



The University of the State of New York

The State Education Department State Review Officer

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No. 21-093

Application of a STUDENT WITH A DISABILITY, by his parent, 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:

Natan Shmueli, Esq., attorney for petitioner

Judy Nathan, Interim Acting General Counsel, attorneys for respondent, by Nathaniel Luken, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from the decision of an impartial hearing officer (IHO) which denied her request to be reimbursed for her son's tuition costs at Bais Frieda Child Care Center Inc. (Bais Frieda) for the 2018-19 and 2019-20 school years. Respondent (the district) cross-appeals from the IHO's determination that it failed to demonstrate that it had offered an appropriate educational program to the student for the 2018-19 school year. The appeal must be sustained in part. The cross-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

According to the parent, the student lost his speech at around 18 months old and did not start to say words again until 24 months old (Parent Ex. N at p. 7). Due to parent and doctor concerns with respect to the student's speech and language, social emotional, and sensory processing development, a developmental evaluation was conducted in December 2017 as part of a referral to the Early Intervention Program (EIP) (Dist. Ex. 13 at p. 1). Based on an assessment of the student's cognition, along with his communication, social/emotional, motor, and adaptive skills, the evaluator concluded that the student did not meet the early intervention criteria for

special instruction and recommended that the student continue to be carefully monitored and re-evaluated if concerns persisted (Dist. Ex. 13 at pp. 7-8). The evaluator also recommended the student for a speech-language evaluation, audiological evaluation, and an occupational therapy (OT) evaluation (*id.* at p. 8).

Subsequently, the student was seen for a December 2017 audiological evaluation, a December 2017 speech-language evaluation, a January 2018 social history, a January 2018 psychological evaluation, a February 2018 classroom observation, and a February 2018 occupational therapy (OT) evaluation (see Dist. Exs. 11; 12; 14; 15; 16; 17).

On March 22, 2018, a CPSE convened for an initial eligibility meeting and after finding the student eligible as a preschool student with a disability developed an IEP for him for the 2018-19 school year (Parent Ex. B; Dist. Ex. 8 at p. 1). The CPSE recommended that the student receive two 30-minute sessions per week of speech-language therapy in a group of two and two 30-minute sessions per week of OT in a group of two with services to begin in September 2018 (Parent Ex. B at pp. 1, 13; Dist. Ex. 8 at pp. 1-3). The March 2018 IEP included five speech-language annual goals and three OT annual goals (Parent Ex. B at pp. 6-12).

The parent signed a consent form for the services detailed above on March 22, 2018, the same day as the CPSE meeting (Dist. Ex. 8 at p. 2; see Parent Ex. B at p. 1).

Beginning in summer 2018, the student was parentally placed at Bais Frieda (see Parent Exs. C at p. 1; L; M at pp. 1-2; N at p. 8; S at p. 7).

On September 3, 2018, the parent executed an enrollment contract with Bais Frieda, where the student subsequently attended school for the 2018-19 school year (Parent Exs. J: K).

In a November 20, 2018 letter to the district, the parent opined that the outcome of the evaluation conducted by the district was seriously flawed, that after further investigation her "fears were confirmed with autism," that the student showed severe language delays and behavior/academic functioning delays both in the home and in the community, and that the student required the support of special education classroom services (Parent Ex. C at p. 1).¹ In addition, the parent stated that an attached "updated report" was submitted to a district administrator on August 1st and that the district's response at that time was that "the administrator is no longer part of the district and a new administrator will reach out" (*id.*). The parent added that while "waiting for a while and watching the adverse effects of my child" without support, she was forced to seek private placement and that she was again reaching out to the district to reconvene with a plan to meet the student's needs with special education and related services (*id.*).

Attached to the November 2018 letter was an April 2018 developmental evaluation, an August 2018 treatment plan for autism spectrum disorder (ASD) and a November 2018 summary

¹ At the beginning of the November 2018 letter, the parent referenced an October 31, 2018 letter (faxed on November 8, 2018) which the parent stated "was sent in error and does not accurately present my current issues" (Parent Ex. C at p. 1). This October 2018 letter was not submitted into evidence (Tr. pp. 1-352).

prepared by the Bais Frieda Board Certified Behavior Analyst (BCBA) (see Parent Ex. C at pp. 2-33).

In a February 12, 2019 email to the district, the parent stated that she had been trying for months to "track down" the new administrator, had left many voicemails which were never returned, and had mailed copies of her son's diagnosis and evaluations and had not received any response; she requested direction to the correct contact person (Parent Ex. D at pp. 3-4). On the same day, the district administrator who participated in the March 2018 CPSE meeting (2018-19 CPSE administrator) provided the parent with a phone number at which she could reach the new administrator (id. at p. 3). In a February 14, 2019 email, the parent thanked the 2018-19 CPSE administrator for the "conversation" and confirmed that she would fax the documents with a cover sheet that afternoon (id. at pp. 2-3). In a March 12, 2019 email, the parent notified the district that a second copy of "the letter" and evaluations were faxed "almost a month ago" and again inquired as to who was the correct contact person (id. at p. 1).

On or around March 2019, Bais Frieda conducted a functional behavioral assessment (FBA) which identified the student's targeted problem behaviors as eloping, tantruming, fixations, and throwing toys (Parent Ex. N at p. 3). In addition to the targeted behaviors, the FBA identified antecedents, consequences, a statement of functional hypothesis and replacement behaviors (id. at pp. 2-6). An accompanying March 2019 Bais Frieda treatment plan addressed the student's needs related to communication, socialization skills, maladaptive behavior, and self-care and a behavior intervention plan (BIP) targeted the behaviors listed in the March 2019 FBA (id. at pp. 7-19).

On or around April 2019 Bais Frieda conducted an FBA for the 2019-20 school year²; that identified the student's targeted problem behaviors as fixating, losing focus, tantruming, having meltdowns, running away, avoiding interactions with peers, jumping around during class-time, eloping, and hitting and grabbing from peers (Parent Ex. S at p. 2). In addition, the FBA identified antecedents, consequences, a statement of functional hypothesis and replacement behaviors (id. at pp. 2-6). Bais Frieda also developed an April 19, 2019 treatment plan that addressed the areas of communication, socialization skills, maladaptive behavior, and self-care and developed a BIP targeting behaviors listed in the April 2019 FBA (id. at pp. 7-20).

The district conducted a classroom observation at the student's program at Bais Frieda on June 8, 2019 (Dist. Ex. 18).

On June 17, 2019, a CPSE convened to conduct the student's annual review and develop his IEP for the 2019-20 school year (Parent Ex. E). Finding the student eligible for special education and related services as a preschool student with a disability, the CPSE recommended an 8:+1 special class in an integrated setting, two 30-minute sessions per week of individual speech-language therapy, one 30-minute session per week of speech-language therapy in a group of two, two 30-minute sessions per week of OT in a group of two, two 30-minute sessions per week of individual counseling, and one 60-minute session per month of parent counseling and training with services to begin in September 2019 (id. at p. 14). The June 2019 IEP included four speech-

² While the reports do not include dates indicating they were developed for the 2019-20 school year, the April 2019 FBA, treatment plan, and BIP were admitted into evidence as assessments and reports for the 2019-2020 school year (Tr. p. 34; Parent Ex. S).

language annual goals, three OT annual goals, two social/emotional annual goals, and three annual goals that addressed general knowledge and comprehension, number concepts, and auditory discrimination skills (*id.* at pp. 6-11).

In a June 19, 2019 email to the district, the parent requested summer services for the student "ASAP" based on regression and stated that she had reached out to the student's then-current providers to share their experiences with the student's progress after gaps in service, and that she would forward the replies as soon as she received them (Parent Ex. F at pp. 1-2).

Starting in July 2019, the student began attending a 12-month program at Bais Frieda (see Parent Ex. Q; R at pp. 1-2).

In a July 18, 2019 email to the district, the parent reported that she visited the recommended school and found that the observed class included six special needs students and two "[t]ypical" students, the classroom teacher was "completely unengaged," the paraprofessionals were "barely trained," the building and classrooms were not locked or secured, and the play area was very small and had metal grates that posed serious safety issues for the student (Parent Ex. G at p. 2). In a July 19, 2019 response, the district informed the parent that she needed to submit a request either for mediation or an impartial hearing (Parent Ex. G at p. 1). On July 20, 2019, the parent replied that she was "confused" and asked "[a]re there no other schools?" (Parent Ex. G at p. 1). The district administrator who participated in the June 2019 CPSE meeting (2019-20 CPSE administrator) responded on July 22, 2019 that she understood the parent had some concerns about the program and that she would convey such to the assigned school staff (*id.*).

In a July 25, 2019 email, the parent provided the district with letters from the student's providers supporting the need for "immediate" 12-month services (Parent Ex. F at p. 1). The letters of support, included with the July 2019 email, discussed the student's potential for regression and the "delicate place" the student was in terms of his learning (*id.* at pp. 3-6).

On August 27, 2019, the CPSE reconvened to amend the student's IEP for the 2019-20 school year (Parent Ex. H at pp. 1-17). The August 2019 CPSE modified the student's IEP to include a 12-month program in a 6:1+1 special class in an integrated setting with the addition of a 1:1 behavior paraprofessional, two monthly parent counseling and training sessions, and the need for a BIP; the CPSE removed individual counseling as a recommendation (*id.* at pp. 1, 5, 13-14, 17).

