The University of the State of New York

The State Education Department
State Review Officer
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No. 21-201

Application of a STUDENT WITH A DISABILITY, by her 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:
The Cuddy Law Firm, PLLC, attorneys for petitioner, by Francesca Antorino, Esq.

Liz Vladeck, 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 daughter's tuition costs at the Manhattan Star Academy (MSA) for the 2020-21 school year. The appeal must be dismissed.

II. Overview—Administrative Procedures

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

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

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

III. Facts and Procedural History

The parties' familiarity with the detailed facts and procedural history of the case and the IHO's decision is presumed and, therefore, they will not be recited here in detail. Briefly, the CSE convened on December 6, 2019, formulated an IEP for the student with an implementation date of December 20, 2019, and developed a behavioral intervention plan (BIP) based upon a functional behavioral assessment (FBA) (see generally Dist. Exs. 7; 10-11). The December 2019 CSE found the student eligible for special education as a student with autism and recommended that the student attend an 8:1+1 special class in a specialized school and receive support from a 1:1 paraprofessional and related services of counseling, occupational therapy (OT), physical therapy

(PT), and speech-language therapy, and that the parent receive parent counseling and training (see Dist. Ex. 7).[1]

In a prior written notice and a school location letter, both dated June 1, 2020, the district summarized the recommendations of the December 2019 CSE and notified the parent of the particular public school site to which it assigned the student to attend for the 2020-21 school year (third grade) (Dist. Exs. 8-9). The parent disagreed with the recommendations contained in the December 2019 IEP, as well as with the assigned public school site for the 2020-21 school year, and, as a result, notified the district of her intent to unilaterally place the student at MSA (see Parent Ex. F).[2]

In a due process complaint notice, dated July 1, 2020, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2020-21 school year (see Parent Ex. A).

An impartial hearing convened on December 16, 2020 and concluded on July 16, 2021 after nine days of proceedings (Tr. pp. 1-399). In a decision dated September 1, 2021, the IHO determined that the district offered the student a FAPE for the 2020-21 school year, finding that the December 2019 IEP was appropriate and the assigned public school site was available to implement the IEP (IHO Decision at pp. 9-22). While the IHO found that the district offered the student a FAPE, she went on to find that MSA was an appropriate unilateral placement and that equitable considerations would have supported an award of tuition had the district failed to offer the student a FAPE (id. at pp. 22-23).

IV. Appeal for State-Level Review

The parties' familiarity with the particular issues for review on appeal in the parent's request for review and the district's answer thereto is also presumed and the pleadings will not be summarized here in detail. The following issues presented on appeal must be resolved in order to render a decision in this case:

1. whether the IHO shifted the burden of proof to the parent regarding the district's offer of a FAPE to the student or inappropriately credited and relied upon the testimony of the district's witnesses;

2. whether the IHO erred in determining that the FBA conducted and BIP developed by the CSE were appropriate;

3. whether the IHO erred in determining that the December 2019 IEP was appropriate for the student despite the lack of a recommendation for a research-based methodology;

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

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

4. whether the IHO erred in determining that the December 2019 IEP was appropriate for the student despite the lack of a recommendation for a transition plan; and

5. whether the IHO erred in determining that the assigned public school site was appropriate for the student.

V. Applicable Standards

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

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "'[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP'" (Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). The Supreme Court has indicated that "[t]he IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement" (Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. __, 137 S. Ct. 988, 999 [2017]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ. of the Chappaqua Cent. Sch. Dist., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at

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

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).[3]

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

[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).

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

VI. Discussion

A. Preliminary Matters

1. Scope of the Impartial Hearing and of Review

The parent argues that the IHO erred in finding that the parent's only disagreement with the December 2019 IEP was related to the lack of methodology and states that her 10-day notice and due process complaint notice stated other areas of disagreement.

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

Upon review of the parent's July 1, 2020 due process complaint notice, I find that the IHO did not err in stating that the parent's only direct challenge to the content of the student's December 2019 IEP was the claim that the IEP should have contained a specific teaching methodology (see IHO Decision at pp. 11, 14; Parent Ex. A at p. 5). However, the IHO went on to make findings with respect to the December 2019 FBA and BIP as well as addressing the parent's claim concerning methodology on the December 2019 IEP (see IHO Decision at pp. 13-16). Additionally, the IHO touched upon some other issues in the decision which were raised by the parent but are not at issue on appeal (id. at pp. 16-18).

In this appeal, that parent contends that the December 2019 IEP was flawed in that it did not include a specific teaching methodology, that the FBA and BIP were inadequate, and that the IEP should have included "transition services" to support the student's transition into and within the public school (Req. For Rev. ¶¶ 23-25, 26-32, 50-54). The district, for its part, does not assert that the IHO should not have reached the question of the need for transition services or the adequacy of the student's FBA and BIP; rather, the district addresses these concerns on the merits and asserts that the FBA and BIP were appropriate and that the student's IEP appropriately met the student's behavior and transition needs (see Answer ¶¶ 14-16, 20, 22, 24,26). In light of this and in an abundance of caution, I will address those issues.

2. IHO Decision Burden of Proof and Credibility

The parent argues that the IHO erroneously shifted the burden to the parent with regard to the district's offer of a FAPE. The parent argues that the IHO's references to the reports available to the CSE implied that any deficiencies in the information was the fault of the parent and/or MSA. The parent also argues that the IHO erred in crediting and relying on the testimony of the district witnesses who had never met the student.

Under the IDEA, the burden of persuasion in an administrative hearing challenging an IEP is on the party seeking relief (see Schaffer v. Weast, 546 U.S. 49, 59-62 [2005] [finding it improper under the IDEA to assume that every IEP is invalid until the school district demonstrates that it is not]). However, under State law, the burden of proof has been placed on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see Hardison v. Bd. of Educ. of the Oneonta City Sch. Dist., 773 F.3d 372, 386 [2d Cir. 2014]; C.F. v. New York City Dep't of Educ., 746 F.3d 68, 76 [2d Cir. 2014]; R.E., 694 F.3d at 184-85).

