



The University of the State of New York

The State Education Department

State Review Officer

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No. 22-092

Application of the BOARD OF EDUCATION OF THE WILLIAM FLOYD UNION FREE SCHOOL DISTRICT for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:

Bond, Schoeneck & King, PLLC, attorneys for petitioner, by Lakshmi Singh Mergeche, Esq.

Thivierge & Rothberg, P.C., attorneys for respondent, by Christina Thivierge, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from the decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to respondent's (the parent's) daughter and ordered it to reimburse the parent for her daughter's tuition costs at the Vincent Smith School (Vincent Smith) for the 2021-22 school year. The parent cross-appeals from those aspects of the IHO's decision which found certain recommendations made by the district's Committee on Special Education (CSE) were appropriate. The appeal must be sustained. The cross-appeal must be dismissed.

II. Overview—Administrative Procedures

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

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

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

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

III. Facts and Procedural History

The student attended district schools for kindergarten through third grade (Dist. Ex. 1 at p. 3). During kindergarten and first grade, the student received resource room services as a general education student (id.). During second grade (2017-18 school year), the CSE found the student eligible for special education and related services as a student with a learning disability and

recommended that the student attend an "[i]ntegrated [c]o-[t]eaching [ICT] [c]lass" (id.).¹ For third grade (2018-19 school year), the CSE continued to find the student eligible for special education and related services and recommended that the student attend a 15:1 special class (id.).

For fourth grade (2019-20 school year), the CSE recommended that the student continue to attend a 15:1 special class; however, the parent unilaterally enrolled the student at Vincent Smith (id.).²

For fifth grade (2020-21 school year), the CSE recommended 12-month services consisting of three hours per day of instruction in a 15:1+1 special class together with one hour per day of individual specialized reading instruction (Dist. Ex. 4 at p. 1). For the 10-month portion of the school year, the CSE recommended that the student attend a 15:1 special class and receive the related services of one 30-minute session per week of individual occupational therapy (OT), one 30-minute session per week of group OT, one hour per day of individual specialized reading instruction, and five 40-minute sessions per week of group specialized reading instruction (id.). The student continued to attend Vincent Smith for the 2020-21 school year (Dist. Ex. 1 at p. 2).

A CSE convened on April 19, 2021 to conduct the student's annual review and to consider the results of a reevaluation of the student, including a February 5, 2021 psychoeducational evaluation, a January 12, 2021 reading evaluation, and a February 26, 2021 OT evaluation (Dist. Exs. 1-4).³ The student's teachers and providers from Vincent Smith also participated in the April 19, 2021 CSE meeting and contributed information that was included in the student's present levels of educational performance (Dist. Ex. 4 at pp. 1, 9-18).

A CSE reconvened on May 18, 2021 for the student's annual review and to recommend a program and placement for the 2021-22 school year (Dist. Ex. 6 at p. 1). The May 2021 CSE recommended 12-month services consisting of three hours per day of 15:1+1 special class instruction, one hour per day of individual specialized reading instruction, one 30-minute session per week of individual OT, and one 30-minute session per week of individual counseling (id.). For the 10-month portion of the school year, the CSE recommended a 15:1+1 special class for English language arts (ELA), math, science, and social studies, one 30-minute session per week of individual OT, one 30-minute session per week of group OT, one hour per day of individual specialized reading instruction in a special location, five 40-minute sessions per week of group specialized reading instruction in a special location, two 30-minute sessions per month of individual counseling, and an individual aide during instructional time, which the IEP specifically indicated was not for use during transitions, lunch, physical education, leisure activities, after school, or field trips (id. at pp. 1, 25-26).

¹ The student's eligibility for special education as a student with a learning disability is not in dispute (see 34 CFR 300.8[c][10]; 8 NYCRR 200.1[zz][6]).