In a September 4, 2019 final notice of recommendation (FNR) the district confirmed the program offered in the August 2019 IEP and the assigned school placement, and the parent signed a consent form for summer services (Dist. Ex. 9).

On September 10, 2019, the parent executed an enrollment contract with Bais Frieda for the 2019-20 school year (Parent Ex. O).

In a September 10, 2019 letter to the district, with a fax stamp date of November 8, 2019, the parent asserted that the district's recommended placement was not appropriate for the student's academic, social, and behavioral needs (Parent Ex. I at pp. 1-2). The parent notified the district that she had placed the student at Bais Frieda, and that unless the issue was resolved she would seek tuition funding (*id.* at pp. 1-2).

A. Due Process Complaint Notice

By due process complaint notice dated February 25, 2020, the parent alleged that the district failed to develop an appropriate individualized education program (IEP) for the student and to provide an appropriate placement for the student, and sought resolution with respect to the 2018-19 and 2019-20 school years including tuition funding (Parent Ex. A at pp. 1-3). Regarding the 2018-19 school year, the parent argued that the March 2018 IEP was inappropriate as it did not include any special education program, only related services of speech-language therapy and OT, and did not recommend a 12-month special education classroom, which the student needed to address "significant issues" with which he was challenged (*id.* at p. 1). In addition, the parent alleged that efforts to arrange for an additional CSE meeting were ignored (*id.*).

Regarding the 2019-20 school year, the parent alleged that the recommended 6:1+1 special class was too restrictive and that the recommended placement was not appropriate (Parent Ex. A at p. 2). As relief, the parent sought an order for the student to remain at Bais Frieda, modification of the student's IEP recommendation from a 6:1+1 to 8:1+1 special class, and for the district to directly fund tuition at Bais Frieda for the 2018-19 and 2019-20 school years (*id.* at p. 3).

B. Impartial Hearing Officer Decision

An impartial hearing convened for status conferences on August 13, 2020 and September 17, 2020, and the parties proceeded to hearing on October 19, 2020 and concluded on February 5, 2021 after four days of hearings (Tr. pp. 1-352). In a decision dated March 11, 2021, the IHO denied the parent's request for tuition funding at Bais Frieda for the two school years in question (IHO Decision at p. 15). Regarding the 2018-19 school year, the IHO found that based on his variety of difficulties, the student required special education teacher support in his classroom and therefore the district did not offer the student FAPE for the 2018-19 school year (*id.* at p. 11). With respect to the parent's unilateral placement for the 2018-19 school year, the IHO found it difficult to ascertain whether the student actually progressed satisfactorily in any area, found there was no evidence of progress in speech and language, and found no evidence of progress in the areas of behavior and his difficulty and frustration in making himself understood (*id.* at pp. 11-12). The IHO found that the program offered at Bais Frieda for the 2018-19 school year was inappropriate (*id.* at p. 12). The IHO addressed the equities in this case, even though she had found the program at Bais Frieda inappropriate, and found that the parent signed the final notice of recommendation accepting the services, and did not provide any communication indicating that she disagreed with the services and intended to place the student unilaterally and request tuition reimbursement (*id.*). The IHO further noted that any notice letter sent by the parent in October 2018 was well after the parent placed the student at Bais Frieda on September 3, 2018 (*id.*). Thus, the IHO found that the late 10-day notice was an equitable consideration that would weigh against an order of tuition funding (*id.*).

Regarding the 2019-20 school year, the IHO found that the district offered the student FAPE (IHO Decision at p. 14). The IHO found that an integrated program—as was recommended by the district—where the student could benefit from the presence of general education students and receive special education teacher support, in conjunction with a paraprofessional for behavior and related services, was appropriate (*id.* at p. 13). Turning to the parent's assertion that the district recommended 6:1+1 special class was too restrictive, the IHO stated that it was unclear why the

parent was objecting to the district program (which was an integrated class with general and special education students) when the program the parent placed the student in at Bais Frieda was more restrictive consisting only of special education students (*id.* at pp. 13-14). With respect to the parent's disagreements with the program site offered by the district, the IHO found no reason to assume the number of typically developing students would have been inadequate, that the teacher would have been unqualified or would have failed in the required duties, that staff (including the recommended 1:1 behavior paraprofessional) would have been unable to address any elopement behaviors, or that any metal in the outside area (noted by the parent as a concern) was dangerous (*id.* at p. 14). Regarding the parent's assertion that the district did not offer a program for summer 2019, the IHO noted that the IEP developed in August 2019 provided for a 12-month school year and that while the June 2019 IEP did not, documentation of regression from the student's providers that would entitle the student to summer services was not received by the district until July 2019, after the June 2019 CSE meeting (*id.* at p. 15). In addition, the IHO found that if the district should have provided a summer placement and if a remedy were to be made, it would "perhaps" be compensatory services and that since they were not being requested here, she would not address that potential issue concerning relief (*id.*).

Regarding placement at Bais Frieda, the IHO found that a review of the student's progress during the 2019-20 school year indicated that the student continued to struggle with both expressive and receptive language, continued to display socialization difficulties, and continued to manifest maladaptive behaviors and therefore she again found concerns regarding the appropriateness of the program at Bais Frieda for the 2019-20 school year (IHO Decision at pp. 14-15). Lastly, for reasons similar to those identified regarding the 2018-19 school year, namely the lateness of the parent's ten-day notice, the IHO noted that there were equitable considerations that would interfere with an award of tuition funding for the 2019-20 school year (*id.* at p. 15).

IV. Appeal for State-Level Review

The parent appeals and argues that the IHO incorrectly found that the unilateral placements of the student for the 2018-19 and 2019-20 school years were inappropriate. The parent argues that the IHO applied the wrong standard of law in assessing the appropriateness of the unilateral placement and additionally incorrectly concluded that the student had not made actual progress. The parent contends that the IHO incorrectly concluded that the district provided the student a FAPE for the 2019-20 school year and applied the wrong standard of law. The parent argues that the IHO incorrectly found that there were equitable considerations that would preclude an order of tuition funding for the 2018-19 and 2019-20 school years and that the balancing of the equities favored the parent and should not have resulted in a denial of funding. As relief, the parent seeks an order reversing the findings of the IHO and directing the district to directly fund tuition for the unilateral placement of the student for the 2018-19 and 2019-20 school years.

The district cross-appeals from the IHO's finding that the district failed to provide the student with a FAPE for the 2018-19 school year. The district further argues that if the SRO determines that the district deprived the student of a FAPE for the 2018-19 school year due to a failure to reconvene and that Bais Frieda was appropriate, any award of tuition should be limited to begin sixty school days from November 20, 2018 (the date of the parent's request for reevaluation) which would be March 6, 2019. Also, the district argues that the IHO correctly determined that the district provided the student with a FAPE for the 2019-20 school year, correctly

determined that Bais Frieda was not appropriate for the student for the 2018-19 and 2019-20 school years, and that equitable considerations weigh against an award of tuition funding for the 2018-19 and 2019-20 school years.

In an answer to the district's cross-appeal, the parent denies the district's claims and requests an order reversing the IHO's decision and directing the district to directly fund the student's tuition at Bais Freida for the 2018-19 and 2019-20 school years.

V. Applicable Standards

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

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP" (Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). The Supreme Court has indicated that "[t]he IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement" (Andrew 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]).³

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).

³ 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).

VI. Discussion

A. 2018-19 School Year

1. FAPE

The district argues in its cross-appeal that the IHO erred in finding that the district failed to offer the student a FAPE because the student required special education teacher support in the classroom and the March 2018 IEP only recommended related services for the student. Specifically, in determining that the district denied the student a FAPE for the 2018-19 school year, the IHO described the evaluative information concerning the student's needs and concluded that the student's "difficulties with communication, socialization, and adaptive skills would affect his ability to benefit from [special] education in the classroom" (IHO Decision at p 11). In so doing, the IHO referenced both evaluative material available to the March 2018 CPSE and the doctor's report obtained subsequently by the parent in April 2018 that was not available to the March 2018 CPSE and so was not considered in the development of the March 2018 IEP (District Ex 10). Given that the doctor's report contained significantly different information than that obtained by the district prior to the March 2018 CPSE meeting, and also formed the basis for the parent's request to reconvene in November 2018, it is necessary to consider the evaluations before the March 2018 CPSE, the recommendations contained in the resultant IEP and the pertinence of the information obtained by the parent subsequent to the CPSE meeting in order to determine whether the IHO correctly found that the district failed to offer the student a FAPE for the 2018-29 school year.

a. Evaluative Information

The CPSE administrator for the 2018-19 school year testified that all the evaluations that were conducted by "the agency" were one component in making a determination with respect to the creation of the student's IEP for the 2018-19 school year (Tr. p. 64; see Tr. pp. 59-61, 63-64; Parent Ex. B at p. 17).