In her decision, the IHO correctly stated that the district bore the burden of proof (IHO Decision at p. 4). The decision when read in its entirety reveals that the IHO made her decision based on an assessment of the relative strengths and weaknesses in evidence presented by both the district and the parent rather than by solely allocating the burden of persuasion to one party or the other (see generally IHO Decision). Thus, even assuming the IHO misallocated the burden of proof to the parent, the error would not require reversal in this case insofar as the hearing record does not support a finding that this was one of those "very few cases" in which the evidence was in equipoise (Schaffer, 546 U.S. at 58; M.H., 685 F.3d at 225 n.3). I am likewise unpersuaded that the IHO erred in granting undue credibility to certain district witnesses who had never met the student; rather, the IHO did not make specific credibility findings and appropriately weighed all of the available evidence before her. Furthermore, I have conducted an impartial and independent review of the entire hearing record and, as discussed below, I reach the same determination as the IHO with regard to the sufficiency of the CSE's recommended program for the 2020-21 school year (34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]).

B. December 2019 IEP

A brief description of the student's needs as presented in the evaluative information in the hearing record is of value prior to turning to the specific disagreements between the parties with respect to the appropriateness of the student's December 2019 IEP.

The hearing record shows that at the time of the December 2019 CSE meeting, the student presented with significant delays in cognitive development, speech-language skills, motor ability, and social/emotional development (Dist. Exs. 5 at p. 1; 7 at pp. 2, 6-7). An FBA completed just prior to and during the CSE meeting noted that the student had made minimal academic progress due to her challenges with self-regulation and distractibility (Dist. Ex. 10 at p. 1; see Tr. pp. 214-15). The FBA indicated that the student engaged in inappropriate behaviors such as dropping to the floor, refusing to participate, and screaming in a loud voice (Dist. Ex. 10 at p. 1). The student had difficulty identifying her emotions and required support to identify appropriate coping strategies when experiencing a particular emotion or different scenarios that would occur in the

classroom (Dist. Exs. 5 at p. 3; 7 at p. 5). When denied access to preferred items or presented with a difficult task, the student was known to whine, yell, cry, throw items, lie on the floor, or intentionally urinate on herself (Dist. Ex. 5 at pp. 1, 5). In addition, she exhibited impulsive and unsafe behaviors when she had "a meltdown," such as running out of the room, throwing herself on the floor, and banging parts of her body purposely (Dist. Exs. 5 at p. 5; 7 at p. 6). The student presented with deficits in her ability to consistently engage in play until completion, respond appropriately to direction, and participate in social interactions with peers and adults (Dist. Ex. 5 at p. 4).

With respect to the student's cognitive/academic needs, the examiner who conducted the February 2018 psychological evaluation indicated that she was unable to obtain a full-scale IQ for the student as she had difficulty understanding and engaging in some of the presented subtests (Dist. Ex. 4 at pp. 3, 4). According to teacher reports the student's reading was on a kindergarten/early emergent level, and she was working on hearing sounds within CVC words and putting the sounds together (Dist. Exs. 5 at p. 2; 7 at pp. 2-3, 28). The teacher indicated that the student made progress answering WH questions following a read aloud story, but in order to do so following a whole story read aloud, the student required an array of visual options (Dist. Exs. 5 at p. 2; 7 at p. 2). With respect to mathematics the student was also performing on a kindergarten level and demonstrated rote counting to 20, one-to-one correspondence to 20, and was working on solving addition problems between numbers one through ten (Dist. Ex. 7 at p. 4). According to a teacher report, the student required 1-2 verbal prompts and/or gestural cues to remain seated during academic instruction and 1-2 verbal prompts to complete classroom routines (Dist. Ex. 5 at p. 1).

Turning to the student's speech-language needs, the reports considered by the December 2019 CSE showed that the student used a combination of verbal language and gestures for communication (Dist. Ex. 5 at p. 1). The student's teacher and therapists at MSA reported that the student's speech-language skills were significantly delayed for her chronological age and characterized by scripting and echolalic language (id.). The student was working on expanding her expressive repertoire and initiating language outside of her scripting behavior (id.). She was described as having difficulty forming responses to unfamiliar questions unless given visual choices but able to answer yes/no questions related to preferences (id.). The December 2019 IEP indicated that the student presented with deficits in her ability to consistently and independently use language functionally across contexts and settings in order to express herself (Dist. Ex. 7 at p. 2). The student reportedly benefited from constant language stimulation to direct her attention to her surrounding environment, frequent verbal redirection to task, and intermittent breaks when engaged in provider directed tasks (id. at p. 3).

With regard to the student's motor and sensory needs, information before the December 2019 CSE indicated that the student required support for fine motor activities such as writing, cutting, and dressing (Dist. Ex. 5 at p. 5). The student's therapist reported that deficits in the student's visual motor and perceptual skills, combined with fine motor and grasping skills, affected her ability to complete academic tasks efficiently in comparison to similar-age peers (id.). In addition, decreased sensory regulation skills affected the student's ability to attend, engage in activities, and function independently in the classroom (id.). The student reportedly benefited from light physical prompts to hold writing utensils correctly and to remain in the lines while writing (id. at p. 2). According to therapist reports, the student displayed motor needs with respect to coordination, motor planning, strength, and body awareness, which affected her ability to navigate

the classroom and school environment safely (id. at p. 6). Due to her decreased body awareness, limited postural control, and strength, the student reportedly benefited from heavy work tasks to activate core muscles (Dist. Exs. 5 at p. 5; 7 at p. 6). The student engaged in activities of daily living with varying levels of independence with the benefit of verbal and gestural prompts and in some instances physical assistance (Dist. Ex. 5 at p. 2).

