 2019 CSE meeting, the CSE only had available to it the information and recommendations from the December 2016 neuropsychological report. In reviewing the programming offered to the student, the focus of the inquiry must be on the information that was available at the time the student's IEP was formulated (see C.L.K. v Arlington Sch. Dist., 2013 WL 6818376, at *13 [S.D.N.Y. Dec. 23, 2013] [finding that "a substantively appropriate IEP

found that there was no specific testimony as to why the student could not function in a 15:1 special class and that the parents' testimony regarding the proposed school placement was speculative. On appeal, the parents note that the district representative's testimony was insufficient to support the CSE's recommendation and that testimony by the assigned school's assistant principal was general as to the recommended program and placement and she was unable to speak to the student's unique needs.

With respect to the recommended 15:1 special class placement, as indicated above, the March 2019 CSE considered the December 2016 neuropsychological testing results, and Yeshiva Prep school provider reports, a vocational assessment parent interview, as well as information provided by the parents at the CSE meeting, and the IEP noted that the student demonstrated needs in reading, writing, and mathematics, organization, social/emotional performance, and fine motor, bilateral, and visual/graphomotor tasks (Parent Ex. C at pp. 1-3). The March 2019 CSE recommended that the student attend a 15:1 special class for five periods per week for mathematics, five periods per week for ELA, five periods per week for social studies, and five periods per week for science and, in addition, that the student receive two 30-minute sessions of individual counseling per week and one 30-minute session of individual OT per week (*id.* at p. 8). Further, based on parent, teacher, and team discussion at the March 2019 CSE meeting, the CSE recommended supports for the student's management needs in the classroom, including but not limited to aid with mathematical word problems, graphic organizers and outlines, editing and revision checklists, sentence starters and checklists for writing, repetition and review, encouragement and praise, preferential seating if necessary, scaffolding, refocusing as needed, and color coding (*id.* at p. 4). Other supports recommended included previewing material and pre-teaching of concepts, modeling, multi-sensory approach to learning when feasible, direction and tasks broken down into manageable steps, instruction broken down into smaller units of learning, and encouraging the student to request aid from teacher when necessary and providing student with information about specific school as he transitioned into larger public school environment (*id.* at p. 4).

The parents assert that due to his inattention, academic, and emotional needs, the professionals familiar with the student recommended a small class size as well as multi-sensory instruction, repetition of directions, chunking, and scaffolding of instruction (Req. for Rev. at p. 4). When compared with the recommendations in the December 2016 neuropsychological report, the March 2019 CSE recommended, throughout the IEP, similar supports including a smaller class size, multi-sensory approach, organizational aids, extracurricular activities, preferential seating, and modifications, extended time limits and a separate setting for tests for the student for the 2019-20 school year (compare Parent Ex. C at pp. 4-9, with Parent Ex. G at pp. 6-7).

may not be rendered inadequate through testimony and exhibits that were not before the CSE about subsequent events . . . that seek to alter the information available to the CSE"; J.M. v New York City Dep't of Educ., 2013 WL 5951436, at *18-*19 [S.D.N.Y. Nov. 7, 2013] [holding that a progress report created subsequent to the CSE meeting may not be used to challenge the appropriateness of the IEP]; F.O. v New York City Dep't of Educ., 976 F. Supp. 2d 499, 513 [S.D.N.Y. 2013] [refusing to consider a subsequent school year IEP as additional evidence because it was not in existence at the time the IEP in question was developed]; J.R. v. Bd. of Educ. of City of Rye Sch. Dist., 345 F. Supp. 2d 386, 395 [S.D.N.Y. 2004] [explaining that the placement determination is "necessarily prospective in nature; we therefore must not engage in Monday-morning quarterbacking guided by our knowledge of [the student's] subsequent progress"].