In December 2017, a special education teacher conducted a developmental evaluation of the student, following his referral to the EIP (Dist. Ex. 13 at p. 1). The evaluator reported that the student's quantitative skills were weak as he did not count by rote or with one-to-one correspondence and did not understand the concepts of one, one more, or all (*id.* at pp. 2, 3, 7). The student's reasoning skills were described as inconsistent as he would self-correct but did not yet use trial and error strategies when he encountered a difficult task (*id.*). According to the evaluator, administration of the Developmental Assessment of Young Children-Second Edition (DAYC-2) yielded a standard score of 87 in the area of cognition for the student, which fell within normal limits of the mean and placed him in the "[b]elow [a]verage" range (*id.* at pp. 3-4). The evaluator reported that the student could combine two related objects in play,⁴ stacked preferred sized blocks into high towers, matched and labeled colors and shapes, matched objects to their

⁴ The summary report indicated that according to the Westby Play Scales (1980), a child between the ages of 19 to 22 months was expected to engage in symbolic play that extended beyond the child's self, should play with dolls, should perform pretend activities on more than one person or object, and should combine two toys in play (Dist. Ex. 13 at p. 3).

corresponding pictures, identified most animals but not their corresponding sounds, and demonstrated self-correction skills when asked to match/sort colored bears into their corresponding cups (id. at p. 3).

With regard to social/emotional functioning, the evaluator indicated that the student presented with a standard score of 73 in the area of social/emotional development, which placed him in the "[p]oor" range (Dist. Ex. 13 at p. 3). The evaluator stated that the student was encountered awake and alert, that eye contact and a positive social rapport were easily established and maintained, and that he was interested and attempted all tasks to the best of his ability (id. at p. 4).⁵ She also noted that the student approached tasks in an anxious manner, although, once he was more sure of himself, he was able to complete tasks independently or ask for assistance (id.). According to the evaluator, the student's mother reported that the student did not play with others, was not empathetic and would not attempt to comfort others in distress, and did not greet others with a hug or another appropriate gesture (id.).

In addition, the parent reported concerns that the student was sometimes difficult to understand, that listeners had difficulty interpreting what he was saying, and that he would shut down verbally when overwhelmed and frustrated and would then communicate via grunting (Dist. Ex. 13 at p. 1). The parent also reported the student engaged in repetitive behaviors, demonstrated poor play skills, would not respond to his name or to redirection, was very routine oriented and would have meltdowns when anything did not go as expected, displayed poor eye contact, sought sensory input from certain textures, was in constant motion, did not have safety awareness as he would open the door and run out of the apartment, and was described as very destructive as he "t[ook] everything apart," threw things around frequently, and would hit and bite others when frustrated (id. at pp. 1, 3, 5).

The evaluator described the student's receptive language skills as fair, noting that he could carry out simple commands but hesitated when given two step directions, benefited from repetition and increased processing time, understood possessives and pronouns, pointed to major and minor body parts upon request, and identified objects described by their use; however, the student did not consistently respond to yes/no questions and was unable to follow directions with spatial terms such as in front, behind, under, and beside (Dist. Ex. 13 at pp. 2, 4, 7). With respect to expressive language, the evaluator found the student had very few "real true clear intelligible" words in spontaneous speech and reported the student consistently spoke via word approximations and jargon (id.). The evaluator stated that the student seemed to have much to say, however his speech was not understood, and he appeared to "grope" when trying to communicate (id. at p. 4). Also, the evaluator reported that the student did not spontaneously say greetings or farewells (id.).

The evaluator found the student's fine motor skills to be fair, noting the student used a pincer grasp when putting small Cheerios in a narrow neck bottle, poked with isolated index finger, turned pages in a book, and scribbled spontaneously (Dist. Ex. 13 at p. 5). The student held a crayon in an adaptive manner with his thumb down, imitated linear and circular strokes and used circular strokes when drawing, placed and removed pegs from a pegboard, placed a square and circle in a foam board, completed a five-piece non-interlocking puzzle, and opened a loosened

⁵ The evaluation took place in the student's home (Dist. Ex. 13 at p. 1).

screw-top bottle (*id.*). The evaluator reported that the student did not use linear strokes when drawing, did not don scissors or snip a paper, did not copy a cross or a square, was unable to lace large beads on a string, and was unable to close a screw-top bottle (*id.*). With regard to gross motor skills, the evaluator stated that the student ambulated independently and demonstrated controlled starts and stops, climbed low playground equipment, ran ten feet without falling, could jump, ascended and descended stairs via a step-to pattern with support, walked backwards and walked swinging arms and legs in cross pattern similar to that of an adult, and could throw and kick a ball (*id.*). The evaluator noted the student did not alternate feet ascending stairs, walk forward heel to toe without losing balance for four or more steps, hop or jump over objects up to six inches high, gallop, or catch a ball (*id.*).

In sum, the evaluator determined that the student did not meet the early intervention criteria for special instruction at the time of the evaluation and recommended that the student continue to be carefully monitored and re-evaluated if concerns persisted (Dist. Ex. 13 at pp. 7-8).

In a December 2017 audiological evaluation report, an audiologist concluded that the student's evaluation results were consistent with normal hearing and ruled out hearing loss greater than mild in severity (Dist. Ex. 17 at pp. 2-3). The audiologist recommended a re-evaluation in six months to obtain frequency specific behavioral information (*id.* at p. 3).

The recommendation section of the student's December 2017 health examination form did not include restrictions to the student's physical activity or diet and did not include a recommendation for early intervention or special education services, however, it did include a prescription for OT as needed (Dist. Ex. 2 at p. 1).

On December 25, 2017, a speech-language pathologist conducted an evaluation of the student in his home (Dist. Ex. 15 at p. 1). The resultant speech-language evaluation report stated that the student presented with significant expressive language delays; used jargon-like vowel productions with some word approximations interspersed; used pulling, pushing, and screaming to have his needs met; did not rephrase when he was not understood; had difficulty following simple directions and often needed repetitions and redirections to answer simple questions (*id.* at pp. 3-6). The report further indicated that the student was less than 20 percent intelligible (*id.* at p. 6). Based on these delays, the speech-language pathologist recommended speech-language therapy to increase the student's communicative abilities and family training to teach his caregivers techniques that were effective in the facilitation of age-appropriate language (*id.*).

According to a January 2018 social history, the parent reported that the student used to be a great eater but now deemed most foods as "gross;" mostly finger fed himself and tried to eat via a spoon but was unable to eat an entire meal with a spoon; could drink from an open cup and through a straw; was not easy to put to bed and did not nap; doffed socks, shoes, pants, and pull-ups; tolerated dressing if he was "not mad"; and generally tolerated diaper changes (Dist. Ex. 11 at p. 2). The parent described the student as an extremely sweet boy who was affectionate and social at home with familiar people but who also threw things and bit others when frustrated (*id.*).

According to a January 30, 2018 psychological evaluation report, the student was referred for an evaluation to address concerns about his overall development and was "recently" approved for speech-language therapy through the EIP (Dist. Ex. 12 at p. 1). The psychological evaluation

was conducted for the stated purpose of assessing the student's then-current level of cognitive and academic functioning (id.). The evaluator observed the student to be cooperative, an enthusiastic participant in the evaluation activities, and active (often bouncing in his seat) and noted the student remained on task throughout most of the evaluations (id. at p. 2). The evaluator stated that the student followed directions and that his eye contact was appropriate (id.). According to the evaluator, the student spoke spontaneously and responded appropriately to questions in conversation, spoke in simple sentences (e.g., "I did it" and "[n]eed to help me") and well-developed sentences (e.g., "I took three, put one back, and said two"), spoke with errors in articulation and his speech was sometimes only intelligible in context (id.). The student was observed to hold a crayon in his right hand in a quadripod grasp, copy a circle and vertical and horizontal lines, and use two hands to open a pair of scissors (a skill that was reportedly not expected at his age) (id.).

Assessment of the student's cognitive functioning, through administration of the Stanford Binet Intelligence Scales: Fifth Edition (SB5), yielded a full-scale IQ of 108 (upper end of the average range), a nonverbal score of 109 (upper end of the average range) and a verbal score of 106 (average range) (Dist. Ex. 12 at pp. 2-3). In the area of non-verbal skills, the evaluator reported that the student demonstrated age-appropriate matching skills, completed simple block sequences, spontaneously labeled a triangle, demonstrated understanding of size and quantity concepts, demonstrated counting skills, and completed simple inset puzzles (id. at p. 3). Regarding verbal skills, the evaluator observed that the student pointed to body parts and labeled a few objects and actions in pictures, that his speech was sometimes only intelligible in context, that his understanding of spatial positional terms was high average, and that his short-term auditory memory for sentences was borderline average as he repeated two-word sentences (id. at p. 3). With respect to pre-academic skills and general information, administration of the Wechsler Preschool and Primary Scale of Intelligence: Third Edition (WPPSI-III) showed that the student's ability to respond to general information questions was high average, however, the evaluator noted that the student responded correctly to six of six general information questions that required him to point to the correct response while he responded correctly to a few questions that required verbal responses (id. at p. 3).

With regard to the student's adaptive functioning, administration of the Vineland Adaptive Behavior Scales – Second Edition (completed via an interview with the parent) yielded an adaptive behavior composite of 87 which was considered adequate for his age (Dist. Ex. 12 at p. 4). Based on parent reporting, the student's communication skills were deemed adequate for his age as he followed two-part instructions with a lot of repetition, sustained his attention on books that were read aloud for a few minutes at a time, identified colors, and spoke in full sentences including pronouns, negatives, possessives, and descriptive words (id.). The parent reported that the student's articulation was often unintelligible and that he tended to interpret things literally (id.). The student's daily living skills were reported to be moderately low for his age as he was not yet toilet trained, pulled up his pants but did not take off his coat, knew how to use a spoon and fork but preferred using his fingers to feed himself, and had poor safety awareness; however, the student helped with simple chores and put away his toys when he was told (id.). The student's socialization skills were reported to be adequate for his age as he engaged in pretend play activities, primarily played parallel to a sister, used words to express his emotions, when motivated transitioned easily from one activity to another, and independently used a tablet (id.). The parent also reported that the student had difficulty adjusting to changes in routine (id.). Regarding gross and fine motor

skills, the student's abilities were reported to be adequate for his age and it was noted that the student could run, jump, hop while holding on, climb on playground equipment, turn doorknobs, screw and unscrew bottle caps, stack blocks, and open candy wrappers (id.). The evaluator reported that the parent expressed concerns about the student's sensory processing and noted he walked on his toes and was sensitive to textures of clothes and blankets, light, and sound (id.).