Reports considered by the December 2019 CSE indicated that the student "required a highly structured instructional environment with established routines and an individualized visual schedule[,] visual behavior boards, [and] preferred positive reinforcers throughout the school day" (Dist. Ex. 4 at p. 4). According to teacher reports, the student required "a great deal" of 1:1 support and prompts to fully engage in all daily structured and unstructured activities, but with 1:1 support she was able to participate in whole-group and small-group classroom activities (Dist. Ex. 5 at p. 2).

To address the student's needs, the December 2019 CSE recommended that the student attend an 8:1+1 special class for core academic classes and receive related services of one 30-minute session of individual counseling per week, three 30-minute sessions of individual OT per week, two 30-minute sessions of individual PT per week, and three 30-minute sessions of individual speech-language therapy per week (Dist. Ex. 7 at p. 24). The CSE also recommended that the student receive the support of a full-time paraprofessional for behavior, special transportation, a visual schedule, and a token economy board (id. at pp. 24-25, 28). In addition, the CSE recommended that the parent be provided with one 60-minute session of individual parent counseling and training per month, that the student receive adapted physical education three times per week, and that all of the recommended services be provided on a 12-month basis (id. at pp. 24, 25). The December 2019 IEP included numerous supports and strategies to address the student's management needs, and academic, social/emotional, speech-language, fine motor, and gross motor goals (id. at p. 8).

1. Special Factors—Interfering Behaviors

The parent argues that the IHO erred by not finding that the district's FBA and BIP were inappropriate and by indicating that it was MSA's responsibility to provide the district with information for the FBA and BIP. The district contends that the FBA and BIP developed for the student were appropriate, and that the student's IEP contained additional supports to address the student's behavior needs.

Under the IDEA, a CSE may be required to consider special factors in the development of a student's IEP. Among the special factors in the case of a student whose behavior impedes his or her learning or that of others, the CSE shall consider positive behavioral interventions and supports, and other strategies, to address that behavior (20 U.S.C. § 1414[d][3][B][i]; 34 CFR 300.324[a][2][i]; see 8 NYCRR 200.4[d][3][i]; see also E.H. v. Bd. of Educ. of Shenendehowa Cent. Sch. Dist., 361 Fed. App'x 156, 160 [2d Cir. Oct. 16, 2009]; A.C., 553 F.3d at 172). State procedures for considering the special factor of a student's behavior that impedes his or her learning or that of others may also require that the CSE consider developing a BIP for a student that is based upon an FBA (8 NYCRR 200.4[d][3][i], 200.22[a]-[b]). Additionally, a district is required to conduct an FBA in an initial evaluation for students who engage in behaviors that impede their learning or that of other students (8 NYCRR 200.4[b][1][v]). State regulation defines an FBA as

"the process of determining why a student engages in behaviors that impede learning and how the student's behavior relates to the environment" and includes, but is not limited to:

> the identification of the problem behavior, the definition of the behavior in concrete terms, the identification of the contextual factors that contribute to the behavior (including cognitive and affective factors) and the formulation of a hypothesis regarding the general conditions under which a behavior usually occurs and probable consequences that serve to maintain it

(8 NYCRR 200.1[r]). According to State regulation, an FBA shall be based on multiple sources of data including, but not limited to, "information obtained from direct observation of the student, information from the student, the student's teacher(s) and/or related service provider(s), a review of available data and information from the student' record and other sources including any relevant information provided by the student's parent" (8 NYCRR 200.22[a][2]). An FBA must also be based on more than the student's history of presenting problem behaviors (8 NYCRR 200.22[a][2]).

The Second Circuit has indicated that, when required, "[t]he failure to conduct an adequate FBA is a serious procedural violation because it may prevent the CSE from obtaining necessary information about the student's behaviors, leading to their being addressed in the IEP inadequately or not at all" (R.E., 694 F.3d at 190; see L.O. v. New York City Dep't of Educ., 822 F.3d 95, 113 [2d Cir. 2016]). The Court also noted that "[t]he failure to conduct an FBA will not always rise to the level of a denial of a FAPE," but that in such instances particular care must be taken to determine whether the IEP addresses the student's problem behaviors (R.E., 694 F.3d at 190).

With regard to a BIP, the special factor procedures set forth in State regulations note that the CSE or CPSE shall consider the development of a [BIP] for a student with a disability when:

> (i) the student exhibits persistent behaviors that impede his or her learning or that of others, despite consistently implemented general school-wide or classroom-wide interventions; (ii) the student's behavior places the student or others at risk of harm or injury; (iii) the CSE or CPSE is considering more restrictive programs or placements as a result of the student's behavior; and/or (iv) as required pursuant to 8 NYCRR 201.3

(8 NYCRR 200.22[b][1]). If the CSE determines that a BIP is necessary for a student "the [BIP] shall identify: (i) the baseline measure of the problem behavior, including the frequency, duration, intensity and/or latency of the targeted behaviors . . . ; (ii) the intervention strategies to be used to alter antecedent events to prevent the occurrence of the behavior, teach individual alternative and adaptive behaviors to the student, and provide consequences for the targeted inappropriate behavior(s) and alternative acceptable behavior(s); and (iii) a schedule to measure the effectiveness

of the interventions, including the frequency, duration and intensity of the targeted behaviors at scheduled intervals (8 NYCRR 200.22[b][4]).[4]

As with the failure to conduct an FBA, the district's failure to develop a BIP in conformity with State regulations does not, in and of itself, automatically render the IEP deficient, as the IEP must be closely examined to determine whether it otherwise addressed the student's interfering behaviors (see C.F. v. New York City Dep't of Educ., 746 F.3d 68, 80 [2d Cir. 2014]; F.L. v. New York City Dep't of Educ., 553 Fed. App'x 2, 6-7 [2d Cir. Jan. 8, 2014]; M.W. v. New York City Dep't of Educ., 725 F.3d 131, 139-41 [2d Cir. 2013]; R.E., 694 F.3d at 190).