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

³ The hearing record indicates that the student was evaluated by a district consultant on January 12, 2021; however, the reading evaluation report was dated February 25, 2021 (Dist. Ex. 2 at p. 1).

In a prior written notice, dated May 18, 2021, the CSE summarized its recommendations and indicated that group specialized reading instruction would be delivered at school, individual specialized reading instruction would be delivered at home, and the recommended 1:1 aide was for the purpose of "academic support in reading and writing, and for organization and attending" (Dist. Ex. 5 at p. 1). The May 18, 2021 prior written notice also stated that the May 2021 CSE considered resource room, an ICT classroom, and a 15:1 special class; "however, those programs were deemed insufficient to meet [the student]'s unique needs and annual goals" (*id.* at p. 2). According to the prior written notice, the CSE also considered a 12:1+1 special class and an 8:1+1 special class; "however, those programs were deemed too restrictive" (*id.*). The prior written notice also indicated that the parent inquired about the student's continued placement at Vincent Smith, and "[t]he CSE rejected this option as" Vincent Smith was not a State-approved nonpublic school (*id.*).

By email dated June 24, 2021, the parent wrote to the assistant director of special education, who also served as the CSE chairperson (CSE chairperson) to advise that the student would not attend "summer school classes or summer services" and that she was "interested in setting up a visit to the" assigned school site (Parent Ex. 14; Dist. Ex. 6 at p. 1; *see* Tr. p. 52).

On May 10, 2021, the parent executed a contract for the student's attendance at Vincent Smith for the 10-month, 2021-22 school year, which was countersigned by the head of school for Vincent Smith on June 28, 2021 (Parent Ex. 4 at pp. 1, 3).

By letter dated August 16, 2021, the parent wrote to the CSE chairperson to reject the CSE's recommended program for the 2021-22 school year and to provide written notice of her intention to unilaterally enroll the student at Vincent Smith and seek public funding for the cost of the student's tuition (Parent Ex. 11 at pp. 1-3). In her letter, the parent stated that the staff of Vincent Smith informed the May 2021 CSE that the student required "a very small class program with appropriate 1:1 reading instruction, in a program similar to [Vincent Smith]. However, the [d]istrict refused to consider continuing [the student]'s placement at [Vincent Smith]" (*id.* at p. 1). The parent stated that the CSE had instead recommended "an inappropriately large" 15:1+1 special class and had failed to recommend specialized research-based reading instruction by a certified reading specialist (*id.* at pp. 1-2). The parent also wrote that the May 2021 IEP lacked sufficient management needs and supports, "and the supports she require[d] could not be provided in such a relatively-large classroom," such as individualized instruction (*id.* at p. 2). With regard to the recommendation for a 1:1 aide, the parent stated that "an aide c[ould] not provide the instructional help that [the student] need[ed] in order to understand tasks and complete instructional work using writing in class" (*id.*). The parent further noted that the student did not require a 1:1 aide at Vincent Smith, and "it would be restrictive and ostracizing to force her into a program where she would struggle and require an aide" (*id.*). The parent also objected to the recommendation for group and individual OT, stating that the student received two sessions per week of individual OT at Vincent Smith and that the district had included interfering behaviors on the May 2021 IEP, but failed to recommend a functional behavioral assessment (FBA) or a behavior intervention plan (BIP) for the student (*id.*).

By email dated August 23, 2021, the parent and principal of the assigned school site corresponded about scheduling a visit to the school and the principal provided a copy of the student's schedule, which included "adaptive" physical education, although not a recommended

related service on the May 2021 IEP (Dist. Ex. 7 at pp. 2-4; compare Dist. Ex. 7 at p. 4, with Dist. Ex. 6 at pp. 1, 25-26).⁴