A February 5, 2018 classroom observation, conducted in a classroom consisting of eight children and four adults, yielded a written report which indicated that the student eagerly joined the class in transitioning to circle-time, waited for his name to be called, followed a two-step direction, responded appropriately to directions and prompting, transitioned to lesson-time, and remained seated throughout the lesson (Dist. Ex. 14).

The February 15, 2018 OT evaluation report stated that the student was cooperative throughout the evaluation; was very quiet and did not engage in any spontaneous conversation; was able to follow the simple directions presented, though at times stood up and required some redirecting; maintained consistent eye contact; and that his demonstrated focus to tasks and tolerance toward activities presented to him was adequate for a child his age (Dist. Ex. 16 at pp. 1-2). The evaluator found the student presented with weaker distal pressure, fair frustration tolerance and fair reaction to auditory and visual stimuli, fair body awareness and that his vestibular movements were handled well (id. at p. 2). Administration of the Peabody Developmental Motor Scales - Second Edition (PDMS-2) found the student's fine motor/grasping skills and visual motor integration skills to be in the low average range (id. at p. 3). The evaluator noted that the student presented with upper extremity full range of motion with mild hypertonicity in his distal upper extremities, appeared to lack some development in hand muscle tone, and that his bilateral manipulation and fine motor skills required some extra distal strength and coordination skill due to overall weakness (id.). The evaluator also noted that the student did not require hand over hand assistance to complete the fine motor tasks presented (id.). In terms of prewriting skills, the evaluator found the student was able to imitate a weak vertical stroke and a horizontal stroke, was not able to complete a fully closed circle but was able to produce gentle circular scribble on a paper, was able to snip the paper randomly in one place although he was unable to cut across a paper, was able to stack eight cubes, appeared to display adequate bilateral coordination skills, and it was noted that his distal pressure was extremely light and very gentle (id.). With respect to gross motor development, while the student demonstrated overall mild low muscle tone throughout his upper extremities and proximally in his trunk; he was able to catch a ball at very close distances, demonstrated a fair toss of the ball, was able to kick the ball, and was observed running after the ball without falling (id.). The evaluator indicated that gross motor skills were not an area of concern to the parent at the time of the evaluation (id.).

Regarding sensory modulation, the OT report indicated that according to the parent the student did not necessarily respond to punishment or correction, changed moods quickly, did not like putting on shirts over his head, did not sit through a whole book because he was busy, would jump on the furniture and almost broke his elbow one time, and loved to squeeze as it "calms him down" (Dist. Ex. 16 at p. 5). Results of the Infant/Toddler Sensory Profile 2 revealed that the student was just as interested in sensory experiences as the majority of others, was much more likely to be overwhelmed by sensory experiences than others, detected many more sensory cues than others, and missed many more sensory cues than others (id. at pp. 5-6, 17). The evaluator noted that the student's scores indicated an overall delay in sensory integration with his registration

ranging from one range to another throughout his day (*id.*). In the sensory processing area of modulating arousal, the evaluator found the student demonstrated difficulties in modulating his arousal, needed a routine to stay content and happy, reportedly almost always took longer than same age children to respond to questions or actions, almost always got anxious in new situations, was distracted in noisy settings and frequently became upset and tried to escape from these settings, almost always pulled at clothing or resisted getting clothing on, and became upset if his own clothing, hands, or face were messy (*id.* at p. 10). Regarding sensory registration and muscle tone, the evaluator found the student demonstrated under registration of proprioceptive and deep pressure input which reportedly often resulted in poor body awareness as demonstrated by the student's constant need for deep pressure input, sensitivity to noise, and irregular sleeping pattern (*id.* at p. 11). The parent reported that the student enjoyed rough play, jumping on furniture, and rhythmic activities and was constantly moving and extremely active to which the evaluator noted that continuous movement and seeking deep pressure input through crushing and tumbling could be self-stimulating behaviors to compensate for under registration of sensory input and noted that this could limit the student's ability to develop more complex and age appropriate skills in play, self-care, and exploration of environment (*id.*). In terms of sensory processing, the evaluator stated that the student had difficulty maintaining appropriate postural support while sitting and playing for longer periods of time, displayed decreased upper body and core strength throughout the evaluation (which reportedly negatively impacted his fine motor skills), presented with lower tone and weak endurance, demonstrated sensory modulation and regulatory issues, and displayed problems understanding proprioceptive input to his major joints (*id.*). The evaluator opined that the student's sensory processing issues would have a definite impact on his motor planning skills and academia if not addressed at that time (*id.*).

b. March 2018 IEP

Turning to the recommendations made by the CPSE to address the student's needs, the March 2018 IEP stated that the student presented with speech-language and sensory motor delays and therefore only related services were being offered to address delays and promote growth (Parent Ex. B at p. 1). The March 2018 CSE recommended that the student receive related services of two 30-minute sessions per week of speech-language therapy in a group of two and two 30-minute sessions per week of OT in a group of two for the 10-month school year (*id.* at pp. 1, 13; Dist. Ex. 8 at pp. 2-3).

The March 2018 IEP included five speech-language annual goals and accompanying short-term objectives which targeted the student's ability to use complete and complex sentences; comprehend complex sentences, stories, and questions; initiate and maintain age-appropriate conversations; correctly produce misarticulated sounds and increase motor planning skills in conversations during play activities; and listen to auditory stimuli without being distracted by background noise (Parent Ex. B at pp. 6-10). The March 2018 IEP included three OT annual goals along with short-term objects targeting the student's improvement of sensory processing and motor planning skills for greater success in school, visual motor skills, and grasping and fine motor skills (*id.* at pp. 11-12). The IEP did not call for the student's removal from the general education environment and stated that the student would participate in appropriate activities with age-appropriate non-disabled peers 100 percent of the time (*id.* at p. 15).

The 2018-19 CPSE administrator testified that at the time of the March 2018 meeting she asked the parent where the student would be in school or daycare for September and that the parent indicated that the child would be at home (Tr. p. 67; see Parent Ex. B at p. 1). The 2018-19 CPSE administrator stated that she remembered "very well" that the parent was not interested in sending the child into school as he was very young (Tr. p. 67-68). The 2018-19 administrator CPSE noted that overall, the student was a cognitively intact, intelligent, young man who she believed just needed to be with typically developing peers with the support of related services (Tr. p. 68). She testified that she highly recommended that the parent consider a general education play group for the student and explained to the parent the benefits of the student being with typically developing peers (Tr. pp. 68, 87). She further explained to the parent that with respect to some of the language frustration the student was having, he would be able to learn how to appropriately express himself when he saw typically developing peers and had role models for behavior, socialization, and language (Tr. pp. 68-69, 87). In addition, the 2018-19 CPSE administrator stated that a teacher in a regular program would be able to challenge the student academically and cognitively because his cognitive skills were 100 percent within normal limits (Tr. pp. 69, 87). She testified that the parent was not 100 percent on board and that she really wanted the student to be at home (Tr. p. 68).

The 2018-19 CPSE administrator testified that there was a discussion during the March 2018 CPSE meeting regarding the student's behavioral, social and emotional challenges (Tr. pp. 78-79, 83). The 2018-19 CPSE administrator stated that the CPSE recommended strategies to address the student's behavioral issues in that the March 2018 IEP identified the student's need for visual and verbal cues, positive reinforcement, and repetition (Tr. p. 83-84). She acknowledged that the special factors section of the IEP indicated that the student did not need strategies, including positive behavioral intervention, supports and other strategies to address behaviors that impeded his learning or that of others (Tr. pp. 84-85; see Parent Ex. B at p. 5). The 2018-19 CPSE administrator testified that she believed that the student's behaviors were developmentally normal for a two year, nine-month-old, which was discussed at the CPSE meeting, and she did not think it was appropriate to make recommendations for behaviors that were developmentally appropriate for a student or to start creating a behavioral intervention plan or extra strategies (Tr. pp. 86-87). On cross examination the 2018-19 CPSE administrator stated that at the time of the March 2018 CPSE meeting, the discussion regarding the student's behavioral needs did not raise any questions in her mind regarding the need to inquire further into whether or not the student was on the autism spectrum (Tr. p. 88).

The 2018-19 CPSE administrator stated that she did not recall that the parent had any disagreements with the recommended services either at or after the March 2018 CPSE meeting and that she felt that the services offered would have provided the student a FAPE (Tr. pp. 72-74).