The December 2019 CSE meeting participants included a special education teacher, a general education teacher, a district school psychologist, and the parent (Tr. 190-191; Dist. Ex. 7 at p. 32). Additionally, the student's teacher at MSA and the MSA education director participated via telephone conferencing (Tr. pp. 190-91; Dist. Ex. 7 at p. 32). The school psychologist testified that the FBA was developed based on data that was collected from the reports provided by the school as well as from the discussion between the school and the parent during the December 2019 CSE meeting (Tr. pp. 203-04, 214-15).[5] The reports relied on by the CSE included an August 2019 teacher progress report, an April 2019-June 2019 quarterly report of progress (June 2019 progress report), and a January 16, 2018 psychological evaluation (Tr. p. 216; see Dist. Exs. 4-6; 7 at p. 1). The school psychologist acknowledged that she did not directly observe the student or evaluate her but testified that the CSE could use data provided from teachers and those who were with the student on a daily basis in order to identify the function of the student's behavior and strategies that had been beneficial in addressing it (Tr. pp. 215). Further, she explained that using information from those who worked with a student and discussing it at a meeting resulted in a team developing the FBA/BIP (Tr. p. 216).

A review of the district's December 2019 FBA shows that the assessment did not comport with State regulation in that it did not include a baseline of the student's behavior across settings, identify antecedent behaviors or the reinforcing consequences of behavior, recommendations for teaching alternative skills or behaviors, or an assessment of student preferences for reinforcement

[4] The Official Analysis of Comments to the federal regulations explains that the decision regarding whether a student requires interventions such as a BIP rests with the CSE and is made on an individual basis (Consideration of Special Factors, 71 Fed. Reg. 46683 [August 14, 2006]). However, neither the IDEA nor its implementing regulations require that the elements of a student's BIP be set forth in the student's IEP. State guidance indicates that New York State regulations merely "require that a student's need for a BIP be documented in the student's IEP" ("Student Needs Related to Special Factors," Office of Special Educ. [April 2011], available at http://www.p12.nysed.gov/specialed/formsnotices/IEP/training/QA-411.pdf). Once a student's BIP is developed and implemented, "such plan shall be reviewed at least annually by the CSE or CPSE" (8 NYCRR 200.22[b][2]). Furthermore, "[t]he implementation of a student's [BIP] shall include regular progress monitoring of the frequency, duration and intensity of the behavioral interventions at scheduled intervals, as specified in the [BIP] and on the student's IEP. The results of the progress monitoring shall be documented and reported to the student's parents and to the CSE or CPSE and shall be considered in any determination to revise a student's [BIP] or IEP" (8 NYCRR 200.22[b][5]).

[5] It appears that the IHO may have had copies of an FBA and BIP dated May 2020 and she initially referred to the documents as being created at that time (Tr. pp. 61-63). However, the parties clarified at the hearing that the FBA and BIP they were referencing were created in December 2019 and it is those documents that were entered into evidence (Tr. pp. 205-13; see Dist. Exs. 10; 11).

(Dist. Ex. 10). Rather, the FBA consisted of a partially completed form with a series of questions regarding the student's behavior (id.). While questions related to the observational data that had been collected, the identification of the student's targeted inappropriate behaviors, and the interventions that should be planned were all answered, the FBA did not contain information regarding the triggers or actions that preceded the student's targeted behaviors (antecedents), environmental conditions that affected the behaviors, the presumed purpose of the behaviors, what the student gained or lost as a result of the behaviors (consequences), or information regarding previously attempted interventions and a statement of the results of those attempts (id. at p. 1). Nor did the FBA identify what the student viewed as positive reinforcement, what the expected behavior changes were, or a description of the methods/criteria for outcome measurement (id.). To the extent that the questions posed in the December 2019 FBA were answered, the answers identified the student's interfering behaviors as dropping to the floor, refusing to participate, and screaming in a loud voice and indicated that issues with self-regulation and distractibility impacted the student's academic progress (id.). The FBA identified a significant number of interventions to be used with the student including providing her with a small supportive environment, 1-2 verbal and or gestural cues for in seat behavior, positive peer models, noise canceling headphones, access to a counselor, manipulatives, a crisis paraprofessional, a communication system, verbal and visual prompts, a highly structured instructional environment with established routines, an individualized visual schedule, a visual behavior board, and preferred positive reinforcers (id.).

The district's BIP identified two target behaviors, along with expected behavior changes and methods/criteria that would be used for outcome measurement for each target behavior (Dist. Ex. 11). The first target behavior identified in the BIP was the student's refusal to participate and tendency to scream in a loud voice (id.). The expected behavior change was that the student would transition from activity to activity without displaying any inappropriate behavior (id.). The second target behavior identified was the student's tendency to drop to the floor and scream in a loud voice (id.). The expected behavior change was that the student would use coping strategies and display appropriate behaviors when feeling frustrated or participating in non-preferred tasks (id.). The BIP included methods/criteria for measuring the outcome of intervention but the methods/criteria described were more intervention strategies for shaping the student's behavior than objective criteria for measuring the success of the plan (id.). The methods/criteria for both target behaviors were the same and included use of a visual schedule, a token economy board, 1-2 verbal prompts or gestural cues for the student to remain in her seat for the entire academic block, verbal and visual prompts, visual behavior boards, and a highly structured instructional environment with established routines (id.). The BIP indicated that the student's progress toward "achieving the targeted behavior" needed to be assessed with parents at least every ten weeks (id.). The BIP did not include a baseline measure of the student's problem behaviors but to some extent identified intervention strategies and a schedule to measure effectiveness (id.).

