



The University of the State of New York

The State Education Department

State Review Officer

www.sro.nysed.gov

No. 22-048

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

Appearances:

Ratcliff Law, PLLC, attorneys for petitioners, by Jennifer Ratcliff, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Theresa Crotty, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioners (the parents) appeal from the decision of an impartial hearing officer (IHO) which determined that respondent (the district) offered an appropriate educational program and related services and denied their request to be reimbursed for their daughter's tuition costs at the Rebecca School for the 2021-22 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

According to an April 2020 psychological evaluation report, due to parental concerns regarding delays in the student's motor developmental milestones and early social and language milestones, the student was evaluated in fall 2017, with the results indicating delays in cognitive skills, fine motor skills, adaptive skills, and social skills and significant delays in receptive, expressive, and pragmatic language (Parent Ex. E at pp. 2, 19). Reportedly, a supplemental psychological evaluation found the student met the criteria for a diagnosis of autism spectrum disorder (ASD) with the evaluator noting difficulties with "joint attention, responding to her name when called, initiating and sustaining any social interactions, and exploring toys in a functional way" and describing the student's play as sensory motor in nature (id. at pp. 2-3). Accordingly, the student qualified for "multiple services" through the Early Intervention Program (EIP) that

included center-based services along with three 30-minute sessions per week of speech-language therapy and two 30-minute sessions per week of occupational therapy (OT) (id. at p. 3).

In June 2018, the student was re-evaluated to determine her eligibility for special education through the Committee on Preschool Special Education (CPSE) (Parent Ex. E at p. 3). Results of this evaluation indicated the student continued to meet the criteria for ASD and the evaluator reported repetitive behaviors including hand-flapping, running back and forth, opening and closing doors, spinning wheels, and making frequent vocalizations in the form of babbling and added that the student sought "high levels of sensory stimulation" (id.). Additional testing found the student's overall adaptive behavior composite to be in the moderately low range with communication skills falling in the low (moderate deficit) range and indicated global delays across the domains of communication, cognitive skills, fine and gross motor skills, adaptive skills, and social/emotional functioning (id.). Finding the student eligible for special education as a preschool student with a disability, the CPSE recommended a 12-month therapeutic nursery program in an 8:1+2 special class setting, along with two 30-minute sessions per week each of school-based speech-language therapy, physical therapy (PT), and OT (id.).

Information from a February 2020 school progress report included in an April 2020 psychological evaluation report indicated that the student's challenges in the domains of attention, self-regulation, and impulse control negatively impacted her overall learning and development across domains and that she benefited from 1:1 support to sustain attention and stay in one area or engage in one activity for longer periods of time (Parent Ex. E at p. 3). According to the report, the student responded well to music and familiar songs, her free play was primarily parallel in nature rather than joint interactive, she joined her peers in group activities approximately 50 percent of the time with 1:1 support, she had shown an increase in tolerating novel tasks that were not self-directed although she occasionally became frustrated, and when dysregulated, she benefited from tactile sensory input with support from staff (id.).

The student's parents obtained a private psychological evaluation to assess the student's current function to understand her educational and treatment needs as she prepared to transition to kindergarten, which was conducted over several days between January and March 2020 and memorialized in a report dated April 7, 2020 (Parent Ex. E at pp. 1, 14, 19). At that time, the student attended a therapeutic nursery program with related services (id. at p. 3). Following administration of a variety of cognitive, social/emotional functioning, and adaptive behavior assessments, the private psychologist concluded that the student continued to meet the criteria for ASD with accompanying language and intellectual impairment (id. at pp. 10-14). According to the private psychologist, it was critical that the student's developmental challenges, including difficulties maintaining self-regulation and sustained attention, be addressed at the core of her program (id. at p. 16). The private psychologist recommended a small class size in a small school that specifically worked with children with neurodevelopmental disorders, small group and individual learning experiences, frequent and close supervision, and grouping with peers who were developmentally similar (id. at pp. 16-17). Further, the private psychologist recommended that the student's program focus on developing her foundational developmental skills in fine and gross motor, attention, socialization and language using hands on activities, visual-motor integration, visual-spatial activities, and pre-academic, sensory, and play-based learning (id. at p. 17). In addition, the private psychologist stated that the student's educational program should capitalize on the student's interest in music, should occur in a language-enriched manner, and should include

a variety of individualized sensory experiences, collaboration among teachers and related services providers, and a strong emphasis on parent-team collaboration (id.).

The private psychologist recommended the following strategies: naturalistic and hands-on opportunities, time for exploration of materials as needed with increased structure and adult-directed activities to follow when the student became more developmentally ready, small group work to support development of peer relationships, preemptive breaks and strategies, sensory play and motor activities, visual supports, and additional processing time (Parent Ex. E at pp. 17-18). Related services of speech-language therapy, OT, PT, and music therapy were recommended along with educational and therapeutic support and parent support and training (id. at pp. 18-19). Additionally, the private psychologist recommended developmentally informed psychotherapy, "such as by using the Developmental Individual Differences Relationship-based (DIR) Model and related Floortime strategies" (id. at p. 19).

On May 7, 2020, a CSE convened to initially consider the student's eligibility for special education as a school-age student with a disability and develop her IEP for the 2020-21 (kindergarten) school year with the projected implementation date of September 1, 2020 (Dist. Ex. 6). Finding the student eligible for special education as a student with autism, the CSE recommended a 12-month extended school year program including a 6:1+1 special class placement in a district specialized school along with related services of three 30-minute sessions per week of individual OT, one 30-minute session per week of individual PT, three 30-minute sessions per week of individual speech-language therapy, and two 30-minute sessions per year of group parent counseling and training (id. at pp. 1, 18-20, 23-24).¹

The student began attending the Rebecca School in September 2020 (Dist. Ex. 5 at p. 1).²

A December 2020 interdisciplinary developmental summary from Rebecca School reported that, in September, in accordance with city and State regulations, the school transitioned to a hybrid learning model where the students attended school for in-person learning two days per week and participated in virtual learning three days per week (Dist. Ex. 5 at p. 1). On in-person learning days the student attended school with "six of her peers," one head teacher, and three teaching assistants, while two of her peers participated virtually throughout the day (id.). The December 2020 summary stated that the school utilized the DIR/Floortime model (id.). Reportedly the student's schedule included morning meeting, reading, math, science, social studies, and DIR/Floortime sessions as well as OT, speech-language therapy, PT, adapted physical education, art, and a music group facilitated by a music therapist (id.).

A CSE convened on March 9, 2021 to conduct the student's annual review, found the student continued to be eligible for special education as a student with autism, and developed her

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 The Rebecca School 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).

IEP for the 2021-22 school year (first grade) (Parent Ex. C; Dist. Exs. 2; 3).³ The CSE reviewed the May 2020 IEP and the December 2020 Rebecca School interdisciplinary developmental summary (Parent Exs. C at p. 1; D at p. 2). The March 2021 CSE recommended a 12-month extended school year program including an 8:1+1 special class placement in a district specialized school, along with the related services of two 30-minute sessions per week of individual OT, one 30-minute session per week of OT in a group of two, two 30-minute sessions per week of individual PT, 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, adapted physical education, special transportation, and one 60-minute session per month of group parent counseling and training (Parent Ex. C at pp. 14-16, 18-19). The March 2021 IEP had a projected implementation date of March 23, 2021 (id. at p. 1).