The parent acknowledged that she signed consent for the services detailed on the March 2018 IEP (Tr. p. 193; see Dist. Ex. 8 at p. 2). However, she explained that she did not agree to the program set forth in the IEP and that she wanted the student to have special education services, behavioral services, and a "one-to-one person" and had asked for it specifically at the meeting but was told that "there wasn't enough information in the reports to give him that, he wasn't going to get it without additional evaluations" (Tr. pp. 192-95, 216). The parent stated that she accepted the IEP as she felt it was the best that the district could offer at the time and felt the student would receive "zero" services if she did not sign (Tr. pp. 192, 194, 216-17). The parent testified that at

the March 2018 CPSE meeting she shared that she was not happy with what the student was receiving and felt that the student needed more as he had behaviors that were not conducive to a normal classroom environment and that none of that was being addressed (Tr. p. 195-96). The parent further explained that she knew the student wasn't going to make it in a regular classroom and so she was going to work with the student at home with therapists, although after a short while she found that it was not meeting the student's needs (Tr. p. 196).

c. CPSE Reconvene Request

In determining whether the district offered the student a FAPE for the 2018-19 school year, it is necessary to take into consideration the parent's request that the district reconvene to consider the doctor's letter and she obtained in April 2018 and accompanying materials.

The IDEA sets forth procedural safeguards that include providing parents an opportunity "to participate in meetings with respect to the identification, evaluation, and educational placement of the child" (20 U.S.C. §1415[b][1]). Federal and State regulations governing parental participation require that school districts take steps to ensure that parents are present at their child's IEP meetings or are afforded the opportunity to participate (34 CFR 300.322; 8 NYCRR 200.5[d]). Although school districts must provide an opportunity for parents to participate in the development of their child's IEP, mere parental disagreement with a school district's proposed IEP and placement recommendation does not amount to a denial of meaningful participation (see E.H. v. Bd. of Educ., 361 Fed. App'x 156, 160 [2d Cir. 2009]; E.F. v. New York City Dep't of Educ., 2013 WL 4495676, at *17 [E.D.N.Y. Aug. 19, 2013] [holding that "as long as the parents are listened to," the right to participate in the development of the IEP is not impeded, "even if the [district] ultimately decides not to follow the parents' suggestions"]; DiRocco v. Bd. of Educ., 2013 WL 25959, at *18-*20 [S.D.N.Y. Jan. 2, 2013]; P.K. v. Bedford Cent. Sch. Dist., 569 F. Supp. 2d 371, 383 [S.D.N.Y. 2008] ["A professional disagreement is not an IDEA violation"]; Sch. For Language and Commc'n Development v. New York State Dep't of Educ., 2006 WL 2792754, at *7 [E.D.N.Y. Sept. 26, 2006] ["Meaningful participation does not require deferral to parent choice"]).

In addition to the district's general obligation to review the IEP of a student with a disability at least annually, federal and State regulations require the CSE to revise a student's IEP as necessary to address "[i]nformation about the child provided to, or by, the parents" during the course of a reevaluation of the student (34 CFR 300.324[b][1][ii][C]; 8 NYCRR 200.4[f][2][ii]), and State regulations provide that if parents believe that their child's placement is no longer appropriate, they "may refer the student to the [CSE] for review" (8 NYCRR 200.4[e][4]). Furthermore, in a guidance letter the United States Department of Education indicated that parents may request a CSE meeting at any time and that if the district determines not to grant the request, it must provide the parents with written notice of its refusal, "including an explanation of why the [district] has determined that conducting the meeting is not necessary to ensure the provision of FAPE to the student" (Letter to Anonymous, 112 LRP 52263 [OSEP Mar. 7, 2012]; see 34 CFR 300.503; 8 NYCRR 200.5[a]). A district's failure to comply with the procedural requirements related to a parent's request to reconvene may constitute a denial of FAPE (see Application of a Student with a Disability, Appeal No. 15- [finding that the district violated the IDEA by failing to either reconvene the CSE in response to the parents' request or respond with written notice stating the reasons why the district did not believe a reconvene was necessary and such violation contributed to a denial of FAPE], see also Letter to Anonymous, 112 LRP 52263 [OSEP Mar. 7,

2012]; 34 CFR 300.503; 8 NYCRR 200.5[a]; Application of a Student with a Disability, Appeal No. 13-172; Application of the Dep't of Educ., Appeal No. 12-128.) However, a district's failure to comply with procedural requirements of the IDEA only constitutes a denial of a FAPE if the procedural violation deprived the student of educational benefits or significantly impeded the parents opportunity to participate in the decision-making process regarding the provision of a FAPE to the student (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]).

The parent testified that she started calling the district in late April or May after the student had received a diagnosis of autism and that she called for the "entire summer" without ever reaching a person (Tr. pp. 196-97; see Parent Ex. C at p. 5). The parent stated that she sent a letter to the district at the end of August requesting a special education classroom (Tr. pp. 196-97; see Parent Ex. C at p. 1).⁶ The parent testified that at that point she found out that the administrator she thought was working for the student "wasn't there" which she concluded, explained why she did not get any answers to her phone calls (Tr. p. 197). She testified that she tried numerous times to contact the district by phone but never got a response and at some point, months later, tried calling the 2018-19 CPSE administrator, who had participated in the March 2018 CSPE meeting (Tr. p. 198-99).

The parent claimed that she sent the district a letter dated October 31, 2018, faxed on November 8, 2018, in which she provided it with notice that she "signed to sue [it] and put [the student] in a special education program" (Tr. pp. 202). This October 2018 letter was not submitted into evidence (Tr. pp. 1-352). The 2018-19 CPSE administrator testified that she believed that it was sometime in February or March of 2019 when the parent reached out to her to discuss changing the "IEP program" (Tr. p. 78).

In the November 20, 2018 letter to the district, the parent opined that the outcome of the evaluation conducted by the district was seriously flawed, that after further investigation her "fears were confirmed with autism," that the student showed severe language delays and behavior/academic functioning delays both in the home and in the community, and that the student required the support of special education classroom services (Parent Ex. C at p. 1). The parent added that while "waiting and watching the adverse effects of my child" without support she was forced to seek private placement and was again reaching out to the district to reconvene with a plan to meet the student's needs with special education and related services (id.).

Further, as detailed above, in February 2019, the parent sent an email to the district stating that she had been trying for months to "track down" the new administrator, had left many voicemails which were never returned, had mailed copies of her son's diagnosis and evaluations and had not received any response, and requested direction to the correct contact person (Parent Ex. D at pp. 3-4). On the same day the 2018-19 CPSE administrator provided the parent with a phone number at which she could reach the administrator (id. at p. 3). In a February 14, 2019 email, the parent thanked the 2018-19 CPSE administrator for the "conversation" and confirmed that she would fax the documents with a cover sheet that afternoon (id. at pp. 2-3). In a March 12, 2019 email, the parent notified the district that a second copy of "the letter" and evaluations were

⁶ The August letter was not included in the hearing record.

faxed "almost a month ago" and inquired again as to who was the correct contact person (*id.* at p. 1).

In this case the hearing record reveals that the parent notified the district that she had new information with respect to the student's needs and requested the CPSE to reconvene "with a plan to meet [the student's] needs" (see Parent Ex. C at p. 1). Attached to the November 2018 letter was an April 2018 developmental evaluation which stated that the student presented with a poor quality of communication, social emotional responses with restricted and repetitive patterns of behavior and interests, and sensory processing difficulties all characteristic of and meeting the diagnostic criteria of an autism spectrum disorder (ASD) (*id.* at pp. 5, 7). Among other things, the examiner recommended a 12-month comprehensive intervention program of a minimum of 25 hours per week in which the student is engaged in systematically planned and developmentally appropriate educational activities geared toward identified objectives, use of a multi-sensory approach, therapy with opportunities to maximize one to one interactions, intensive and individualized speech-language therapy to address communication deficits, increased OT with sensory integration to address fine motor deficits, coordination, motor planning, adaptive difficulties, modulation of activity level, and sensory processing problems, parent training, and team meetings (*id.* at pp. 7-8). Also, the parent provided an August 2018 BCBA report and treatment plan and a November 2018 BCBA summary report from the student's then current school provider, Bais Frieda (*id.* at p. 1, 10-33). The reports included information with respect to then-current "problem areas," assessment of the student's then-current functioning, and details of a BIP, transition plan, crisis plan, and parent involvement (*id.* at pp. 11-23).

Here, the district's failure to reconvene the CPSE at the parent's request or otherwise respond to the parent's request to reconvene was a procedural violation that rises to the level of a denial of FAPE for the 2018-19 school year because the it deprived the student of educational benefits and significantly impeded the parents opportunity to participate in the decision-making process regarding the provision of a FAPE to the student (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]). While it is not entirely clear whether the district was aware of the parent's efforts to bring the new information she obtained in April 2018 to its attention prior to November 2018, the parent did obtain information shortly after the March 2018 CPSE meeting, the district was indisputably aware of it by November 2018 and, at that time, could have either reconvened the CPSE or informed the parent of its reason not to do so. Instead, the CPSE did not meet until June 2019 to review the student's placement for the 2019-20 school year. By failing to reconvene the CPSE the district deprived the parent of her right to share new information with the CPSE, participate in the IEP planning and development process, and significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the student. Moreover, unlike in situations where a reconvene of the CSE is unlikely to yield any new information or any information that has the potential to impact the CSE's recommendations (see Application of a Student with a Disability, Appeal No. 14-158 [finding that because information forming the basis for a parent's request to reconvene did not reflect a change in the student's needs and abilities to such an extent that the placement recommended by CSE became inappropriate as a result, "based on the unique circumstances" of the matter, the parents' participation was not impeded based on the CSE's failure to reconvene the CSE]), here, the new information obtained by the parent included a diagnosis of ASD for the student, an assessment of the student which showed a greater degree and complexity of need than had been previously identified by other evaluations and contained detailed recommendations

concerning additional services and supports to address the student's needs that would be highly relevant to the creation of an appropriate educational program and placement for him. Accordingly, while my analysis of the district's failures with respect to the development and recommendation of an appropriate educational program and placement differ somewhat from the IHO's findings, I nonetheless concur with her conclusion that the district deprived the student of a FAPE for the 2018-19 school year.⁷

2. Unilateral Placement – Bais Frieda

The IHO found the program offered at Bais Frieda for the 2018-2019 school year was inappropriate as it was difficult to ascertain whether the student actually progressed satisfactorily in any area, and there was no evidence of progress in speech and language or in the area of making himself understood (IHO Decision at p. 12).