While the FBA and BIP were lacking in detail, the student's December 2019 IEP provided more in-depth information regarding the student's interfering behaviors and the behavior strategies used to address them.

The December 2019 IEP indicated that the student needed strategies, including positive behavioral interventions, supports, and other strategies to address behaviors that impeded her learning or that of others (Dist. Ex. 7 at p. 9). In addition, the IEP indicated that the student needed 1:1 support for safe transitions, leaving the classroom when prompted, entering a new space, and

"supporting" the student when she engaged in tantrums during transitions from preferred to non-preferred tasks (id.). The IEP noted that the student required constant reminders of transitions and classroom routines, and that her teacher and 1:1 paraprofessional provided extra time and different types of positive reinforcement including stickers, movement breaks, and gummy bears to help the student transition (id. at p. 1). The IEP also noted that the student enjoyed imaginative play with animal toys, drawing out scenes from her imagination, playing games on an iPad, and a variety of sensory activities (id. at p. 3). The IEP described the circumstances under which the student demonstrated interfering behaviors, specifically noting that in speech-language therapy the student "often quite abruptly" became upset by something in her environment and disengaged from her partner during cooperative games (id.). The IEP noted that attempts to reengage the student were variably successful (id.).

The December 2019 IEP indicated that the student's counseling sessions focused on identifying emotions, developing coping strategies and increasing the student's social and play skills and that the provider used a token board to help the student follow directions and attend to task (Dist. Ex. 7 at p. 5). The IEP indicated that the student was "very responsive" to the token board and was able to work for the duration of the counseling session to earn one reinforcer when she returned to class (id.). The IEP stated that the student was "regulating her emotions much better than [at] the beginning of the year" and she was "better able to handle disappointments and cope with disappointments in a more pro social manner[;] [h]owever, at times, she [was] still . . observed to yell, fall to the floor, or shut down when frustrated" (id.). The IEP also indicated that during OT sessions the student presented with a low frustration tolerance and, although some interfering behaviors had decreased, except for during moments of extreme frustration and dysregulation, other impulsive and unsafe behaviors such as running out of the room, throwing herself on the floor, and banging parts of her body persisted (id. at p. 6).

While the FBA/BIP identified the student's target behaviors, expected change in those behaviors, and identified some supportive interventions designed to improve the student's behavior, the documents are missing required information that renders them, in and of themselves, insufficient to address the student's behaviors absent additional recommended supports and strategies. However, even if I were to find that the district's FBA/BIP were insufficient and constituted a procedural violation, the December 2019 CSE nonetheless recommended appropriate and sufficient supports to address the student's behaviors (Dist. Ex. 7 at pp. 8, 14-15, 23-25). Here, the December 2019 CSE considered the student's June and August 2019 progress reports, as well as input from the student's teacher, and incorporated management strategies outlined in the FBA/BIP and deemed successful in the student's June 2019 quarterly progress report as part of the recommended IEP (compare Dist. Ex. 7 at p. 8, with Dist. Ex. 5 at pp. 1-6). Additionally, the IEP included social/emotional goals that addressed the student's need to identify her emotions, feelings, and coping strategies, as well as a goal to address the student's need to use self-regulation coping strategies to avoid engaging in unexpected behavior (Dist. Ex. 7 at pp. 14-15). The December 2019 IEP also recommended a small educational environment in an 8:1+1 special class with a 1:1 paraprofessional for behavior support, counseling as a related service, an individual paraprofessional for transportation, use of a visual schedule, and a token economy board (id. at pp. 23-25). Therefore, the IEP addressed the student's behaviors through the management interventions, goals, program recommendations, and supplementary aids and services in addition to what was contained in the FBA/BIP. While the FBA/ BIP may not have met all the components necessary for compliance, under the particular circumstances of this matter, the December 2019

CSE nonetheless recommended appropriate and sufficient supports to address the student's behaviors. Hence, any deficiencies attributed to the FBA/BIP do not rise to the level of a denial of FAPE.

2. Methodology in IEP

The parent contends that the IHO erred in finding that the December 2019 IEP was appropriate despite the fact that the CSE did not include a recommendation for research-based methodologies. The parent points to evidence that the student benefited from instruction at MSA during the 2019-20 school year, which was delivered using multisensory instruction influenced by applied behavior analysis (ABA), Treatment and Education of Autistic and other Communication-handicapped Children (TEACCH), and Developmental Individual-difference Relationship-based (DIR)/Floortime methodologies. The IHO disagreed that the program offered by the district needed to include the specific designation of ABA or Floortime in the IEP. Under the circumstances of this case, I concur with the IHO that the hearing record does not put forth evidence such that one would conclude that the student required ABA or Floortime in order to obtain educational benefit.

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

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

In this case the hearing record provides scant evidence that student required a program that employed a particular methodology, such as ABA, DIR/Floortime, or TEACCH; instead, the available evidence suggests that the student obtained educational benefit from a program that

utilized elements of a variety of methodologies to address the student's behaviors during instruction. The student's teacher at MSA testified that he was not an ABA therapist and further that there was no one at the school who provided ABA (Tr. pp. 232-33). However, he reported that there was a Board Certified Behavior Analyst (BCBA) employed by the school who provided support to the classroom staff when the student had an "episode" or demonstrated certain behaviors (Tr. pp. 232-34). According to the teacher, the BCBA was able to direct the student and staff regarding the "best course of action to . . . help regulate [the student] and bring her back into being an active participant" and collaborated with the team during team meetings (Tr. pp. 233-36). The teacher explained that classroom staff provided the BCBA with data collected in the classroom, which the BCBA assessed and used to help staff regarding how to best support the student (Tr. p. 234). The teacher indicated that staff would confer with the BCBA depending on the situation (Tr. p. 245). He noted that sometimes he or the student's paraprofessional were able to help the student in the classroom while other times if the student's behavior was more disruptive or lasted longer staff would call on the BCBA for help (id.). In some instances, staff debriefed after an incident to "best figure out what to do going forward" (id.). The student's teacher testified that there was no "one method" or approach in terms of how to respond to the student's behaviors and confirmed that some of the incidents were mediated without consultation with the BCBA (Tr. pp. 245-46). The classroom teacher also testified that MSA did not "use specific methodologies" but rather incorporated elements of ABA, TEACCH, and Floortime "but not directly" (Tr. pp. 234-35).