On May 12 and May 14, 2021, the parents executed an enrollment contract for the student's attendance at the Rebecca School for the 2021-22 extended school year starting on July 1, 2021 and ending on June 23, 2022 (Parent Ex. J).

In a prior written notice, dated June 2, 2021, the district notified the parents of the March 2021 CSE's determination that the student was eligible for special education services, identified the evaluative information considered by the CSE, identified the special education program and related services recommended for the student, and advised the parents of their due process rights (Parent Ex. D at pp. 1-4). In a school location letter, also dated June 2, 2021, the district apprised the parents of the name and location of the particular public school site to which it assigned the student for the 2021-22 school year (id. at p. 5). The school location letter also notified the parents that they could visit the school and provided the parents with the name and contact information for someone who could assist in arranging a visit (id.).

In a letter to the district, dated June 16, 2021, the parents detailed their position that the March 2021 IEP, including the recommended 8:1+1 special class placement, was not appropriate and would not allow the student to make meaningful progress as she would not be afforded the attention, 1:1 support, "consistent support," "frequent and close supervision," sensory diet, and "essential techniques" for regulation which were offered at the Rebecca School (Parent Ex. B at pp. 1-2). The parents stated their intention to place the student at the Rebecca School for the 2021-22 school year and seek funding for costs of the student's attendance from the district (id.).

On July 26, 2021, the parents submitted a "[p]endency [p]rogram" form indicating pendency at the Rebecca School and daily round trip transportation for the student, which a district representative signed, as uncontested, on August 11, 2021 (August 11, 2021 Uncontested Pendency Form).

³ The hearing record contains duplicative exhibits (compare Parent Exs. C, and D, with Dist. Exs. 1, and 4). For purposes of this decision, only parent exhibits are cited in instances where both a parent and district exhibit are identical in content. The IHO is reminded that it is her responsibility to exclude evidence that she determines to be irrelevant, immaterial, unreliable, or unduly repetitious (8 NYCRR 200.5[j][3][xii][c]).

A. Due Process Complaint Notice

In a due process complaint notice, dated July 26, 2021, the parents requested an impartial hearing asserting that the district denied the student a FAPE for the 2021-22 school year (see Parent Ex. A).

Specifically, the parents asserted that the district failed to provide them with a meaningful opportunity to participate in the March 2021 CSE process, specifically noting that the CSE failed to provide them with meeting minutes, handwritten notes, or other documentation regarding the CSE meeting or documents the CSE relied upon at the meeting and failed to fully explain to the parents their options (Parent Ex. A at p. 2). The parents claimed the district impermissibly predetermined the CSE's recommendations, thereby precluding the parents from meaningfully participating in the CSE process, particularly that the district's program choice was based on the student's eligibility category and availability of resources, instead of her needs (id.). The parents contended that the CSE failed to consider sufficient, current, and appropriate evaluative materials, specifically noting that the CSE failed to consider the April 2020 private psychological evaluation (id. at pp. 2-4). The parents also noted that the CSE failed to reconvene after having received their 10-day notice dated June 16, 2021 (id. at p. 2).

With respect to the March 2021 IEP, the parents asserted that the CSE's recommended 8:1+1 class ratio was inappropriate as the student required more support to make meaningful progress (Parents Ex. A at p. 3). The parents noted that based on the psychological evaluation and the IEP, the student required a smaller class with a lower student-to-teacher ratio (id.). The parents noted that, according to the psychological testing, the student required "very substantial support" for her social communication skills and "substantial support" for her atypicality requiring "frequent and close supervision" (id.). They asserted that the student needed 1:1 support from an adult to remain regulated and make progress as demonstrated by the progress she made in reading, literacy, and math at the Rebecca School in a 2:1 classroom (id.). The parents also argued that the March 2021 IEP indicated that the DIR/Floortime model used at the Rebecca School has "promote[d] the student's development, has successfully assisted [the student] sustain attention, remain regulated, and make academic and social-emotional progress" (id. at pp. 3-4). Finally, the parents asserted that, despite their concern and evidence of the student's need for a sensory diet, the CSE failed to recommend one in the March 2021 IEP (id. at p. 4).

Regarding the assigned public school site, the parents contended that, after receiving the district's school location letter on June 2, 2021, they promptly contacted the school (Parent Ex. A at p. 4). They claimed that a school official told them he would return their call after July 4, 2021; however, they alleged that they never received a return call and, therefore, were unable to learn more about the "school environment, the pedagogical approach to students with neurodevelopmental delay, teacher and paraprofessional training, the one-to-one support, the related services, etc." (id.). Next, the parents argued that the assigned public school building was too large for the student, alleging that it had approximately 500 students and shared a building with three other schools with an estimated student population of over 2,000 (id.).

Last, the parents contended that the student's unilateral placement at the Rebecca School was appropriate and that equitable considerations weighed in favor of the parents' requested relief as they were active participants throughout the CSE process and provided timely notices to the

district (Parent Ex. A at p. 5). The parents requested tuition and costs for the Rebecca School for the 2021-2022 extended school year, as well as "20 hours per week of 1:1 ABA services; [five] hours per week of play therapy/counseling; and [s]pecial transportation services to and from Rebecca School" (id.).

B. Impartial Hearing Officer Decision

The parties convened for a prehearing conference on December 28, 2021 and a status conference on January 27, 2022 (Tr. pp. 1-16). The evidentiary phase of the impartial hearing began and concluded on March 11, 2022 (Tr. pp. 17-120). In a decision, dated March 17, 2022, the IHO determined that the district offered the student a FAPE for the 2021-22 school year (IHO Decision at p. 10). The IHO found that, "while this case was challenging," the evidence supported a determination that the district "met its procedural and substantive obligations in developing an IEP and making an appropriate placement recommendation for the [s]tudent based on her specific needs" (id.). The IHO further found that the parents' interpretation of the April 2020 psychological evaluation was too restrictive (id.). Specifically, the IHO found that the parents' interpretation of the recommendation that the student be placed in a small class in a small school was a "wholesale rejection of all 6:1+1 or 8:1+1 special education classes in District 75" and speculative (id.). Further, the IHO found that the parents "provide[d] no evidence to support their belief that the recommended 8:1:1 special education class alongside the suite of recommended services would not offer educational benefits and afford meaningful academic progress to autistic students like their child" and that their attempt to show the inappropriateness of the recommendation by highlighting the student's progress at the Rebecca School along with their insistence on a 2:1 ratio in a school using the DIR/Floortime methodology made it impossible for the district to find a suitable program for the student (id.).

After acknowledging that it was unnecessary, the IHO determined that the parents' unilateral placement was appropriate and "satisf[ied] the [s]tudent's educational and social needs based on the depth and breadth of its services" (IHO Decision at p. 10). With regard to equitable considerations, the IHO found that the parents "only intended on enrolling" the student at the Rebecca School and that any consideration of a public school placement was pretextual and the parents' actions were not reasonable (id. at p. 11). In conclusion, the IHO denied the parents' request for tuition reimbursement "and other awards" for the 2021-22 extended school year (id.).⁴

IV. Appeal for State-Level Review

The parents appeal and argue that the IHO erred in finding that the district offered the student a FAPE for the 2021-22 school year and that the parents' actions impeded the district's ability to provide the student with a FAPE and erred in denying funding and reimbursement for the student's tuition at the Rebecca School.