On September 14, 2021, the CSE reconvened in response to the parent's August 23, 2021 letter (Dist. Ex. 9 at p. 1). In a prior written notice dated September 14, 2021, the CSE identified concerns raised by the parent in her letter and explained how the CSE responded to the parent's concerns (Dist. Ex. 8 at pp. 1-3). Specifically, in response to the parent's concerns regarding specialized reading instruction, the prior written notice indicated that the student's individual and group specialized reading instruction would have been provided by a "certified specialized reading teacher" from the DaVinci Collaborative utilizing a "multisensory approach to reading" (id. at p. 2). The prior written notice further indicated that "[i]ndividualized supports" would have been provided by the 1:1 aide, "classroom aide, and related services providers in addition to the differentiation of the special education teachers" (id. at p. 3). The parent's concern that the recommendation for a 1:1 aide would be "restrictive and ostracizing" for the student was not enumerated as a concern or addressed in the September 14, 2021 prior written notice (compare Parent Ex. 11 at p. 2, with Dist. Ex. 8 at pp. 2-3).

In a letter dated December 3, 2021, the parent again wrote to the CSE chairperson to reject the program recommended for the 2021-22 school year (Parent Ex. 12 at pp. 1, 2). The parent wrote that during the September 14, 2021 CSE meeting, she stated that she visited the assigned school site and the school principal "refused to answer many of [her] questions, including what students in the proposed class were working on, what types of curricula [we]re used with those students, or where [the student] would receive reading instruction" (id. at p. 1). The parent further wrote that when she asked the principal how much individual instruction the student would receive from the teacher, the principal told her "that all individual needs would be met by [the student]'s aide" (id.). Next the parent wrote that the principal of the assigned school site also told her that the student would have been placed in an 8:1+1 special class rather than the 15:1+1 special class recommended on the student's IEP (id.). The parent further stated that she believed the assigned school site was a large school and would be overwhelming for the student (id.). In addition, the parent wrote that the September 2021 CSE refused to meaningfully consider any of her concerns, and instead repeated that the May 2021 IEP was appropriate as developed (id.). With regard to the student's specialized reading services, the parent stated that she was informed during the September 2021 CSE meeting that the student's individual reading services would be provided outside of school by a consultant, and that the group reading instruction during the school day would be provided on a pull-out basis causing the student to miss core academic instruction daily (id. at pp. 1-2). The parent stated that during the CSE meeting, she and the staff from Vincent Smith expressed concern that the student "would regress with placement in a large class where she was pulled out of academic classes for reading" (id. at p. 2). Lastly, the parent stated that the CSE refused to consider placement at Vincent Smith, failed to develop an appropriate IEP and as a

⁴ According to State regulation, adapted physical education means a specially designed program of developmental activities, games, sports and rhythms suited to the interests, capacities and limitations of students with disabilities who may not safely or successfully engage in unrestricted participation in the activities of the regular physical education program (8 NYCRR 200.1[b]). Although the parties referred to the service as "adaptive" physical education, it will be referred to as adapted physical education in this decision.

result the parent would continue to send the student to Vincent Smith and seek public funding for the cost of the student's tuition (id.).⁵

A. Due Process Complaint Notice

By due process complaint notice dated December 6, 2021, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2021-22 school year (Parent Ex. 1 at p. 1). The parent generally asserted that the district failed to develop an appropriate IEP, failed to offer an appropriate placement, and failed to recommend appropriate reading instruction (id.).

Specifically, the parent argued that the recommendation for a 15:1+1 special class with a 1:1 aide was not appropriate and that the class was too large for the student (Parent Ex. 1 at p. 5). The parent also asserted that if the student was in an appropriate smaller class, she would not require a 1:1 aide (id. at pp. 5, 6). The parent also contended that the district failed to develop sufficient, appropriate management needs, failed to develop appropriate annual goals and short term objectives, failed to recommend appropriate progress reporting, failed to recommend sufficient or appropriate supplementary aids, services, and program modifications to enable the student to benefit from instruction and make educational gains, failed to fully and accurately reflect the student's present levels of educational performance by including outdated information about the student's social skills, failed to recommend appropriate related services such as individual OT, failed to recommend social skills instruction, and failed to conduct an FBA or develop a BIP to address behaviors that impeded the student's learning (id. at pp. 6, 7).