According to the MSA teacher's affidavit, to address the student's needs with respect to her delays in speech-language abilities, social and pragmatic skills, challenges with regulating her emotions, limited frustration tolerance, and delayed fine motor and sensory integration needs, the student required "differentiated instruction" (Parent Ex. AA at p. 1). Further, he indicated that MSA used solution-based thinking, therapeutic collaboration, analytic approach, and realistic goals to address the student's challenges (id.). He also indicated the student needed a small classroom setting, visual schedules, predictable learning environment, small building, limited distractions, sensory gym, and community integration to generalize her skills (id. at p. 4). He indicated that the student benefited from having her instruction adapted to meet her needs and collaboration with related service providers in order to best support her (id.). Neither the teacher's affidavit nor his testimony indicated that the student required a particular methodology to be utilized in the classroom (id.). Notably, the MSA program description did not mention specific methodologies employed by the school but rather indicated that the program used a multi-sensory approach that included music, art, yoga, and adapted physical education to enhance the curriculum (Parent Ex. L).

The student's teacher testified that the BCBA at MSA suggested the use of a visual schedule and having preferred positive reinforcers available so the student had something she could work toward (Tr. pp. 238-39). He also highlighted the importance of knowing the student's interests and the right time to provide the reinforcers (Tr. p. 239).

The BCBA also confirmed that he was available on "a need basis," meaning if a teacher or therapist was having issues with behavioral support, they could reach out to him and he would meet with them to work on it (Tr. pp. 131-32; Parent Ex. BB at p. 1). He confirmed that he served as a consultant to the teachers and did not work with students directly (Tr. pp. 120-21, 131-32; see Parent Ex. BB at p. 1). He indicated that the student needed a program that had BCBA supervision because she engaged in disruptive behavior that impeded her learning and, as such, a "behavior-

lytic" or circumstantial view of the reasons why the behavior occurred was very important to helping the student work through the behaviors so that she was more able to "contact academic material" (Tr. pp. 121-22). The BCBA reported that MSA was not a "behavior school" as it did not strictly employ one approach using ABA but rather MSA was "more of an eclectic school that use[d] a variety of different approaches" including TEACCH methodologies and Greenspan relation developmental perspectives (Tr. pp. 121-122, 146-147).

The BCBA reported that the student engaged in episodes of behaviors that included yelling, dropping to the floor, crying, noncompliance, disrobing and purposeful urination and that he and his assistant collected frequency and duration data on the episodes (Parent Ex. BB at pp. 1-2). According to the MSA BCBA, to address the student's maladaptive behaviors the student's team at MSA used proactive strategies such as verbal reminders of expectations throughout the day, a visual schedule, textual expectations for each activity written on her desk, encouragement, praise, and reinforcements (id. at p. 2). The team also used reactive strategies such as downsizing reactions, "waiting of calm," prompting appropriate language, continuing the demand and limiting eye contact (id.). According to the BCBA, after the student engaged in an episode, he would debrief the student's team (id.). He indicated that when the team first adopted proactive procedures, members discussed the rationale of why the student was engaging in interfering behaviors and reviewed the possible consequences that served to maintain the behaviors (id.). The BCBA opined that the student needed a program like MSA to make progress because MSA looked at the antecedents or triggers of the student's behaviors in order to look at the behavior objectively and thereby determine what the student was trying to communicate and what she wanted to obtain as a result of the behavior (id.). He explained that staff at MSA then worked to engage the student in more socially acceptable behavior to get the desired results and opined that without a program that looked closely at behaviors the student would not be able to access the curriculum as her behaviors would be "so pervasive that it would prevent her from learning" (id.). While the BCBA acknowledged that MSA utilized elements of different methodologies in combination to implement its "eclectic" approach to a student's learning and behavioral needs, the BCBA's, much like that of the student's teacher, fell short of presenting the type of consensus view with regard to methodology that would require the CSE to recommend a particular methodology on the student's IEP.[6]

As noted by the IHO, MSA did not appear to adhere to a strict ABA program, rather it provided multisensory instruction "'influenced'" by DIR/Floortime, TEACCH, and ABA with the support of a BCBA (IHO Decision at p. 15). Although the BCBA opined that the student required a program like MSA that looked closely at the student's behavior, he acknowledged that the school

[6] The BCBA who worked with the student at home testified to observing services at MSA that integrated principles derived from ABA methodology in both the classroom and during related services (Tr. pp. 284-86). She also testified that the student would benefit from a placement that included a BCBA on staff because she had observed "great improvement to [the student's] adaptive skills, which have all happened in the presence of working with a [BCBA]" (Tr. pp. 288-89). Although the home BCBA testified that she would recommend services from a BCBA because she had observed that the student benefited from such services, she did not feel she could make a determination whether the student needed a BCBA or not (Tr pp. 304-05). The home BCBA also testified that discrete trial teaching methods could be used by a variety of people in addition to ABA professionals (Tr. pp. 357-58). Additionally, she testified that during the school year at issue she was working with the student incidentally, providing naturalistic opportunities for the student to learn and demonstrate the targeted skills rather than using a discrete trial method (Tr. pp. 356-57).