The parent argues that the IHO applied the wrong standard of law in assessing the appropriateness of the unilateral placement and additionally argues that the IHO incorrectly concluded that the student had not made progress. The evidence in the hearing record, as detailed below, supports the parent's position that Bais Frieda was an appropriate placement.

A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak, 142 F.3d at 129). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (Carter, 510 U.S. at 13-14). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ. of the City Sch. Dist. of Yonkers, 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement'" (Gagliardo, 489 F.3d at 112, quoting Frank G. v. Bd. of Educ. of Hyde Park, 459 F.3d 356, 364 [2d Cir. 2006]; see Rowley, 458 U.S. at 207). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). When determining whether a unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether the placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see Gagliardo, 489 F.3d at 115; Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] ["evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]). A private placement is

⁷ Lastly, the district argues that if the SRO determines that the district deprived the student of a FAPE for the 2018-19 school year due to a failure to reconvene and that Bais Frieda was appropriate, any award of tuition should be limited to begin on a date sixty school days from November 20, 2018 (the date of the parent's request for "reevaluation") which would be March 6, 2019. Here, it seems that the district is confusing or conflating a request for a reconvene of the CPSE (as in the instant case) with a request for a re-evaluation (which was not requested). Therefore, the timing of the parent's request does not affect a finding that the district failed to provide a FAPE to the student for the 2018-19 school year in its entirety or limit the parent's tuition award.

appropriate if it provides instruction specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; Educ. Law § 4401[1]; 34 CFR 300.39[a][1]; 8 NYCRR 200.1[ww]; Hardison v. Bd. of Educ. of the Oneonta City Sch. Dist., 773 F.3d 372, 386 [2d Cir. 2014]; C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 836 [2d Cir. 2014]; Gagliardo, 489 F.3d at 114-15; Frank G., 459 F.3d at 365).

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

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

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

The director of Bais Frieda (director) testified that the school program consisted of five classrooms (two special education classrooms and three general education classrooms) with students from ages two to five years old (Tr. p. 280). A Bais Frieda curriculum document indicated that the program was established to allow the integration of children with special needs into the social setting of a general education program and that the creation of a multi-dimensional program allowed students who required individualized services to benefit from the models and social interaction of the typical children (Parent Ex. J at p. 4). The director explained that the special classes included eight to twelve students and that every class had its own full-time individual Board Certified Behavior Analysis (BCBA) in the class who worked closely with the parents and often worked in the home as well (Tr. p. 281). The director also stated that most of their students within the special education classrooms were students who had an autism diagnosis but were moderate to high functioning, that typically in the special education classrooms the school employed the applied behavior analysis (ABA) methodology, and that with school staff's support and instruction the goal was to get the students to general education after preschool (Tr. p. 280).

a. Student's Needs

The director testified that the student entered Bais Frieda in the summer of 2018 as part of a general education program and noted that it was extremely challenging for him and that he was

unable to remain without intensive support (Tr. p. 282).⁸ The director stated that with respect to ADLs, the student was "way" below grade level, and that the student was also "below" in his cognitive abilities, and "below" in his ability to participate or function as a typical child (Tr. p. 287). The director added that staff was not concerned with the student's cognitive skills, such as knowing all his letters, rather they were concerned with the student's readiness skills—his ability to transition, to identify and respond to rules, and to know how to stay safe (Tr. p. 295).

The director stated that, coming into the 2018-19 school year, the student had "a lot of stereotypical behaviors that really threw him off" (Tr. p. 284). With respect to sensory challenges, the director reported that if there was too much noise the student would hold his ears and shriek; he could not tolerate any setting that was too stimulating (Tr. p. 284). The director testified that the student had a lot of "shut-down" behavior where he would have a tantrum and then refuse to comply (Tr. p. 284). She opined that "a lot of times it was due to rigidity" (Tr. p. 284). According to the director, the student's behaviors overwhelmed him to the extent that he could not express himself and could not function (Tr. p. 285). The director stated that the student also had sensory issues related to the classroom routine and explained that the student could not participate in individual or group music therapy because he would start thrashing and kicking and needed to be removed as he had tremendous challenges with any kind of sensory stimulation (Tr. p. 289-90). Additionally, the director stated that the student would cry, scream, "just lie on the floor," throw things, hurt others, endanger himself and others, and was an elopement risk (Tr. pp. 285, 289, 296).

The director stated that communication was also an area of deficit for the student and that he did not use words functionally or appropriately but rather in an echolalic, repetitive way that often had "zero meaning" as they were said at the wrong time and in the wrong way and also that the student had "scripting problems," with repetitive language constantly going through his mind which kept him from being engaged in any kind of social environment (Tr. pp. 287-89). With respect to social-emotional functioning, the director testified that the student was very self-absorbed and self-focused and identified the student as "in his own world" (Tr. p. 287). The director stated that the student needed extra time, that consistency was extremely important, and that the student was challenged in all areas of ADL, noting the student was not toilet trained at the start of the year and often came to school in his pajamas with his clothes in a bag (Tr. p. 286).

According to an August 2018 treatment plan prepared by the Bais Frieda BCBA, the parent described the student's speech as unintelligible and reported that the student was verbal and able to put together simple sentences but did not always express his needs and wants vocally, made fleeting eye contact at times, responded to WH questions with one-word or no response, did not use a variety of prepositions, struggled with two-step instructions, did not say his full name, could only attend to a story for one to two minutes, counted quickly and miscounted the number of

⁸ The student's placement for summer 2018 is unclear. On cross examination, the director "corrected" herself and indicated that the student was not in the same classroom for summer 2018 that he was in September 2018 (Tr. pp. 315-18). When asked if the student was in a special class the director indicated that "it [wa]s fair to say that he had a one-to-one" and he was in a much larger classroom than a class of eight (Tr. p. 316). The director testified that the school informed the parent that the student would be in a special class for summer 2018 (Tr. 324-25). Within her November 20, 2018 letter to the district, the parent stated that she tried general education for the student that "past summer" and that it did not work (Parent Ex. C at p. 1).

objects, and did not know how to label the alphabet or numbers or sort or label categories such as fruit or vehicles (Parent Ex. C at p. 11).

With respect to socialization skills, the August 2018 treatment plan stated that the student did not try to make friends with peers and did not initiate or participate in conversations; did not play interactively with peers or play functionally with toys; had difficulty sharing; demonstrated poor self-regulation; would hit, kick, scream, and throw and break things when he was angry or did not get his way; struggled with transitions; did not maintain an acceptable distance between self and others; spoke too loud and did not wait his turn; could only recognize and label basic emotions such as happy and sad; often showed aggression during socialization; might run and elope during social activities; and lacked danger awareness (Parent Ex. C at p. 11).

According to the August 2018 treatment plan, in the area of maladaptive behavior the parent reported that the student engaged in temper tantrums countless times per day which could last up to one hour and consisted of kicking, hitting, screaming, and throwing and breaking things; did not comply with instructions unless he was highly motivated; got fixated on objects; on some occasions, though rare, he would hit or bite himself when upset; engaged in echolalia 80 percent of the time and spun around often throughout the day; and would leave his apartment without permission and take the elevator alone or wander the halls (Parent Ex. C at p. 12).

With respect to self-care, the August 2018 treatment plan stated that the student's sense of safety awareness was highly compromised, that he did not know what to do in a dangerous situation, was not careful around hot or sharp objects, was not toilet trained, could not put on his shoes and did not assist with bathing, and that he did not clean up after himself (Parent Ex. C at p. 12).

Within the August 2018 treatment plan, the evaluator reported that results of formal assessments placed the student's communication, daily living, socialization, and motor skills in the moderately low range, and that with regard to maladaptive behaviors, assessments found the student in the elevated range for internalizing problem behaviors and in the clinically significant range for externalizing problem behaviors (Parent Ex. C at p. 13).

b. Specialized Instruction and Progress

The director testified that for the 2018-19 school year, the student was in a class of eight students and two teachers (Tr. p. 283). The student's 2018-19 daily schedule indicated that the student's school day included social interaction programs; breakfast and lunch with general education students; physical education; ABA discrete trial programs in a group involving communication skills, socialization skills, expressive language skills, receptive language skills, class readiness skills, adaptive living skills, sensory processing and motor planning skills, fine and gross motor skills, problem solving and reasoning skills, curiosity and creativity, emotional development, cognitive abilities, self-help skills/ADL, and personal health and safety skills; group activities in dramatic block and puzzle play, creative art, computers/iPad communication training, science and mathematical experiences, communication skills training-PECS; exposure to literature; gross and fine motor activities/outdoor play; social interaction with typical peers; 1:1 special education teacher time to reinforce goals; and related services of counseling, OT, speech therapy, and music therapy on alternating days (Parent Ex. K at pp. 1-2).