Based on the information the CSE had at the time of the March 2019 IEP meeting, the CSE recommended that the student remain in a self-contained classroom for his core academic subjects outlined in the recommendation section of the IEP, and that the student may be mainstreamed for all other subjects at the school's discretion (*id.* at p. 11). In addition, the March 2019 CSE considered and found ICT services to be insufficient to address the student's "academic needs for the upcoming school year as thoroughly discussed with parent" and that a 12:1+1 special class placement in a community school was considered too restrictive (*id.* at p. 12). While the December 2016 neuropsychological evaluation report did note that at the time of the report the student attended a class with 4-5 other students, the report also indicated the student was "fully mainstreamed" in mathematics, and the recommendation specifically indicated "continued placement in a small-group, special education class for his academic difficulties in all core academic areas" (Parent Ex. G at pp. 1, 6). As the recommended 15:1 special class can be considered a "small" class size (see *A.A. v. New York City Dept. of Educ.*, 2015 WL 10793404, at *4 [S.D.N.Y. Aug. 24, 2015] [upholding IHO and SRO decisions finding a 15:1 class ratio in a special class was justified on the basis that the student needed the support of a small class ratio]), the recommendation in the December 2016 neuropsychological evaluation report for a "small class," without more, does not offer a reason to depart from the IHO's ultimate determination that the district's program recommendation would have enabled the student to make progress in light of his circumstances.

The principal from Yeshiva Prep testified that he did not agree with the student being placed in a 15:1 special class because it was "way too large for [the student] to get the proper interventions and education" and that the student did very well and made great progress in a 5:1 classroom last year and he "could not see [the student] making that progress in any which way in a 15:1 setting" (Tr. pp. 88-89; see also Parent Ex. R at pp. 7-8). The principal did not identify specific challenges that the student might face with the 15:1 special class placement nor did he offer a comparison of how the supports the student received in the 5:1 classroom at Yeshiva Prep would differ from those he would receive with the March 2019 CSE program recommendations and 15:1 special class placement.

With respect to the parents' assertions that the district representative's testimony was insufficient to support the CSE's recommendations, the hearing record shows she testified that the program recommendations and the student's present levels of performance were based on testing from the December 2016 neuropsychological report, the vocational interview with the student's father, school program reports, and information provided by the assistant principal from Yeshiva Prep (Tr. pp. 27-28). Further, the district representative noted that the student's goals were developed based on the progress reports and what the Yeshiva Prep assistant principal reported at the March 2019 CSE meeting (Tr. p. 28). The assigned school's assistant principal testified that the school would have been able to provide the student with a 15:1 special class placement for academic subjects including mathematics, ELA, social studies, and science for five periods per week each for the 2019-20 school year; and that the school would have been able to provide the student with his recommended related services (Tr. pp. 40-42). In addition, the assigned school's assistant principal agreed that the teachers could have provided the recommended strategies to address the student's management needs and testing accommodations, and could have provided for students' safety in transitions through the building (Tr. pp. 43-44, 46-47).

Based on the student's needs identified in the March 2019 IEP, the CSE's recommendation of a 15:1 special class along with related services, supports to address the student's management needs, testing accommodations, and annual goals were sufficient to address the student's needs for the 2019-20 school year.

E. Special Factors

The parents assert that the IHO erred by excusing the district's failure to recommend appropriate behavioral supports for the student; and that the IHO incorrectly found that the March 2019 IEP addressed the student's behavioral issues sufficiently. Further, the parents allege that the district did not conduct an FBA or develop a BIP and the IEP failed to address the student's behaviors including yelling, shutting down, and lashing out and did not provide the student with sufficient goals to work towards managing his behaviors.

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]; Gavriety 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/IEPgguideDec2010.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]). Additionally, a district is required to conduct an FBA in an initial evaluation for students who engage in behaviors that impede their learning or that of other students (8 NYCRR 200.4[b][1][v]). 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]).

Although the student's social/emotional needs are discussed above, a brief synopsis of the student's behaviors as indicated in the March 2019 IEP follows in order to discuss whether the March 2019 CSE recommended appropriate behavioral supports for the student for the 2019-20 school year, and whether an FBA or BIP were necessary.¹²

As noted above, the student was described as charismatic, charming and popular and he got along well very with his classmates in both special education and general education settings (Parent Exs. C at p. 2; R at p. 2). However, the student was also unfocused and uninterested in classwork, had difficulty following directions and the daily structure of the classroom, was self-directed and impulsive, and would shut down or lash out when upset (Parent Ex. C at pp. 2-3). The student's IEP stated that he could "benefit from a behavioral plan and specific guidelines set by staff members" (Parent Ex. C at p. 3). The IEP also stated that the student had made great progress in his behavior and in participation in schoolwork (id. at p. 2).