had not conducted a formal or informal FBA or written a BIP for the student but instead addressed the student's behavior through "in-house classroom proactive procedures" (Tr. pp. 138-39).[7] Moreover, the BCBA suggested that the reason MSA had not conducted a formal FBA of the student was that it is not primarily a behavioral school (Tr. p. 139). The hearing record does not support a finding that a specific teaching methodology was necessary in order for the student to make meaningful progress. Although instruction at MSA incorporated elements of, or was influenced by, several methodologies including ABA, DIR/Floortime, and TEACCH, the hearing record shows that MSA was an eclectic program that borrowed from diverse methodologies rather than strictly adhering to a specific methodology in toto when instructing the student and addressing her interfering behaviors. In the absence of clear evidence that a specific methodology was necessary to offer the student a FAPE, the precise methodology is usually a matter left to the teacher's discretion (Rowley, 458 U.S. at 204; R.B., 589 Fed. App'x at 575-76; A.S., 573 Fed. App'x at 66; K.L., 530 Fed. App'x at 86; R.E., 694 F.3d at 192-94; M.H., 685 F.3d at 257). Thus, with regard to the parent's contention that the December 2019 IEP was not appropriate due to its failure to recommend a particular methodology for the student, I find that such allegation is not supported by the hearing record.

3. Transition Plan

The parent argues that the IHO erred in finding that the December 2019 IEP was appropriate notwithstanding the lack of transition services. The parent argues that the student tended to struggle with changes in routine and transitions during the school day and also required a plan to transition from private school to a public school.

Generally, the IDEA does not require a "transition plan" as part of a student's IEP when a student moves from one school to another (A.D. v. New York City Dep't of Educ., 2013 WL 1155570, at *8 [S.D.N.Y. Mar. 19, 2013]; F.L. v. New York City Dep't of Educ., 2012 WL 4891748, at *9 [S.D.N.Y. Oct. 16, 2012], aff'd, 553 Fed. App'x 2 [2d Cir. Jan. 8, 2014]; A.L. v. New York City Dep't of Educ., 812 F. Supp. 2d 492, 505 [S.D.N.Y. 2011]; E.Z-L. v. New York City Dep't of Educ., 763 F. Supp. 2d 584, 598 [S.D.N.Y. 2011], aff'd sub nom., R.E., 694 F.3d 167; see R.E., 694 F.3d at 195).[8]

Moreover, I concur with the IHO that the hearing record supports a finding that the student's transition needs would have been adequately addressed by the array of special education services, related services, goals and management needs set forth on the December 2019 IEP (see IHO Decision at pp. 21-22). For example, the IEP provides the student with a full-time 1:1 paraprofessional which would provide the student with direct support in navigating the school

[7] It is clear that MSA relied in part on behavioral principles to address the student's behavior (Tr. pp. 137-39).

[8] To the extent that the parent intended to include "transitional support services" as part of the "transition services" she references, transitional support services are defined by State regulation as "temporary services, specified in a student's [IEP], provided to a regular or special education teacher to aid in the provision of appropriate services to a student with a disability transferring to a regular program or to a program or service in a less restrictive environment" (8 NYCRR 200.1[ddd]). However, in this instance, even if the district may have been required to include transitional support services on the student's IEP, such services are designed to support the student's teachers in the classroom and there is no indication in the hearing record that the absence of such services in the IEP may have contributed to a denial of a FAPE.

environment throughout the school day as well as a paraprofessional and special transportation to assist the student in transitioning to and from the home and the public school (Dist. Ex. 7 at pp. 24-25).

The IEP also identifies the student's transition needs, noting that the student's "decreased body awareness, coordination, motor planning and strength affect her ability to navigate the classroom and school environment safely" and recommending continued PT for the student to improve these deficits and increase gross motor skills (Dist. Ex. 7 at pp. 7, 24). The CSE's determination that the student required a BIP was also made in part to address transition needs (id. at p. 9). With respect to the parent's concern for the student's ability to handle noisy environments such as hallways, the IEP identifies the student's sensory processing and regulation needs and recommended continuing OT in part to address them (id. at pp. 6, 25). The IEP also provides "[noise] canceling headphones" for the student, which continued to be beneficial to the student according to MSA reports (id. at p. 8; Parent Ex. Z at p. 2). The IEP management needs would also address transition concerns by providing small group instruction, a small, supportive environment, and a highly structured instructional environment with established routines (Dist. Ex. 7 at p. 8). Lastly, the IEP contained counseling, PT and OT goals intended to improve the student's coping strategies, increase body awareness and balance, and avoid unexpected behaviors that would improve the student's ability to transition during the school day (id. at pp. 14, 18, 22).

In light of the above, I am not persuaded that the December 2019 IEP failed to adequately address the student's transition needs.

C. Assigned Public School Site

The parent argues generally that the IHO erred in finding the parent's testimony and concerns about the assigned public school site to be speculative, because in the parent's view her concerns with the assigned school were not disproven by the district. The IHO had noted that it was speculative to conclude that the student would be required to move from classroom to classroom at the assigned school and that the student would have been barred from using the elevator in the building despite what the parent was told by school staff (IHO Decision at pp. 21-22). The district contends that its evidence establishes that the assigned school could implement the student's IEP at the beginning of the 2020-21 school year, which is all that is required in order to establish that it offered the student a FAPE.