In their request for review, the parents delineate several distinct issues for review. First, the parents allege that the IHO failed to properly weigh the credibility of all the witnesses and

⁴ While the parents also requested 20 hours per week of ABA services and five hours per week of play therapy/counseling in their due process complaint notice, these requests were withdrawn at the impartial hearing (Tr. p. 114).

improperly credited the district's only witness without explaining her reasoning. Regarding the district's witness, the parents assert that she is not a special education teacher, never met the student, and did not attend any CSE meetings regarding the student.

Second, the parents assert that the IHO failed to address the parents' claims regarding the procedural deficiencies in the IEP, such as the CSE's failure to allow the parents an opportunity to meaningfully participate in the development of the IEP and allege that the IHO erroneously shifted the burden of proof to them to support their belief that the recommended 8:1+1 special education class along with related services would not afford the student an educational benefit or academic progress. The parents argue that it is the district's burden to prove that the IEP and program recommendations are appropriate for the student.

Third, the parents contend that the IHO erred in finding that the March 2021 IEP was substantively appropriate and sufficient to meet the student's needs for the 2021-22 school year. The parents claim it was error for the IHO to rely on the unsubstantiated testimony of the district's witness, whose testimony was devoid of detail, who was not part of the student's IEP team, and who by her own admission, did not review the student's psychological evaluation. Also, the parents assert that the IHO erred in finding that the IEP was sufficient despite the district's failure to include the DIR/Floortime methodology.

Fourth, the parents argue that the district failed to establish, and the IHO erred in finding, that the district could properly implement the student's IEP. The parents claim that, although they contacted the recommended placement, they did not receive a response and were unable to learn more about the school.

Next, the parents contend that the IHO correctly found that the Rebecca School is an appropriate placement for the student. The parents assert that the Rebecca School has a 2:1 ratio, two sensory gyms, and sensory corners in each classroom. The parents also contend that testimony from the program director at the Rebecca School demonstrates the importance of sensory input and a sensory diet for the student.

For the above stated reasons, the parents request an order reversing the IHO's decision that the student was provided a FAPE for the 2021-22 school year, an order sustaining the IHO's finding that the Rebecca School is an appropriate unilateral placement, an order reversing the IHO's finding that the parents impeded the district's ability to provide the student with a FAPE, and an order directing the district to fund and/or reimburse tuition expenses for the 2021-22 extended school year, including transportation.

In an answer, dated June 14, 2022, the district asserts that the IHO's decision should be affirmed and the parents' request for review dismissed. The district argues that their sole witness was a qualified witness who testified that the CSE had sufficient evaluative material before it to develop the student's March 2021 IEP despite not directly reviewing the April 2020 private psychological evaluation report. Regarding the parents' claim that the IHO erroneously shifted the burden of proof, the district acknowledges that although the IHO may have stated that the parents did not provide evidence to show that the recommended program was inappropriate, she nonetheless applied the correct legal standard and found that the district met its burden. The district also asserts that the IHO correctly found that the district offered the student a FAPE even

though the CSE did not recommend the DIR/Floortime methodology, as the specific teaching methodology is usually left to the teacher's discretion. Further, the district notes that the private psychological evaluation did not explicitly recommend DIR/Floortime and the district's witness testified that there was no evidence that the student could not progress with a different methodology. The district agrees with the IHO's finding that the parents' challenge that the recommended specialized school could not implement the student's IEP was speculative and not an appropriate basis for a unilateral placement.

V. Applicable Standards

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

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

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]).

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

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

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

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

have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

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

VI. Discussion

A. IHO Decision—Burden of Proof and Credibility

The parents argue that the IHO improperly shifted the burden to the parents to prove that the recommended program was not appropriate when the district actually bore the burden of proof to show that its IEP was appropriate. In particular, the parents point to language in the IHO decision where the IHO stated that "the [p]arents provided no evidence to support their belief that the recommended 8:1:1 special education class alongside the suite of recommended services would not offer educational benefits and afford meaningful academic progress to autistic students like their child" (see IHO Decision at p. 10). The parents also argue that the IHO erred in relying on the testimony of the district's sole witness, who was not a special education teacher, had never met the student, and did not attend the March 2021 CSE meeting. The parents further allege that the IHO failed to weigh the credibility of all the witnesses, credited the district witness without explaining her reasoning or providing support, and that the IHO failed to weigh conflicting evidence from the student's mother, who was present at the CSE meeting, as well as from the private psychologist, and representative from the Rebecca School.

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).

At first glance, an examination of the IHO decision—and in particular, the language referenced above by the parent—might appear to support the parent's contention that the IHO improperly shifted the burden of proof from the district to the parent (see IHO Decision at p. 10). In her analysis of whether the district offered the student a FAPE, the IHO found, among other things, that in challenging the appropriateness of the IEP, the parents "provided no evidence to support their belief that the recommended 8:1:1 special education class . . . would not offer educational benefits and afford meaningful academic progress," that the parents "attempted to establish the inappropriateness of the recommended IEP by highlighting" the student's progress at "her highly specialized private school," and that the parents "made it impossible" for the district to recommend a program they "would find suitable" by "insisting that only a 2:1 classroom in a school using DIR[F]loortime would meet their child's unique needs" (id.).

Notwithstanding the use of this language, the IHO recited the appropriate burden of proof (IHO Decision at p. 9). The IHO also made detailed findings of fact with respect to the documentary and testimonial evidence presented at the impartial hearing (*id.* at pp. 3-7). The IHO found that the district's evidence supported a finding of a FAPE and that the district presented "credible evidence to support that the 2021-22 IEP was reasonably designed to comprehensively respond to the [s]tudent's unique needs" as outlined in the April 2020 psychological evaluation report, progress reports, and other information provided to the IEP team and discussed at the IEP meeting (*id.* at p. 10). The IHO further found that based on all of the evidence presented, the district established that it offered the student a FAPE (*id.*). Thus, the available evidence in the hearing record led the IHO to find that the IEP adequately addressed the student's needs and that there was no contrary evidence that would rebut that conclusion (i.e., evidence that the student required the specific class ratio and methodology preferred by the parent); accordingly, the actual analysis of the relevant evidence by the IHO did not represent a shift of the burden of persuasion to the parent to demonstrate the IEP's substantive deficiency (see E.E. v. New York City Dep't of Educ., 2018 WL 4636984, at *11 n.13 [S.D.N.Y. Sept. 26, 2018]; Application of a Student with a Disability, Appeal No. 18-058; see also C.F., 746 F.3d at 76 [noting that "the Department bears the burden of establishing the validity of the IEP"]). The decision when read in its entirety reveals that the IHO made her decision based on an assessment of the relative strengths and weaknesses of the 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 the district's witness who was not a special education teacher, had never met the student, and did not attend the March 2021 CSE meeting; 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 2021-22 school year (34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]).

B. CSE Process

1. Parental Participation

The parents allege in their request for review that the IHO failed to address the parents' claims regarding the procedural deficiencies in the IEP, such as the CSE's failure to allow the parents an opportunity to meaningfully participate in development of the student's IEP.