¹² In their request for review, with respect to behavioral needs, the parents specifically cite to the December 2016 neuropsychological report and a December 2019 Yeshiva Prep counseling report) (Request for Review at p. 5; see Parent Exs. G at p. 5; K at p. 1). For the purposes of this discussion, with respect to behaviors, the cited portions of the December 2016 neuropsychological evaluation report will be compared with the March 2019 IEP. As noted above, because the March 2019 CSE could not have considered the December 2019 counseling progress report, it will not be discussed.

The December 2016 neuropsychological report noted that on a broad-based behavior rating scale the student's mother endorsed items associated with attention problems and anxiety, as well as a "'critical item' of clinical concern: '[l]oses control when angry'" (Parent Ex. G at p. 5). The report indicated that in a corresponding behavior rating scale, the student's teacher endorsed an elevated number of items on scales associated with attention problems, hyperactivity/impulsivity, aggression, conduct problems, anxiety, depressed mood, social withdrawal, and difficulty adapting to the demands of his school environment (*id.*). According to the report, the student's teacher also endorsed "critical items" of clinical concern including "'[t]hreatens to hurt others"; "'[l]oses control when angry"; "'[b]ullies others"; and "'[i]s distracted by smartphone (or similar device) during class'" (*id.*). On an additional rating scale, the report indicated that the student's mother endorsed an elevated number of items related to symptoms of inattention while the student's teacher endorsed an elevated number of items related to symptoms of inattention, hyperactivity/impulsivity, and oppositional/defiant behaviors (*id.*). The evaluation report noted that on a self-report measure of behavioral/emotional status, the student acknowledged the presence of feelings and behaviors associated with maintaining a negative attitude towards teachers and the presence of anxiety (*id.*). The student endorsed critical items of clinical concern that included "'I feel sad"; "'It seems my life is getting worse and worse"; and "'I have trouble controlling my thoughts'" (*id.*). In addition, the report indicated that during the clinical interview and on measures of projective personality assessment, the student acknowledged the presence of school related stress and his wishes reflected feelings of unhappiness, apathy, socialization, difficulty, anxiety, and generalized maladjustment (*id.* at p. 6). Further, the report noted that the student stated that he felt very stressed at school and often felt upset at himself for getting angry; and that the student explained that he primarily got angry at his workload at school rather than at teachers or other students (*id.*).

The principal from Yeshiva Prep testified that the student responded really well to teachers' interventions, and when "[the student] ha[d] a piece of emotional frustration that [] c[a]me out, . . . the teacher pull[ed] him aside and [talked] him down, deescalating the situation" (Tr. p. 79). The principal further noted that the student responded well when he was motivated to do academic work with the teacher, and responded well to his superiors and administrators, taking their feedback "seriously and professionally" (*id.*). In addition, the principal stated that the student's "need that was most challenging for" him "was being able to do independent work, and being able to wean off the" "one-on-one encounters that he had" (Tr. pp. 90-91).

Although the March 2019 CSE did not adopt the exact language from the December 2016 neuropsychological evaluation report in describing the student's behaviors, the March 2019 IEP reflected the student's similar, but updated, and improved behavior performance as reported by the assistant principal of Yeshiva Prep as well as the February 2019 school provider reports included in the IEP (*compare* Parent Ex. C at pp. 1-3, *with* Parent Ex. G at p. 5). However, although I reach the same conclusion as the IHO that the absence of a behavior plan, under the particular circumstances of this matter, did not rise to the level of a denial of a FAPE, given the CSE's own determination that a behavior plan, coupled with other supports, would be beneficial to the student, I am not able to find, as the IHO did, that none of the evaluative data or witness testimony reflected that the student exhibited behaviors that impeded his learning or that of others to the degree that an FBA was required.