A November 2018 summary of classroom goals revealed that the student was working on attending at circle time, responding to this name, playing appropriately with a toy, engaging in interactive play and turn taking with a peer, verbally manding with full sentences, verbally requesting for missing items, selecting common objects, following one step instruction, and decreasing tantrums (Parent Ex. C at pp. 31-33).

In March 2019 Bais Frieda staff conducted an FBA which identified the student's targeted problem behaviors as eloping, tantruming, fixations, and throwing toys, and identified antecedents, consequences, a statement of functional hypothesis, and replacement behaviors (Parent Ex. N at pp. 2-6). The accompanying March 2019 BIP targeted the behaviors listed in the FBA (*id.* at pp. 7-19). The March 2019 BIP indicated that to address toy throwing, staff would prompt and reinforce the student to engage in prosocial behaviors with his peers, teach the student to say, "play with me" and "can I have it," present high probability tasks, and pair his work with reinforcement (*id.* at p. 10). To address tantruming, crying, screaming, crying, and kicking, staff would provide verbal reminders with the use of a timer to support transitions, would implement momentum and high probability demands, pair workstations with reinforcers to lessen the demand for escape, and provide no attention to the tantrum (*id.*). In targeting eloping, the BIP called for workstations to be paired with preferred activities, staff to provide reinforcement for staying on task and following directions, staff to provide warnings and cues, and for the student to learn to ask for help or for a break (*id.*). The BIP addressed the student's fixation on objects or events through the teaching of coping strategies, visual schedules, a daily "change" to help the student get used to dealing with change, and warnings before transition (*id.* at p. 11). The director testified that they also used visual schedules to help the student with transitions (Tr. p. 294).

In addition to the skills detailed in the November 2018 summary of classroom goals, the March 2019 BIP indicated that Bais Frieda worked with the student on toileting and washing, identifying calming activities, counting with 1:1 correspondence, grouping and labeling items, saying consonant sounds and using prepositions, responding to personal questions and to WH questions, writing his name, attending to a story, learning to label the alphabet, maintaining an acceptable distance from others, initiating and sustaining conversation with a peer, making eye contact and practicing safety awareness (Parent Ex. N at pp. 13-18).

In addition, Bais Frieda reportedly worked closely with the parent in addressing the student's behaviors in the home (Tr. p. 296; Parent Exs. C at p. 30; N at pp. 12-13). According to the March 2019 BIP, parent goals included prompting and reinforcing prosocial behaviors toward siblings, maintaining a demand when the student engaged in a tantrum, prompting play with an array of toys, reading social stories regarding anger, arranging play dates and facilitating play, prompting the student to follow two or more steps, proactively asking the student to run away with parent, and creating a list of words the student could not pronounce correctly and prompting the student to say the words twice a day (Parent Ex. N at pp. 12-13).

According to the March 2019 Bais Frieda speech-language progress report, during the 2018-19 school year the student worked on responding with three-to-four-word utterances, utilizing functional language appropriately to request wants and needs, maintaining eye contact when engaging in a joint activity, and following one to two related commands (Parent Ex. N at pp. 20-21). The provider noted that prompts, cues, verbal reinforcement, repetition, and models were provided to the student (*id.*). In the area of articulation, the provider reported that the student

presented with various phonological processes such as stopping (when fricative f or s is substituted), gliding (when /r/ becomes a /w/ and /l/ becomes /w/ or /y/), cluster reduction (producing "spider" as "pider") and vowelization (when the /l/ sound is replaced with a vowel, "appo" for "apple") (id. at p. 20). The provider indicated that during drill activities the student was able to imitate target sound appropriately, however, did not carry this over in spontaneous conversation (id. at p. 21).

The March 2019 Bais Frieda OT progress report indicated that the provider worked with the student on positioning writing tools and grasp patterns correctly, scissor skills, copying block designs, toileting, attention skills, and sensory processing skills of interacting with different textures such as rice, sand and water beads (Parent Ex. N at pp. 22-23). The director added that the classroom included materials geared to re-engaging the student and engaging him in a sensory way by finding materials that he appreciated touching, feeling, and smelling (Tr. p. 291).

Turing next to the issue of progress, the parent argues that the hearing record revealed the student's progress during the 2018-19 school year through the student's reports and assessments, which included improved readiness skills, play skills, communication skills, and social skills.

The November 2018 Bais Frieda summary indicated that the student made progress in the area of expressive and receptive language stating that the student had learned to verbally request instead of leading others to what he wanted, responded when asked his name or reciprocated a greeting with minimal prompt, was able to look up at a speaker when greeted, was able to attend a group activity for short intervals with assistance, could follow along with simple instructions presented to the group when combined with visual cues, was able to attend to simple instructions such as sit down, and could identify labels in an array and sort like objects (Parent Ex. C at p. 27). With respect to progress in self-care skills, the November 2018 summary stated that the student was able to hang up his coat and his knapsack, had begun to throw out his plate/cup/napkin, could wash and dry his hands, could pull his pants on and off, and could sometimes void in the toilet (id. at p. 28). Regarding play and social skills, the Bais Frieda summary noted progress in the student's ability to complete a simple sorter or ring stacker, stack blocks, join his peers for group activities such as movement time and free play with assistance, and join his peers for meals with teacher prompting for peer awareness (id. at pp. 28-29). With respect to maladaptive behaviors, according to the November 2018 summary the student could usually follow through with most routines that were only slightly modified, was able to follow along with the classroom when a visual schedule was used, and while he continued to tantrum frequently the intensity of the tantrums had greatly decreased (id. at p. 30).

Within the March 2019 speech-language therapy progress report, the provider stated that the student demonstrated some progress in his speech and language ability and was able to follow simple directions such as "sit down" and "clean up," was able to follow along with classroom routines when given prompts, was able to identify common objects appropriately, could maintain joint attention for very short intervals, demonstrated comprehension of quantitative concepts such as big and small, could label common objects/shapes/colors, responded to his name, could engage in structured activity appropriately, and had emerging turn taking skills (Parent Ex. N at p. 20). The director testified that the student learned to express himself when prompted, learned self-calming techniques, and reduced the rate of his scripting and echolalia (Tr. pp. 293-94).

The March 2019 OT progress report noted the student's progress in tolerating various types of sensory input, copying vertical and horizontal lines and closed circles, requiring less assistance with toileting, and showing improved attention skills and interest in engagement throughout therapy sessions (Parent Ex. N at p. 23). The director testified that the student was toilet trained independently, daytime and nighttime within the 2018-19 school year (Tr. pp. 290-93).

Further, the director testified that the student was socially challenged at the beginning of the year in that he would cry, scream, run, kick, thrash or just lie on the floor and that these behaviors were gradually reduced (Tr. p. 296). Also, the director stated that the student made significant steps towards progress in the areas of language, pragmatic language, social skills, behavior, and readiness skills with the interventions that Bais Frida provided (Tr. p. 296).

Based on the above, the hearing record shows that Bais Frida provided the student with instruction specially designed to meet his unique needs and that the student made progress while attending the school. As such, the parent's unilateral placement for the 2018-19 school year was appropriate.

3. Equitable Considerations

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

Reimbursement may be reduced or denied if parents do not provide notice of the unilateral placement either at the most recent CSE meeting prior to their removal of the student from public school, or by written notice ten business days before such removal, "that they were rejecting the placement proposed by the public agency to provide a [FAPE] to their child, including stating their concerns and their intent to enroll their child in a private school at public expense" (20 U.S.C. § 1412[a][10][C][iii][I]; see 34 CFR 300.148[d][1]). This statutory provision "serves the important purpose of giving the school system an opportunity, before the child is removed, to assemble a team, evaluate the child, devise an appropriate plan, and determine whether a [FAPE]

can be provided in the public schools" (Greenland Sch. Dist. v. Amy N., 358 F.3d 150, 160 [1st Cir. 2004]). Although a reduction in reimbursement is discretionary, courts have upheld the denial of reimbursement in cases where it was shown that parents failed to comply with this statutory provision (Greenland, 358 F.3d at 160; Ms. M. v. Portland Sch. Comm., 360 F.3d 267 [1st Cir. 2004]; Berger v. Medina City Sch. Dist., 348 F.3d 513, 523-24 [6th Cir. 2003]; Rafferty v. Cranston Public Sch. Comm., 315 F.3d 21, 27 [1st Cir. 2002]); see Frank G., 459 F.3d at 376; Voluntown, 226 F.3d at 68).

Turning to the parties' disagreement over equitable considerations in this case, the hearing record shows that the parent was informed of her due process rights on January 30, 2018, as part of the initial social history (Dist. Ex. 11 at p. 1). On March 22, 2018, the parent was informed of her right to request mediation or an impartial hearing if she disagreed with the CPSE's recommendation (Dist. Exs. 8 at p. 2; 11 at p. 1). Further, the parent signed consent for the provision of 10-month CPSE services on March 22, 2018 (Dist. Ex. 8 at p. 2). However, the parent testified that she disagreed with the March 2018 IEP at the March 2018 CPSE meeting and discussed her disagreement with the CPSE administrator at that time (Tr. p. 216). According to the parent, the CPSE administrator advised her that she needed further evaluation (Tr. p. 216). The parent reported that she obtained the evaluation and then started contacting the district, but she was unaware that no one was there to take her calls (Tr. p. 216). The IHO did not state that she found the parent's testimony in this regard to lack credibility. The student enrolled at Bais Frieda starting in July 2018 (Parent Exs. L; M at pp. 1-2). On September 3, 2018, the parent executed an enrollment contract with Bais Frieda for the 2018-19 school year (Parent Ex. J at pp. 1-3).