The IDEA sets forth procedural safeguards that include providing parents an opportunity "to participate in meetings with respect to the identification, evaluation, and educational placement of the child" (20 U.S.C. § 1415[b][1]). Federal and State regulations governing parental participation require that school districts take steps to ensure that parents are present at their child's IEP meetings or are afforded the opportunity to participate (34 CFR 300.322; 8 NYCRR 200.5[d]). Although school districts must provide an opportunity for parents to participate in the development

of their child's IEP, mere parental disagreement with a school district's proposed IEP and placement recommendation does not amount to a denial of meaningful participation (see T.F. v. New York City Dep't of Educ., 2015 WL 5610769, at *5 [S.D.N.Y. Sept. 23, 2015]; A.P. v. New York City Dep't of Educ., 2015 WL 4597545, at *8, *10 [S.D.N.Y. July 30, 2015]; E.F. v. New York City Dep't of Educ., 2013 WL 4495676 at *17 [E.D.N.Y. Aug. 19, 2013] [stating that "as long as the parents are listened to," the right to participate in the development of the IEP is not impeded, "even if the [district] ultimately decides not to follow the parents' suggestions"]; P.K. v. Bedford Cent. Sch. Dist., 569 F. Supp. 2d 371, 383 [S.D.N.Y. 2008] [noting that "[a] professional disagreement is not an IDEA violation"]; Sch. for Language & Commc'n Dev. v. New York State Dep't of Educ., 2006 WL 2792754, at *7 [E.D.N.Y. Sept. 26, 2006] [finding that "[m]eaningful participation does not require deferral to parent choice"]). When determining whether a district complied with the IDEA's procedural requirements, the inquiry focuses on whether the parents "had an adequate opportunity to participate in the development" of their child's IEP (Cerra, 427 F.3d at 192). Moreover, "the IDEA only requires that the parents have an opportunity to participate in the drafting process" (D.D-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at *11 [E.D.N.Y. Sept. 2, 2011], aff'd, 506 Fed. App'x 80 [2d Cir. Dec. 26, 2012], quoting A.E. v. Westport Bd. of Educ., 463 F. Supp. 2d 208, 216 [D. Conn. 2006]; see T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 420 [2d Cir. 2009] [noting that the IDEA gives parents the right to participate in the development of their child's IEP, not a veto power over those aspects of the IEP with which they do not agree]).

In this matter, the parents, along with staff from the unilateral placement, were present at the March 2021 CSE meeting (Dist. Exs. 2; 3 at pp. 1-4). The March 2021 CSE meeting minutes and the March 2021 IEP included the parents' input regarding the student's current functioning including the statements that virtual learning had been a challenge for the student, the student was able to use materials in the home setting, the student required access to a quiet space for breaks, and the student was completing pre-potty training at home (Parent Ex. C at pp. 3-5; Dist. Ex. 3 at pp. 1-2). In addition, the March 2021 CSE meeting minutes and the March 2021 IEP noted the parents' concerns, including their request for an assistive technology evaluation, and their belief that an 8:1+1 placement would not be appropriate for the student at this time (Parent Ex. C at p. 20; Dist. Ex. 3 at pp. 3-4). While the parents ultimately disagreed with the recommendations made by the CSE, the evidence in the hearing record reveals that the parents were provided adequate opportunity to participate in the development of the student's IEP.

2. Consideration of Evaluative Information

Next, the parents argue that the IHO erred by failing to address their claim regarding the CSE's failure to adequately consider appropriate evaluative material. In addition, the parents argue that the district failed to follow the recommendations of the April 2020 psychological evaluation or otherwise evaluate the student.

The IHO found that the district presented credible evidence that the March 2021 IEP was reasonably designed to comprehensively respond to the student's unique needs as outlined by the April 2020 psychological evaluation as well as other information provided to the CSE team and discussed at the CSE meeting (IHO Decision at p. 10). A review of the hearing record does not provide reason to disturb this finding.

In developing the recommendations for a student's IEP, the CSE must consider the results of the initial or most recent evaluation; the student's strengths; the concerns of the parents for enhancing the education of their child; the academic, developmental, and functional needs of the student, including, as appropriate, the student's performance on any general State or district-wide assessments as well as any special factors as set forth in federal and State regulations (34 CFR 300.324[a]; 8 NYCRR 200.4[d][2]). Regarding the parents' claim that the IHO erred insofar as she should have found that the CSE failed to review and consider the private neuropsychological evaluation, a CSE must consider independent educational evaluations whether obtained at public or private expense, provided that such evaluations meet the district's criteria, in any decision made with respect to the provision of a FAPE to a student (34 CFR 300.502[c]; 8 NYCRR 200.5[g][1][vi]). However, consideration does not require substantive discussion, or that every member of the CSE read the document, or that the CSE accord the private evaluation any particular weight (Mr. P. v. W. Hartford Bd. of Educ., 885 F.3d 735, 753 [2d Cir. 2018], citing T.S. v. Ridgefield Bd. of Educ., 10 F.3d 87, 89-90 [2d Cir. 1993]; see Michael P. v. Dep't of Educ., State of Hawaii, 656 F.3d 1057, 1066 n.9 [9th Cir. 2011]; K.E. v. Indep. Sch. Dist. No. 15, 647 F.3d 795, 805-06 [8th Cir. 2011]; Evans v. Dist. No. 17, 841 F.2d 824, 830 [8th Cir. 1988]; James D. v. Bd. of Educ. of Aptakisic-Tripp Community Consol. Sch. Dist. No. 102, 642 F. Supp. 2d 804, 818 [N.D. Ill. 2009]).

The parent testified that the April 2020 psychological evaluation report was not reviewed at the March 2021 CSE meeting (Tr. p. 71). The school psychologist acknowledged that she did not attend the March 2021 CSE meeting so she did not know if the "actual evaluation itself" was reviewed, however she stated that she knew that the May 2020 IEP was reviewed and, therefore, information from the April 2020 psychological evaluation included in the May 2020 IEP was reviewed (Tr. pp. 48-49; see Tr. pp. 38, 46-48). The school psychologist also testified that she reviewed the May 2020 IEP, and she stated that it included some information about the student's cognitive and social/emotional functioning and information recorded in the student's "most current" psychological evaluation (Tr. pp. 37-39; Dist. Ex. 7 ¶ 5).

A review of the May 2020 IEP demonstrates that the May 2020 CSE reviewed and included within the IEP many of the testing results and findings from the April 2020 psychological evaluation (compare Dist. Ex. 6 at pp. 1-6, 23, with Parent Ex. E at pp. 10-16). For example, the May 2020 IEP included the results from the Wechsler Preschool and Primary Scale of Intelligence-Fourth Edition (WPPSI-IV), the Autism Diagnostic Observation Schedule, Second Edition (ADOS-2), and the Behavior Assessment System for Children, Third Edition (BASC-3), which were all conducted as part of the April 2020 psychological evaluation (compare Dist. Ex. 6 at pp. 1-6, with Parent Ex. E at pp. 1, 10-16). The May 2020 IEP included findings from the April 2020 psychological evaluation that the student's usage of gestures was below age expectations and her long-term auditory memory skills were an area of personal strength; that she exhibited poor social interaction skills and struggled with joint attention, integrating verbal and nonverbal communication, attending to social cues, and providing eye contact; and that the student engaged behaviors such as repeating certain sounds usually with exaggerated intonation, putting various objects in her mouth, and walking around the room (compare Dist. Ex. 6 at pp. 2-3, with Parent Ex. E at pp. 11-14). Also, the May 2020 IEP indicated that average scores were obtained in the areas of aggression, anxiety, and somatization (compare Dist. Ex. 6 at p. 5, with Parent Ex. E at p. 13). The May 2020 IEP stated that the student met the criteria for ASD with accompanying

language impairment and accompanying intellectual impairment (compare Dist. Ex. 6 at p. 6, with Parent Ex. E at p. 14).