However, even if I were to find that the district's decision not to conduct an FBA of the student was a procedural violation, the March 2019 CSE nonetheless recommended appropriate and sufficient supports to address the student's behaviors (see Parent Ex. C at p. 4). The Second Circuit has explained that, when required, "[t]he failure to conduct an adequate FBA is a serious procedural violation because it may prevent the CSE from obtaining necessary information about the student's behaviors, leading to their being addressed in the IEP inadequately or not at all" (R.E., 694 F.3d at 190). However, the Court also noted that "[t]he failure to conduct an FBA will not always rise to the level of a denial of a FAPE," but that in such instances particular care must be taken to determine whether the IEP addresses the student's problem behaviors (id.). In this matter, the strategies utilized included supports for the student's management needs, two 30-minute individual sessions of counseling per week, and four counseling goals (id. at p. 5). Specifically, with respect to the student's management needs, as iterated above, many of the reported behaviors stemmed from the student's difficulty sustaining attention and focus and frustration with challenging academic tasks or his academic workload. As noted above, the March 2019 CSE recommended strategies that addressed the student's academic management needs including providing the student with encouragement and praise, previewing material and pre-teaching of concepts, preferential seating, refocusing, scaffolding, instruction broken down into smaller units of learning, and directions and tasks broken down into manageable steps (id. at p. 4). In addition, the counseling goals targeted the student's need to demonstrate consistent patterns of timeliness and being prepared for class and his need to improve his self-advocacy with regard to his academic needs by raising his hand and requesting clarification during lessons on concepts that he found challenging rather than resorting to negative statements (id. at p. 5). Another counseling goal targeted the student's need to engage others in a position of authority with a respectful tone and language despite his frustration in the moment and a fourth goal targeted the student's need to display autonomy of behaviors by accepting responsibility for his actions as opposed to quickly placing blame on others (id.). As indicated above, the principal at Yeshiva Prep testified that the student responded very well to teacher interventions when demonstrating frustration (Tr. p. 79).

Accordingly, the March 2019 CSE recommended appropriate behavioral supports that aligned with the behaviors identified in the March 2019 IEP for the 2019-20 school year, and the failure of the district to create a BIP for the student did not rise to the level of a denial of a FAPE.

F. Transition Services

The parents assert that the IHO erroneously excused the district's failure to recommend appropriate transition services and post-secondary goals for the student. In addition, the parents allege that the district failed to conduct any transition assessments or vocational assessments with the student directly, instead the district produced a brief, unsigned vocational assessment conducted via parent interview at the March 2019 CSE meeting. The parents claimed that because the student was 16 years old during the 2019-20 school year, the district was required to include appropriate postsecondary goals and transition activities in the student's IEP.

Under the IDEA, to the extent appropriate for each individual student, an IEP must focus on providing instruction and experiences that enable the student to prepare for later post-school activities, including postsecondary education, employment, and independent living (20 U.S.C. § 1401[34]; see Educ. Law § 4401[9]; 34 CFR 300.43; 8 NYCRR 200.1[fff]). Accordingly, pursuant to federal law and State regulations, an IEP for a student who is at least 16 years of age

(15 under State regulations), or younger if determined appropriate by the CSE, must include appropriate measurable postsecondary goals based upon age appropriate transition assessments related to training, education, employment, and, if appropriate, independent living skills (20 U.S.C. § 1414[d][1][A][i][VIII]; 34 CFR 300.320[b]; 8 NYCRR 200.4[d][2][ix]).¹³ An IEP must also include the transition services needed to assist the student in reaching those goals (*id.*). Transition services must be "based on the individual child's needs, taking into account the child's strengths, preferences, and interests" and must include "instruction, related services, community experiences, the development of employment and other post-school adult living objectives, and, when appropriate, acquisition of daily living skills and functional vocational evaluation" (20 U.S.C. § 1401[34][B]-[C]; 8 NYCRR 200.1[fff]). It has been found that "a deficient transition plan is a procedural flaw" that will only rise to a denial of a FAPE if it impeded the student's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or caused a deprivation of educational benefits (*M.Z. v. New York City Dep't of Educ.*, 2013 WL 1314992, at *6, *9 [S.D.N.Y. Mar. 21, 2013], citing *Klein Indep. Sch. Dist. v. Hovem*, 690 F.3d 390, 398 [5th Cir. 2012] and *Bd. of Educ. of Tp. High Sch. Dist. No. 211 v. Ross*, 486 F.3d 267, 276 [7th Cir. 2007]; see *F.L. v. New York City Dep't of Educ.*, 2016 WL 3211969, at *8-*9 [S.D.N.Y. June 8, 2016]; *C.W. v City Sch. Dist. of the City of New York*, 171 F. Supp. 3d 126, 134 [S.D.N.Y. 2016]; *J.M. v New York City Dep't of Educ.*, 171 F. Supp. 3d 236, 247-48 [S.D.N.Y. 2016]; *A.D. v. New York City Dep't of Educ.*, 2013 WL 1155570, at *11 [S.D.N.Y. Mar. 19, 2013]).