As discussed in detail above, in a November 20, 2018 letter to the district the parent opined that the outcome of the evaluation conducted by the district was seriously flawed, that after further investigation her "fears were confirmed with autism," that the student showed severe language delays and behavior/academic functioning delays both in the home and in the community, and that the student required the support of special education classroom services (Parent Ex. C at p. 1). In addition, the parent stated that an attached "updated report" was submitted to the district administrator on August 1st and that the district response at that time was that the "administrator [wa]s no longer part of the district and a new administrator w[ould] reach out to her" (*id.*). The parent added that while "waiting and watching the adverse effects of my child" without support, she was forced to seek private placement and was again reaching out to the district to reconvene with a plan to meet the student's needs with special education and related services (*id.*).

The 2018-19 CPSE administrator testified that she believed that it was sometime in February or March 2019 when the parent reached out to her to discuss changing the "IEP program" (Tr. p. 78). On February 12, 2019 the parent sent an email to the district stating that she had been trying for months to "track down" the new administrator, had left many voicemails which were never returned, had mailed copies of her son's diagnosis and evaluations and had not received any response, and requested direction to the correct contact person (Parent Ex. D at pp. 3-4). On the same day the district 2018-19 CPSE administrator provided the parent with a phone number at which she could reach the administrator (*id.* at p. 3). In a February 14, 2019 email the parent thanked the administrator for the "conversation" and confirmed that she would fax the documents with a cover sheet that afternoon (*id.* at pp. 2-3). In a March 12, 2019 email, the parent notified the district that a second copy of "the letter" and evaluations were faxed "almost a month ago" and inquired as to who was the correct contact person (*id.* at p. 1).

Here, the hearing record indicates that the parent failed to comply with the 10-day notice provision. However, although the reduction or denial of tuition reimbursement may result from a parent's failure to adhere to the ten-day notice requirement, under the unique circumstances of this case, I find, in my exercise of discretion, that that a total reduction in tuition reimbursement is unduly harsh and that the prevailing equitable considerations identified do not weigh entirely against the parent. Rather, the hearing record demonstrates that the parent cooperated fully with the CPSE process and sought a private evaluation of the student shortly after the March 2018 CPSE meeting. There is no indication from the hearing record that the parent's efforts to present new information to the CSPE and revisit the student's IEP through a reconvene of the CPSE were made in bad faith or in an attempt to thwart or circumvent the process. In addition, the procedural violations underpinning the denial of FAPE in this instance were attributable to the district and, in effect, resulted in impeding the parent's participation in the CPSE process and ability to collaborate with the CPSE in its recommendation of an appropriate program and placement. Under these circumstances, I am compelled to weigh equitable considerations as being much closer to equipoise with respect to the conduct of the parent and the district during the 2018-19 CPSE process and, accordingly, the IHO's decision to deny any tuition reimbursement for the 2018-19 is reversed.

B. 2019-20 School Year

The IHO found that the district offered the student a FAPE for the 2019-20 school year (IHO Decision at p. 14). The parent contends that the IHO incorrectly determined that the district offered the student a FAPE despite its failure to recommend summer services for the student for the 2019-20 school year and that the district was not obligated to prove that it was capable of implementing the student's IEP at the assigned school site.

1. Extended School Year

The gravamen of the parent's arguments on appeal is not, for the most part, related to the substantive content of the August 2019 IEP. First, the parent contends that the school district failed to have an appropriate education program in place for the student at the start of the extended, 12-month 2019-20 school year and that the district's failure to offer placement at the start of the school year constituted a denial of FAPE.

The 2019-20 CPSE administrator testified that she did not believe that the Bais Frieda staff member who participated in the June 2019 CPSE meeting expressed the need for the student to have a 12-month program and that she did not say very much at all regarding any aspect of how the student was doing in the classroom and described Bais Frieda staff's participation as "very withholding" (Tr. p. 138). The director testified that, based on the data Bais Frieda kept, anytime the student was out for more than a day staff saw severe regression and therefore felt that not having the student in a summer program would have resulted in intense regression as the student required minute-by-minute structure in order to keep him continuing with the skills that he was learning (Tr. pp. 300-303). The 2019-20 CPSE administrator testified that she could not recommend summer services without documentation (Tr. p. 154).

The parent testified that the June 2019 CPSE discussed the students need for a 12-month placement but "didn't settle on it" and that she did not realize it until she went home and so she

called the 2019-20 CPSE administrator that same day to inquire whether the student was signed up for a 12-month program (Tr. pp. 206-07). According to the parent she was told there would need to be a different meeting for that and was further told "what she needed" in order to set that up (Tr. p. 207).

The 2019-20 CPSE administrator stated that the parent sent her an email on June 19, 2019 requesting additional summer services and that she responded by informing the parent that she needed to send documentation from the student's providers (Tr. p. 150; see Parent Ex. F at pp. 1-2). She explained the documentation regarding student regression was sent to her on July 25th, more than a month from June 19th, which she opined, "was certainly late" as there were about two more weeks left in the summer program (Tr. p. 151; see Parent Ex. F at pp. 1-6).

The 2019-20 CPSE administrator testified that while initially the recommendation was for a 10-month program, when the student's providers provided the district with documentation attesting to the student's need for a 12-month program, the CPSE reconvened on August 27, 2019, and recommended a 12-month program for the student to prevent regression (Tr. p. 109; see Parent Ex. H at pp. 1, 17).

In addition to recommending the student for a 12-month program, the August 2019 CPSE modified the student's IEP to include a 1:1 behavior paraprofessional,⁹ two monthly parent counseling and training sessions, and the need for a BIP; the CPSE also recommended that individual counseling be removed from the student's IEP (Parent Ex. H at pp. 1, 5, 13-14, 17).

The 2019-20 CPSE administrator testified that she did not believe the student should have been receiving summer services in summer 2019 because she received the documentation regarding regression after it was too late for the student to receive services that summer (Tr. pp. 136-37).

With respect to the parent's assertion that the district did not offer a program for summer 2019, the IHO noted that the IEP developed in August 2019 provided for a 12-month school year and that while the June 2019 IEP did not, documentation of regression from the student's providers was not received by the district until July 2019 after the June 2019 CSE meeting (IHO Decision at p. 15). A review of the hearing record reveals that the IHO correctly relied on evidence that the district did not have sufficient information to recommend summer services for the student at the time of the June CPSE meeting and, upon receipt of such information in July, the CPSE promptly reconvened and recommended summer services for the student. Accordingly, there is no reason to disturb the IHO's finding that the district's failure to recommend summer services for the student until August 2019 did not constitute a denial of FAPE.

⁹ The 2019-20 CPSE administrator stated that the CPSE received additional documentation before the August 2019 CPSE meeting from the parent that included an FBA and that FBA was used to approve the student for the one-to-one paraprofessional, however the 2019-20 CPSE administrator also acknowledged that she had the FBA available when the June 2019 IEP was created (Tr. pp. 114, 129, 131-32).

2. Implementation

Next, the parent alleges the district failed to implement the program recommended for the student by failing to offer the student an appropriate school placement which included not only "offering [a] placement in a school that c[ould] fulfill the requirements set forth in the IEP," but also offering a placement that "conforms to the program offered in the IEP." Specifically, the parent argues that the district provided no evidence or testimony that the assigned school was able to offer an integrated 8:1+1 or 6:1+1 special class to the student.

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

Reviewing the claims raised on appeal, the parent's allegation that the district failed to present sufficient evidence concerning the capacity of the assigned public school to implement the integrated special class recommendation contained in the August 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"]). The parent's subjective belief that the school would not implement the integrated special class recommended by the CPSE is based on speculation and conjecture and not on any factual claim that the assigned school lacked capacity to implement the IEP as written. Accordingly, there is no reason to disturb the IHO's finding that the district did not deprive the student of a FAPE by failing to demonstrate that it could implement the student's August 2019 IEP.

VII. Conclusion

Having determined that the evidence in the hearing record supports the IHO's determinations that the district failed to offer the student a FAPE for the 2018-19 school year, offered the student a FAPE for the 2019-20 school year and that Bais Frieda was an appropriate unilateral placement for the student for the 2018-19 school year, but does not support a finding that equitable considerations so weighed against the parent that tuition reimbursement for the 2018-19 school year should be denied in its entirety, the necessary inquiry is at an end.

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

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

THE CROSS-APPEAL IS DISMISSED.

IT IS ORDERED that the IHO decision dated March 11, 2021 be modified by reversing that portion which denied tuition reimbursement at Bais Frieda to the parent for the 2018-19 school year based on equitable considerations; and

IT IS FURTHER ORDERED that the district reimburse the parent for the cost of the student's tuition at Bais Frieda for the 2018-19 school year upon proof of payment.

Dated: Albany, New York
June 7, 2021

CAROL H. HAUGE
STATE REVIEW OFFICER