In addition, the May 2020 IEP incorporated a number of the recommendations found in the April 2020 psychological evaluation report including supports and accommodations of close supervision, small group and individual learning experiences, sensory activities and supports, self-regulation support, hands-on activities, music, movement breaks, a multi-sensory approach, visual supports, gestures, safety due to the mouthing of objects, time to process, and ongoing communication with parents (compare Dist. Ex. 6 at pp. 7, 18-20, with Parent Ex. E at pp. 16-19). Further the May 2020 IEP included recommendations for related services of speech-language therapy, OT, PT, parent counseling and training and a 12-month program, all in line with the recommendations found in the April 2020 evaluation report (compare Dist. Ex. 6 at pp. 18-20, with Parent Ex. E at pp. 18-19). The school psychologist testified that the evaluation indicated that the student presented with difficulties with remaining on task and attention; therefore, supports for those behaviors present in the classroom were indicated in the management needs section of the IEP (Tr. p. 41; compare Parent Ex. E at pp. 8-9, 14, 17-18, with Dist. Ex. C at pp. 5-6).

In addition, the May 2020 CSE attendance page indicated that the private psychologist, who conducted the April 2020 psychological evaluation, was present at the CSE meeting and a review of the May 2020 IEP's present levels of performance shows that her input was recorded (Dist. Ex. 6 at pp. 2, 26).

According to a June 2021 prior written notice of recommendation, the March 2021 CSE reviewed and discussed the May 2020 IEP in the development of the March 2021 IEP (Parent Ex. D at pp. 1-2).

In this instance, the evidence in the hearing record shows that the March 2021 CSE considered the information contained within the April 2020 psychological evaluation report through their review of the May 2020 IEP and included several recommendations from the evaluation in the March 2021 IEP; the appropriateness of the CSE's recommendations that were ultimately included in the March 2021 IEP as compared to the totality of recommendations included in the April 2020 psychological report are discussed further below.

C. March 2021 IEP

The parents argue that the IHO erred in finding that the March 2021 IEP was substantively appropriate and sufficient to meet the student's needs during the 2021-22 school year. Specifically, the parents argue that despite "overwhelming, corroborative evidence" that the student required a small class ratio and a methodology targeted to address the needs of students with neurodevelopmental delays as per the recommendations from the independent psychological evaluation, the district failed to follow such recommendations or otherwise evaluate the student.

Additionally, the parents argue that the student was able to make progress during the 2020-21 school year only with the intensive support offered by the 2:1 program ratio with the DIR/Floortime methodology offered by the Rebecca School.

1. The Student's Needs

While not at issue in this case, review of the student's needs and current functioning will provide the background necessary to evaluate the appropriateness of the March 2021 IEP. To develop the March 2021 IEP the CSE had available the student's May 2020 IEP and the December 2020 Rebecca School interdisciplinary developmental summary as well as input from the parents and the Rebecca School staff who attended the meeting (Parent Ex. D at pp. 1-2; Dist. Exs. 2; 3; see Dist. Exs. 5; 6).⁶

Review of the May 2020 IEP shows that it included results and findings from the April 2020 psychological evaluation report (compare Parent Ex. E, with Dist. Ex. 6 at pp. 1-7). The May 2020 IEP's present levels of performance reflected that the WPPSI-IV was administered as part of the psychological evaluation and that the student did not attend to the visually presented materials or demonstrate understanding of verbal directives despite scaffolding and prompting and therefore, she did not receive credit on any of the test items (Dist. Ex. 6 at p. 1). The IEP noted that while this reflected significant delays in intellectual functioning, the student's performance should still be interpreted with caution due to her language impairment and attentional difficulty (id.). Within the May 2020 IEP present levels of performance, the student's teacher reported that, while the student's ability to comprehend was impaired, her understanding of spoken language increased when it was accompanied by high affect, body language, and repetition although it was further reported that this was not observed during administration of the ADOS-2 when the evaluator provided prompts and a high level of enthusiasm (id. at p. 2). Additionally, the May 2020 IEP included reporting that the speech-language therapist had told the evaluator that the student was beginning to purposefully point to objects of interest during speech sessions although again, the evaluator reported that this was not observed during the administration of the ADOS-2 and that the student's usage of gestures was below age expectancy (id.). The May 2020 IEP stated that as per the April 2020 psychological evaluation, the student's long term auditory memory skills were an area of personal strength as evidenced by her ability to recall a number of songs (id.). Further, the student demonstrated awareness of object permanence and foundational visual memory skills (id.).

With respect to social development, the May 2020 IEP reflected that the student's score on the ADOS-2 exceeded the cutoff score for the autism range and that the severity of her symptoms of autism was at a level three in the area of social affect (indicating the need for very substantial support), and at a level two in the area of restricted, repetitive behaviors (indicating the need for substantial support) (Dist. Ex. 6 at p. 3). The evaluator noted that these scores referred to the student's poor social interaction skills as she noted that the student did not make social overtures during the testing activities and overall struggled with joint attention, integrating verbal and nonverbal communication, attending to social cues, and providing eye contact (id.). In addition, the evaluator noted that the student engaged in behaviors such as repeating certain sounds usually with exaggerated intonation, putting various objects in her mouth, and walking around the room,

⁶ While the CSE meeting minutes are dated "3/9/2022," this appears to be an error and the date should be March 9, 2021, as the meeting attendees match those on the March 9, 2021 attendance page and the student's functioning levels match those reported in the March 2021 IEP (compare Dist. Ex. 3 at p. 1, with Parent Ex. C at pp. 2-3, and Dist. Ex. 2).

and that she also exhibited a fixation with looking out the window and rubbing her finger on the windowsill during the administration of the ADOS-2 (id.). The IEP also included results of the BASC-3, which was administered as part of the April 2020 psychological evaluation (id.). With the parent acting as the informant, the evaluator reported that the student attained clinically significant scores in the areas of hyperactivity, depression, atypicality, withdrawal, attention problems, adaptability, social skills, activities of daily living, and functional communication (id.). As per the student's mother, the student often avoided interactions with peers, often seemed unaware of others, had difficulty forming friendships, was mostly hyperactive as demonstrated by a high level of movement, could not wait her turn, interrupted others, was easily frustrated and cried easily, continuously babbled to herself and stared blankly, was easily distracted, and had difficulty concentrating (id.). In addition, the parent reported that the student did not try new things and did not adjust well to change (id.).

The May 2020 IEP included information from the classroom observation which was conducted as part of the April 2020 psychological evaluation and indicated that the student presented as happy as she frequently smiled and made vocalizations; walked around the room and briefly explored various objects via touching, lifting, and occasionally putting objects in her mouth; did not show interest in joining several of her classmates; inconsistently followed directives from staff; responded more to overtures made by staff that involved music; remained seated during snack time and expressed her needs via nonverbal communication (Dist. Ex. 6 p. 4). The IEP reflected the report that at the private psychologist's office, the student initially presented as tearful and agitated, which the parent indicated was typical of the student's behavior in new environments and said "Mommy" and "no" several times (id.). According to the parents the student sometimes shared with others and the BASC-3 parent rating yielded average scores in the areas of aggression, anxiety, and somatization (id. at p. 5).

Regarding physical development, as per the April 2020 psychological evaluation report, the student met the criteria for ASD with accompanying language impairment and with accompanying intellectual impairment (Dist. Ex. 6 at p. 6). Additionally, as part of the BASC-3, the parent reported that the student was not toilet trained, almost always needed help putting on her clothes, tying her shoelaces, fastening buttons, and bathing herself (id.).