In his affidavit, the student's father expressed that he participated in a vocational interview as part of the IEP development process and reported that the student was interested in computers and that he might be interested in a career in computer science; he also reviewed the student's interests with the March 2019 CSE including exercising and playing basketball (Parent Exs. Q at pp. 2, 4; C at pp. 1, 10; Dist. Ex. 3). The student's father opined that the student would ultimately benefit from career counseling "as to provide him with further plans and skills for living, working, and traveling independently and managing his time" (Dist. Ex. 3). With respect to transitioning into the postsecondary environment, the assistant principal from the assigned school testified that in addition to the general education college office, a transition linkage coordinator worked specifically with students receiving special education (Tr. p. 46).

The March 2019 CSE developed measurable post-secondary goals, which indicated that upon graduating the student would attend a two to four year college which offered a major in computer science; that he would be competitively employed in the field of computer science; and that he would live and work independently within the community once he was gainfully employed (Parent Ex. C at p. 5). In addition, with respect to transition needs the CSE indicated that the student, over the course of his high school experience, should inquire about obtaining working papers, registering to vote, and possibly taking driver's education courses (*id.*). With respect to a coordinated set of transition activities, the March 2019 CSE outlined services/activities needed to facilitate the student's movement from school to post-school activities including the student's ability to describe the characteristics of occupations consistent with his interests; the student's participation in counseling and OT; the student's exploration of opportunities in the community

¹³ In addition, State regulations require districts to conduct vocational assessments of students age 12 to determine their "vocational skills, aptitudes and interests" (8 NYCRR 200.4[b][6][viii]).

for enjoyment and employment; and the student's participation in activities such as mock interviews and looking through job postings and websites so that he might familiarize himself with worker expectations (*id.* at p. 10). I agree with the IHO that the March 2019 IEP's post-secondary goals, transition needs and coordinated set of transition activities were sufficiently supportive. With respect to conducting a vocational assessment of the student, there is no evidence in the hearing record that the district did so, however, under the circumstances presented, the lack of a student vocational assessment does not rise to the level of a denial of a FAPE.

G. Implementation of March 2019 IEP at Assigned Public School

The parents appeal from the IHO's determination that their testimony regarding the proposed school placement was speculative. The parents assert that the district failed to carry its burden of proving that the assigned public school could implement the March 2019 IEP. The parents reiterate their objection to the "large class" and note that the assistant principal of the assigned school testified that because the student was not registered to attend the assigned school, he was not given a program. The parents further assert that the assistant principal testified that she did not know the other students' academic levels and could not confirm that the student would be grouped with peers with similar strengths and needs and that not all students received counseling and OT services remotely during the 2019-20 school year.¹⁴

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]).¹⁵ 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*

¹⁴ On appeal, the parents do not reassert their claims that the assigned school could not implement strategies to address all of the student's management needs, that the school would have been inappropriate for the student because it "had no formal program to help students transition to the school," or that the school used "quiet rooms" (Req. for Rev.; *see* Parent Ex. A at p. 6). Accordingly, these matters are deemed abandoned (8 NYCRR 279.8[c][4]; "any issue not identified in a party's request for review, answer, or answer with cross-appeal shall be deemed abandoned and will not be addressed by a State Review Officer").

¹⁵ 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]).