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., 611 Fed. App'x 728, 731 [2d Cir. May 8, 2015]; R.B. v. New York City Dep't of Educ., 603 Fed. App'x 36, 40 [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., 584 F.3d at 419; R.B. v. New York City Dep't of Educ., 589 Fed. App'x 572, 576 [2d Cir. Oct 29, 2014]).[9] However, a district's assignment of a student to a

[9] The Second Circuit has held that a district's assignment of a student to a particular public school site is an administrative decision that must be made in conformance with the CSE's educational placement recommendation,

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. v. New York City Dep't of Educ., 746 F.3d 68, 79 [2d Cir. 2014] [holding that while parents are entitled to participate in the decision-making process with regard to the type of educational placement their child will attend, the IDEA does not confer rights on parents with regard to the selection of a school site]). The 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., 659 Fed. App'x 3, 5-6 [2d Cir. Aug. 24, 2016]; J.C. v. New York City Dep't of Educ., 643 Fed. App'x 31, 33 [2d Cir. Mar. 16, 2016]; B.P. v. New York City Dep't of Educ., 634 Fed. App'x 845, 847-49 [2d Cir. 2015]). Permissible prospective challenges must be "tethered" to actual mandates in the student's IEP (see Y.F., 659 Fed. App'x at 5). 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 M.E. v. New York City Dep't of Educ., 2018 WL 582601, at *12 [S.D.N.Y. Jan. 26, 2018]; Z.C. v. New York City Dep't of Educ., 222 F. Supp. 3d 326, 338 [S.D.N.Y. 2016]; L.B. v. New York City Dep't 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., 2016 WL 3981370, at *13; 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]).

In light of the above, the IHO did not err in finding the parent's concerns about the elevator and the student's sensory needs were "speculative" because those challenges do not 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., 659 Fed. App'x at 5-6; J.C., 643 Fed. App'x at 33; B.P., 634 Fed. App'x at 847-49). There is sufficient evidence in the hearing record to support a finding that the assigned school had the capacity to implement the student's IEP at the start of the 2020-21 school year (Tr. pp. 90-98; Dist. Exs. 7-9). Nonetheless I will briefly address the parent's three concerns with respect to the assigned public school site because there is sufficient evidence in the hearing record to do so and the IHO made findings associated with these concerns in her decision (see IHO Decision at pp. 18-22).

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and the district is not permitted to deviate from the provisions set forth in the IEP (R.E., 694 F.3d at 191-92; T.Y., 584 F.3d at 419-20; see C.F., 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 district is required to implement the IEP and parents are well within their rights to compel a non-compliant district to adhere to the terms of the written plan (20 U.S.C. §§ 1401[9][D]; 1414[d][2]; 34 CFR 300.17[d]; 300.323; 8 NYCRR 200.4[e]).

1. Availability of a Seat

The parent alleges that the IHO erred in relying on a district witness to conclude that there was a seat available for the student at the assigned public school site, notwithstanding the parent's testimony that she was informed in August 2020 that the student was on a waiting list (Parent Ex. T at pp. 2-3). However, as the district points out, this does not conflict with the testimony of the district's administrator who stated that, at the time the student was assigned to the public school, there would have been a seat available had the parent chosen to accept the recommended placement because the student's 12-month school year started in July 2020 (Tr. pp. 90-95; Dist. Exs 7 at pp. 8, 25; 8; 9; see Answer ¶28). Given that the parent provided the district with notice of her intent to unilaterally place the student at MSA for the 2020-21 school year by letter dated June 16, 2020, the district was not required to hold open a seat in a school that the parent expressed she would not utilize (Parent Ex. F). The IDEA does not require districts to maintain classroom openings for students enrolled in private schools (E.H., 611 Fed. App'x at 731 [finding that the parent's argument that the student was denied a FAPE because the proposed classroom did not have a space for the student was without merit and that the district public school was not obligated to hold a seat open for the student after the parent rejected the district's offered public school placement prior to the start of the school year]).

2. Elevator

The parent asserts that the IHO erred in finding the assigned public school site appropriate despite the lack of an elevator. In particular, the parent alleges that she was informed by the principal of the assigned public school site that the student would not be allowed to use the elevator and that the district did not address this concern, notwithstanding that it knew that the student wore de-rotation straps to rotate her hips externally. However, as the district points out, the hearing record does not support a finding that the student required an elevator or that it would be unsafe for the student to use the stairs in the assigned school. I note, as set forth in more detail above, that the IEP addressed the student's transition needs by providing the student with a 1:1 paraprofessional among other supports and services (Dist. Ex. 7). Additionally, the student's September 2020 through December 2020 quarterly report of progress from MSA notes that "stair negotiation skill was not addressed during this quarter as [the student] is independent with the task" (Parent Ex. X at p. 12).

3. Sensory Needs

The parent asserts that the IHO erred in finding the assigned public school site appropriate given the student's sensory needs. The parent contends that the principal informed her that the student would have to eat lunch in the cafeteria or the dean's office and that this was not appropriate for the student given information available to the CSE that the student had adverse reactions to loud noises. Again, the record does not support a finding that the student's sensory needs could not be addressed in the assigned school. With respect to the cafeteria, the parent assumes it would be too noisy for the student without having been told by school staff that it was a noisy environment and without [understandably] having had an opportunity to visit the assigned school (Parent Ex. T at p. 2). With respect to the parent's concern that the student would "have to" eat lunch either in the cafeteria or the dean's office, I note that the parent asked district personnel if there was an option to have the student eat in a location that would be less noisy than the cafeteria and was told

that the school would accommodate that by having the student eat lunch in the dean's office until the student's providers could transition the student into the cafeteria once she was able to do so with support for her sensory needs (Req. for Rev. ¶¶ 36-44; see Parent Exs. E at p. 1; T at p. 2). With respect to the student's sensory needs in using the school's hallways, I note that again the parent assumes that these areas would be too loud for the student and also note that, as set forth in more detail above, the IEP addressed the student's transition needs by providing the student with a 1:1 paraprofessional among other supports and services (see Dist. Ex. 7).

In light of the above, I concur with the IHO and I decline to find that the assigned school would have been unable to implement the student's IEP.

VII. Conclusion

I have considered the parties' remaining contentions and find that I need not address them in light of my determinations herein.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
November 5, 2021

CAROL H. HAUGE
STATE REVIEW OFFICER