The December 2020 interdisciplinary developmental summary from the Rebecca School indicated that the focus of the student's program had been developing trusting relationships and the ability to co-regulate with the classroom staff (Dist. Ex. 5 at p. 1).

According to the December 2020 Rebecca School interdisciplinary developmental summary, the student was challenged to sustain her regulation during transitions, particularly at the beginning of the school day, and had benefited from maximum support from a familiar adult in the form of sensory input, gross motor movement, a soothing affect, the humming of preferred songs, and a 1:1 highly preferred activity with a familiar adult before joining a group (Dist. Ex. 5 at p. 1). Reportedly, with a preferred adult, the student was typically able to co-regulate and reach a state of shared attention within one hour, although it was noted that at times the student's dysregulation caused her to fall asleep for long periods of the day (up to three hours); however, since September these periods had been decreasing (id. at p. 2). According to the summary the student benefitted from tactile sensory input (id.).

The December 2020 interdisciplinary developmental summary also stated that the student primarily communicated using gestures, body language, and facial expressions and reportedly since September, had increased her emerging ability to use vocalizations and short verbal approximations in the context of meaningful interactions with familiar adults (Dist. Ex. 5 at p. 1). In the area of literacy, the summary indicated that when utilizing the DIR/Floortime methodology the student had demonstrated the emerging ability to share attention in group reading activities and noted that her best literacy-based interactions happened 1:1 with a preferred adult (id. at p. 3). Regarding mathematical and scientific thinking, the summary reflected that the student demonstrated an emerging ability to respond to a countdown and demonstrated emerging number sense in terms of knowing that numbers are related to quantities of things, although it was also noted that her scripted rote counting was not related to 1:1 correspondence (id. at p. 4).

With respect to OT, the summary report stated that the student may have difficulty processing sensory input and maintaining regulation when the environment or activity became unpredictable, and she benefited from deep tactile input and minimal language in a calm soothing affect (Dist. Ex. 5 at p. 5). Reportedly, the student was increasingly accepting sensory supports providing deep tactile input in the context of anticipatory play, was demonstrating improvement obtaining an optimal arousal level during the day and was more available for shared attention and engagement with staff (id. at pp. 5-6). In the area of PT, the student reportedly ambulated through the school environment, participated in stair negotiation, explored new spaces within the school environment, and demonstrated decreased safety awareness (id. at pp. 7-8). According to the December 2020 interdisciplinary developmental summary the student would continue to work on motor planning, sequencing, body awareness, bilateral coordination, strength, endurance, and balance (id. at p. 8). Regarding speech-language therapy the student had made gains in being "wooded back" into an interaction with a shorter amount of time more consistently, demonstrated increased interest in her peers, communicated about the "here and now," and reportedly, the student's oral mechanism appeared to be within functional limits for all feeding and speech tasks (id. at pp. 9-10).

2. 8:1+1 Special Class Placement

The parents assert that the IHO erred by failing to properly consider the April 2020 psychological evaluation report, which stated that the student required a small classroom with intensive support, and that despite "overwhelming, corroborative evidence" that the student required a small class ratio, the district failed to follow such recommendations.

As detailed above, the March 2021 CSE recommended for the student an 8:1+1 special class placement in a specialized school along with adapted physical education and related services (Parent Ex. C at pp. 1, 14-16, 19).

State regulation provides that an 8:1+1 special class placement is intended to address the needs of students "whose management needs are determined to be intensive and requiring a significant degree of individualized attention and intervention" (8 NYCRR 200.6[h][4][ii][b]).

Within the April 2020 psychological evaluation report, the private psychologist stated that the student required "a small class size in a small school" (Parent Ex. E at p. 16). In addition, the private psychologist recommended that the student's classroom "should have enough staff

members, so that there is consistent support of her unique profile, while providing her with both small group and individual learning experiences" and the private psychologist stated that the student needed frequent and close supervision (*id.*). As alluded to above, although a CSE is required to consider reports from privately retained experts, it is not required to adopt their recommendations (see, e.g., *Mr. P.*, 885 F.3d at 753; *G.W. v. Rye City Sch. Dist.*, 2013 WL 1286154, at *19 [S.D.N.Y. Mar. 29, 2013]; *C.H. v. Goshen Cent. Sch. Dist.*, 2013 WL 1285387, at *15 [S.D.N.Y. Mar. 28, 2013]; *T.B. v. Haverstraw-Stony Point Cent. Sch. Dist.*, 933 F. Supp. 2d 554, 571 [S.D.N.Y. 2013]; *Watson v. Kingston City Sch. Dist.*, 325 F. Supp. 2d 141, 145 [N.D.N.Y. 2004] [noting that even if a district relies on a privately obtained evaluation to determine a student's levels of functional performance, it need not adopt wholesale the ultimate recommendations made by the private evaluator], *aff'd*, 142 Fed. App'x 9 [2d Cir. July 25, 2005]). Moreover, in this instance, the private psychologist did not further define what she meant by a "small class size."

In her written testimony the parent stated that for the 2018-19 and 2019-20 school years the student was placed in a center-based 8:1+2 preschool program which she described as having "a lot of support" (Parent Ex. N ¶¶ 4-5).

The parent testified that, at the March 2021 CSE meeting, she and the student's teacher expressed concern that the 8:1+1 special class placement would not provide enough support for the student and would not be appropriate since she made progress at the Rebecca School in a more supportive class with a ratio of 2:1, which offered adequate staff in the classroom to provide the student with the support of a preferred adult (Tr. pp. 70-71, 76; Parent Ex. N ¶¶ 11, 15). In addition, the parent stated that the ratio recommended by the district "was less support" than that which the student was receiving at the Rebecca School (Tr. p. 71). The March 2021 IEP documented the concerns of the parent and the Rebecca School teacher (Parent Ex. C at p. 20).

In her written testimony, the Rebecca School program director (program director) stated that their classrooms typically had eight students, one head teacher, and three assistant teachers (Parent Ex. M ¶ 6). The program director stated that, at a minimum, the Rebecca School classrooms had a 2:1 ratio or "two students to every teaching adult in the classroom" and that when including related service providers, educational supervisors, and other staff there were multiple opportunities for a student to get one-to-one attention throughout the day (Tr. p. 90; Parent Ex. M ¶ 17).⁷

Based on the foregoing, the evidence in the hearing record reflects that the 8:1+1 special class recommended by the March 2021 CSE varied from the class ratio the student received during preschool and while attending the Rebecca School in terms of the number of supplementary school personnel assigned to the classroom but offered an identical class size of no more than eight students. While the parent may have preferred the particular class ratio privately offered at the

⁷ Under cross examination, and in regard to the representation that the Rebecca School classrooms maintained a 2:1 ratio, the district school psychologist stated that, while ratios of adults to students in a classroom could vary, she did not believe that in this case it meant two students to one certified teacher (Tr. p. 59). The reference to a 2:1 ratio appears to describe to the number of students to adults, without reference to the role of the adults; the ratio of students to head teacher with three assistant teachers might be more specifically described as an 8:1+3 ratio.

Rebecca School, districts are not required to replicate the identical setting used in private schools (see, e.g., M.C. v. Mamaroneck Union Free Sch. Dist., 2018 WL 4997516, at *28 [S.D.N.Y. Sept. 28, 2018]; Z.D. v. Niskayuna Cent. Sch. Dist., 2009 WL 1748794, at *6 [N.D.N.Y. June 19, 2009]; Watson, 325 F. Supp. 2d at 145).