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]).

Reviewing the claims raised on appeal, the parents' allegation that the district failed to present sufficient evidence about the capacity of the assigned public school to implement every aspect of the March 2019 IEP is not a valid argument (see J.S. v. New York City Dep't of Educ., 2017 WL 744590, at *4 [S.D.N.Y. Feb. 24, 2017] [finding that a district did not have a burden to produce evidence demonstrating the adequacy of the assigned public school site absent non-speculative allegations about the school's ability to implement the IEP]; N.K., 2016 WL 590234, at *6 [noting that "[t]o be a cognizable claim, i.e., one that triggers the school district's burden of proof, the 'problem' with the placement cannot be a disguised attack on the IEP"]; see also M.B. v. New York City Dep't of Educ., 2017 WL 384352, at *6 [S.D.N.Y. Jan. 25, 2017] [noting that the parent in that matter did "not allege that the placement school did not have the ability to satisfy the IEP" but instead sought "to require the District to prove in advance that it w[ould] properly implement the IEP," which "M.O. does not require"])).

Turning to the parents' specific challenges, regarding the functional grouping of the proposed class at the assigned school, 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]).¹⁶ 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 of requirements from grouping in accordance with age ranges (see, e.g., Application of a Student with a Disability, Appeal No. 17-026).

In this instance, the assistant principal from the assigned school testified that typically, teachers performed baseline assessments so that they could use that data in addition to the IEP to understand specific levels of students; and, from there, could differentiate assignments or support as well as consider grouping for specific tasks within the classroom (Tr. pp. 44-45). She further testified that because the student was not registered for the 2019-20 school year in the public school, he would not have been given a program; explaining that as a large school, they had several sections of each class so when a specific student was registered, a specific program for that student was made depending on their specific course needs (Tr. pp. 49-50). Further, the assistant principal noted that the students in the 15:1 special class were not necessarily with the same students for core academics all day because there were several sections of each class; and depending on the students' other classes and needs, the students might be moved around (Tr. p. 50). In addition, the assistant principal testified that most of the students in the 15:1 special class were classified as having a learning disability or speech or language impairment, but that there were certainly others as well (Tr. pp. 50, 52-53). The assistant principal explained that if the student had attended the public school for the 2019-20 school year, his junior year, the ages of the other students with whom he would have been placed, would have been, "16, 17, maybe an 18-year-old" (Tr. pp. 51-52). Although not certain, the assistant principal testified that the ELA and mathematics skill levels of the juniors identified for the 15:1 special class at the start of the 2019-20 school year varied; and that the lowest level a student's skills in the class might be at would be the fourth or fifth grade level (Tr. p 53). Based on the above, the parents' challenge to the assigned school's ability to functionally group the student in accordance with State regulation is without merit. It does not fall within the permissible prospective challenges to a district's capacity to implement the March 2019 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 March 2019 IEP, thus this issue will not be addressed further.

¹⁶ 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.

With respect to the assigned school providing counseling as a related service remotely during the 2019-20 school year, the assistant principal testified that the school worked with the families to coordinate times to continue their counseling services as close to regular as possible; but that not all of the students necessarily received their full mandates of counseling when services went remote (Tr. pp. 53-54). With respect to providing OT as a related service, remotely, the assistant principal testified that the school reached out to the families for individual consent to provide regular service, or if parent consent was not provided, they would do parent consultations; and she was "not 100 percent sure" whether all of the mandates were met, but knew that the occupational therapist was working to meet mandates as much as possible (Tr. pp. 54-55). This testimony that not all students at the assigned school received services due to programming modifications that occurred during the 2019-20 school year in direct response to the Covid-19 pandemic, well after the parents had already made their decision to place the student at Yeshiva Prep; accordingly, it was not a prospective challenge to the school's ability to implement the March 2019 IEP (see M.O., 793 F.3d at 244).

VII. Conclusion

Having found that the district offered the student a FAPE for the 2018-19 school year, the necessary inquiry is at an end.

THE APPEAL IS DISMISSED.

**Dated: Albany, New York
April 26, 2021**

**CAROL H. HAUGE
STATE REVIEW OFFICER**