Further, the evidence in the hearing record supports a finding that, based on the information available to the March 2021 CSE, the recommended 8:1+1 special class was sufficiently supportive to address the student's needs and that the student did not require additional supplementary support personnel in the classroom in order to receive educational benefit.

The district school psychologist testified that an 8:1+1 special class setting, which would have no more than eight students with one licensed special education teacher and a paraprofessional, would allow the student to have the "intensive supervision" and "constant support" that was needed for her to make progress in the academic setting (Tr. p. 44; see Dist. Ex. 7 ¶ 2, 9). She also stated that the student did not present with the behavior challenges that had been impeding her learning academics the year prior when the May 2020 CSE had recommended a 6:1+1 special class and that, since then, she "ha[d] developed," made progress, and exhibited "more interest in her peers" (Tr. pp. 58-59). She further opined that an 8:1+1 special class would have been "identified as the least restrictive setting" for the student at the time of the CSE meeting (id.). The March 2021 IEP and a June 2021 prior written notice indicated that the March 2021 CSE considered other program options including a 6:1+1 special class, which the CSE rejected as "too restrictive" at that time, and a 12:1+1 special class placement, which the CSE rejected since the student required a program with a "higher level of supports in a smaller class size" (Parent Exs. C at p. 20; D at p. 2).⁸

With respect to individual attention and instruction, the parent shared her concerns that, while the student's independence had greatly improved, she still required 1:1 support to remain regulated and attend to the curriculum and for safety reasons (Parent Ex. N ¶¶ 14, 21). However, the March 2021 IEP provided for multiple opportunities for individual attention and instruction. For example, within the management needs section of the present levels of performance, the March 2021 IEP identified the student's need for modeling and frequent opportunities for practice, redirection to the task at hand, chunking of verbal information, and close supervision particularly to ensure safety due to the mouthing of objects (Parent Ex. C at pp. 5-6). The March 2021 IEP's English language arts (ELA) and math annual goals indicated utilization of 1:1 instruction and

⁸ Although not particularly significant to the disputed issues in this case, if the school psychologist and the notations in the March 2021 IEP and prior written notice were referring to the IDEA's LRE requirement, this reflects a misunderstanding of the term "restrictive" in such context, which has nothing to do with the ratio of disabled students to their teachers. In circumstances such as those in the present case, LRE is not defined by the particular student-to-adult staff ratio present in a placement because the ratio distinctions present no difference in the degree of the student's access to nondisabled peers (see 20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2]; 300.116[b], [c]; 300.117; 8 NYCRR 200.1[cc]; 200.6[a][1]). Instead, as described by the Second Circuit, the LRE determinations are made by considering the extent to which the student has been placed with nondisabled peers; that is, "whether education in the regular classroom, with the use of supplemental aids and services, can be achieved satisfactorily for a given child," and, if not, then "whether the school has mainstreamed the child to the maximum extent appropriate" Newington, 546 F.3d at 120, quoting Daniel R.R. v. State Bd. of Educ., 874 F.2d 1036, 1048 [5th Cir. 1989]; see J.G. v. Kiryas Joel Union Free Sch. Dist., 777 F. Supp. 2d 606, 639 [S.D.N.Y. 2011]).

"small reading groups" (*id.* at pp. 7-8). In addition, the March 2021 IEP recommended the student receive services in speech-language therapy, OT, and PT on an individual basis (*id.* at p. 15).

Given the foregoing, there is insufficient basis in the hearing record to disturb the IHO's determination that the March 2021 CSE's recommendation for an 8:1+1 special class did not deny the student a FAPE.

3. Methodology

Turning to the parents' arguments regarding methodology and their assertion that the student was able to make progress during the 2020-21 school year only with the intensive support offered by the 2:1 program ratio with DIR/Floortime methodology, the parents assert that despite the "overwhelming, corroborative evidence" that the student required the DIR/Floortime methodology, the district failed to follow such recommendations and failed to specify a particular methodology in the IEP.

Generally, 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 her testimony, the Rebecca School director described the DIR/Floortime methodology as based on the premise that children with neurodevelopmental delays in relating and communicating do not progress through basic developmental levels that nondisabled children go through at the same rate or in the same way and that, through DIR, staff meet students at their developmental level to move them up the ladder, address their sensory needs, and enable students

to learn skills and generalize them across contexts (Tr. pp. 88-90; Parent Ex. M ¶ 13). The December 2010 Rebecca School interdisciplinary developmental summary described areas addressed through the DIR/Floortime methodology as including the student's ability to regulate emotions, engage in relationships, and engage in communications with others, as well as her sensory seeking behaviors and need for sensory-based interactions for classroom engagement (Dist. Ex. 5 at p. 1-2).

Within the April 2020 psychological evaluation report the private psychologist recommended the student receive "[d]evelopmentally-informed psychotherapy," such as the DIR model and related Floortime strategies to address the student's attention and regulation challenges (Parent Ex. E at p. 19). The December 2020 interdisciplinary developmental summary stated that the Rebecca School utilized the DIR/Floortime methodology in all areas of instruction including related services of speech-language therapy, OT, and PT (Dist. Ex. 5 at pp. 1, 3-10).

I find that there is no "clear consensus" that the student could only receive an academic benefit from the use of the DIR/Floortime methodology as the private psychologist who conducted the April 2020 psychological evaluation did not specifically recommend DIR/Floortime and did not indicate that it was necessary for the student to progress. Rather, the private psychologist identified the DIR/Floortime methodology as an example of a methodology that the student could benefit from.

Also, the district school psychologist explained that, especially with students with autism, there were other methodologies that could be deemed appropriate (Tr. p. 61). Under cross examination the school psychologist stated that she was not comfortable saying that a student can only make progress with one specific methodology (Tr. pp. 60-63). Additionally, under cross examination, the school psychologist testified that, to her knowledge, the CSE did not have any information supporting the idea that that the only way the student would be able to make social/emotional and academic progress was using the DIR methodology (Tr. p. 53).

Moreover, the March 2021 IEP described and addressed the student's sensory needs—which the private psychological evaluation also identified as underlying its recommendation for a methodology addressing the connection between the student's "sensory processing profile and her self-regulation," such as DIR/Floortime (Parent Ex. E at p. 20) – consistent with the available evaluative information.

Specifically, the CSE identified within the March 2021 IEP present levels of performance the student's need for repetition, modeling and frequent opportunities for practice, visual supports/cues including a visual schedule, visual/verbal/gestural/physical prompts, segmenting tasks into shorter intervals, movement breaks, redirection, chunking verbal information into smaller units, processing time, hands-on activities, a multisensory approach to all activities, sensory tools to help with learning and with self-regulation, appropriate oral sensory tools, close supervision particularly to ensure safety due to the mouthing of objects, music/singing in learning activities, positive reinforcement, ongoing communication with parents, social stories, access to a quiet place, labels for organization, use of a theraband, strong trusting relationships between all staff and providers, and consistent collaboration and communication between all staff and family (Parent Ex. C at pp. 5-6). The March 2021 IEP included annual goals addressing the student's needs in the areas of ELA, math, speech-language therapy, PT, and OT (*id.* at pp. 7-14). In

addition, and as detailed above, the IEP included the recommendation for adapted physical education, OT, PT, speech-language therapy, and parent counseling and training (*id.* at p. 15).

Absent evidence that the specific methods of delivering regulation support and sensory input in a particular environment were necessary for the student to receive educational benefit, the hearing record supports the conclusion that the methodology and techniques utilized by the Rebecca School and preferred by the parent, namely DIR/Floortime, were examples of methodologies or a series of approaches by which the student's needs could be met and the omission of those specific methodologies from the March 2021 IEP did not deny the student a FAPE (see *N.B. & C.B. v. New York City Dep't of Educ.*, 2016 WL 5816925, at *5 [S.D.N.Y. Sept. 29, 2016] [finding that the omission of certain sensory management techniques from the student's IEP did not deny the student a FAPE]; *E.P. v. New York City Dep't of Educ.*, 2016 WL 3443647, at *12 n.8 [S.D.N.Y. June 10, 2016] [declining to find an IEP inappropriate on the basis that it did not include the same sensory regimen that the student received at a private school placement]; *T.C. v. New York City Dep't of Educ.*, 2016 WL 1261137, at *15 [S.D.N.Y. Mar. 30, 2016] [noting that the law does "not require every aspect of a child's specific educational needs to be detailed in the IEP, as long as the IEP is designed to address those issues"]). Here, the March 2021 CSE comprehensively described the student's sensory, self-regulation and communication needs and recommended a variety of supports, strategies and services to address those needs in the March 2021 IEP. Based on the above, the evidence in the hearing record supports the IHO's determination that the district was not obligated to include in its IEP the specific methodology used by the Rebecca School and preferred by the parents in order to provide the student with a FAPE.

D. Assigned Public School Site - Implementation

Turning to the parents' challenges to the assigned public school site, the parents argue that the IHO erred by assuming the district would be able to properly implement the student's IEP when the district failed to provide information regarding the recommended program. The parents contend that the district failed to establish that it would be able to properly implement the March 2021 IEP and note that they were unable to visit the school or speak with an administrator in order to learn more about the school environment, the pedagogical approach to students with neurodevelopmental delays, and the teacher and paraprofessional training.⁹

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" (*id.* 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"],

⁹ The parents have not pursued their claims that student needed to be grouped with similarly functioning peers and that the recommended school site was too large to implement the student's IEP. Accordingly, as the parents have not pursued these claims on appeal, they are deemed abandoned and will not be further discussed (8 NYCRR 279.8[c][2], [4]; see 8 NYCRR 279.4[a]).

quoting T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 419 [2d Cir. 2009]; R.B., 589 Fed. App'x at 576).¹⁰ 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., 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. Dec. 30, 2015]). Such 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., 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]).

Regarding the parents' allegation that they were unable to tour the assigned public school site, the United States Department of Education's Office of Special Education Programs (OSEP) has opined that the IDEA does not provide a general entitlement to parents of students with disabilities or their professional representatives to observe proposed school placement options for their children (Letter to Mamas, 42 IDELR 10 [OSEP 2004]; see G.J. v. Muscogee County Sch. Dist., 668 F.3d 1258, 1267 [11th Cir. 2012] [noting that rather than forbidding or mandating access for parents, "the process contemplates cooperation between parents and school administrators"]; J.B. v. New York City Dep't of Educ., 242 F. Supp. 3d 186, 195 [E.D.N.Y. 2017] [noting that the IDEA does not afford parents a right to visit an assigned school placement before the recommendation is finalized]; J.C. v. New York City Dep't of Educ., 2015 WL 1499389, at *24 n.14 [S.D.N.Y. Mar. 31, 2015] [acknowledging that courts have rejected the argument that parents

¹⁰ 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]).

have a right under the IDEA to visit assigned schools and listing authority], aff'd, 643 Fed. App'x 31; E.A.M. v. New York City Dep't of Educ., 2012 WL 4571794, at *11 [S.D.N.Y. Sept. 29, 2012] [finding that a district has no obligation to allow a parent to visit an assigned school or proposed classroom before the recommendation is finalized or prior to the school year]; S.F. v. New York City Dep't of Educ., 2011 WL 5419847, at *12 [S.D.N.Y. Nov. 9, 2011] [same]). On the other hand, there is district court authority indicating that a parent has a right to obtain information about an assigned public school site (see H.L. v. New York City Dep't of Educ., 2019 WL 181307, at *9 [S.D.N.Y. Jan. 11, 2019] [noting that "[i]n light of M.O., courts have found that parents have the right to obtain timely and relevant information regarding school placement, in order to evaluate whether the IEP can be implemented at the proposed location"]; F.B. v New York City Dep't of Educ., 2015 WL 5564446, at *11-*18 [S.D.N.Y. Sept. 21, 2015] [finding that the parents "had at least a procedural right to inquire whether the proposed school location had the resources set forth in the IEP"]; V.S. v New York City Dep't of Educ., 25 F. Supp. 3d 295, 299-301 [E.D.N.Y. 2014] [finding that the "parent's right to meaningfully participate in the school selection process" should be considered rather than the "parent's right to determine the actual school selection"]; C.U. v. New York City Dep't of Educ., 2014 WL 2207997, at *14-*16 [S.D.N.Y. May 27, 2014] [holding that "parents have the procedural right to evaluate the school assignment" and "acquire relevant information about" it]).

Here, the school location letter, dated June 2, 2021, identified the assigned public school site and set forth the contact information for an individual that the parents could reach in order to arrange a visit to the school (Parent Ex. D at p. 5). According to the affidavit testimony of the student's mother, she "immediately contacted" the assigned public school site on June 2, 2022 upon receiving the school location letter from the district in order "to speak with an administrator to learn more about the school environment, the pedagogical approach to students with neurodevelopmental delays, the teacher and paraprofessional training" and "was told that someone from the school would return my call," but never received a return call or correspondence from that individual after July 4, 2021 as promised (Parent Ex. N ¶ 18). The parent did not indicate that she requested an opportunity to visit the assigned public school site but was prevented from doing so. In addition, it is unclear whether the parents made additional inquiries after they did not receive a return call, or otherwise made any other efforts to obtain the information they believed necessary in order to make an informed decision.

Thus, unlike the parents in F.B., who were attempting to respond to the district's offer to arrange for a school visit but were repeatedly unable to get assistance or even a response from the district and created a trail of written communications, there is no evidence in the hearing record that the parents in the matter followed up with the district, in writing or otherwise, and did not mention in their notice of unilateral placement that they had been unable to visit the school (see Parent Ex. B). Accordingly, the facts of this case are different from the circumstances of the cases most favorable to the parent, like F.B. above, in which the district delayed in assigning a school placement and repeatedly failed to respond to the parents' written requests for information about the school placement.

Accordingly, the evidence in the hearing record does not support a finding that the district denied the student a FAPE by not providing the parents with sufficient information about the assigned public school site.

VII. Conclusion

Having determined that the evidence in the hearing record supports the IHO's determinations that the district offered the student a FAPE for the 2021-22 school year, the necessary inquiry is at an end and there is no need to reach the issues of whether the Rebecca School was an appropriate unilateral placement or whether equitable considerations weighed in favor of the parents' request for relief.¹¹

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

THE APPEAL IS DISMISSED.

**Dated: Albany, New York
July 14, 2022**

**CAROL H. HAUGE
STATE REVIEW OFFICER**

¹¹ I note, however, that even if the parents had no intention of placing the student in the district's recommended program, it is well-settled that it would not be a basis to deny their request for tuition reimbursement (see E.M. v. New York City Dep't of Educ., 758 F.3d 442, 461 [2d Cir. 2014]; C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 840 [2d Cir. 2014] [holding that the parents' "pursuit of a private placement was not a basis for denying their [request for] tuition reimbursement, even assuming . . . that the parents never intended to keep [the student] in public school"]).