With regard to reading instruction, the parent alleged that the district failed to recommend Wilson reading instruction provided by a certified Wilson instructor, despite the parent's experts indicating that the student required Wilson reading instruction; the district "failed to make a clear recommendation for [the student]'s individual reading services, preventing [the parent] from fully participating in [the student]'s IEP development"; and the district failed to designate the location for the provision of services on the proposed IEP and a prior written notice indicated that reading services would be provided at home (Parent Ex. 1 at pp. 5, 6). The parent also asserted that when she visited the assigned school site, she was not informed where the student would receive reading instruction; she asserted the location was not clear on the IEP or the prior written notice and was important for her to know due to the student's need for placement in a non-distracting environment (id. at p. 7). Next the parent alleged that when she asked at the assigned school site how much individual instruction the student would receive from the teacher, she was told that all individual needs would be met by the student's 1:1 aide (id. at pp. 7-8). The parent further claimed that she was told the student would be placed in an 8:1+1 special class (id. at p. 8). The parent also contended that the district informed her at a subsequent CSE meeting that the student's individual reading services would be provided outside of school by a district consultant and that her in-school daily group reading instruction would require her to be pulled out of a core academic class daily (id.). The parent asserted that the district's recommendation for the student to receive reading instruction from an out-of-district consultant would be inappropriate and ineffective because the

⁵ In response to the parent's letter, the CSE reconvened on January 18, 2022 and conducted a program review (Dist. Ex. 10 at pp. 1, 5, 7-8, 9-11).

student required "instruction incorporating her reading needs across the school day which c[ould] only be provided in a program with an in-house certified reading instructor who c[ould] collaborate with [the student]'s other instructors" (*id.*). The parent next alleged that the student's "ADHD and reading fatigue ha[d] been noted in all evaluations" and that "receiving reading instruction after the conclusion of the school day would be exhausting, ineffective, and inappropriate for her" (*id.*). The parent also asserted that the student would be unable to participate in extracurricular activities if she received one hour of reading instruction every day after school (*id.* at pp. 8-9).

Concerning the district's recommended placement, the parent argued that the district failed to consider the full continuum of services on the basis of administrative convenience and predetermined the student's program (Parent Ex. 1 at p. 7). The parent asserted that the district failed to recommend a placement that provided "consistent academic instruction in addition to reading instruction" because the student "would be pulled out of a core academic class daily for group reading instruction" (*id.* at p. 8). The parent also alleged that the student would be overwhelmed by the number of students at the assigned school site (*id.*).

The parent also claimed that the district refused to consider Vincent Smith, refused to consider evaluations and expert opinions that recommended placement at a small, specialized program with intensive and evidence-based reading instruction provided by a Wilson certified instructor, failed to treat the parent "as a full and equal IEP Team Member," and failed to meaningfully consider her requests and concerns (Parent Ex. 1 at pp. 5, 6, 7, 9).

The parent further argued that Vincent Smith was an appropriate unilateral placement and that the parent had cooperated with the district (Parent Ex. 1 at pp. 2, 9). As relief, the parent requested direct funding and/or tuition reimbursement for the cost of the student's attendance at Vincent Smith and for reimbursement of the student's transportation costs and expenses (*id.* at p. 9).

B. Impartial Hearing Officer Decision

An impartial hearing convened on March 21, 2022 and concluded on April 5, 2022 after four days of proceedings (Tr. pp. 1-632).

In a decision dated June 15, 2022, the IHO found that the May 18, 2021 IEP did not offer the student a FAPE in the least restrictive environment (LRE) for the 2021-22 school year (IHO Decision at p. 19). The IHO first addressed the district's proposed specialized reading instruction and found that it "was not clearly delineated as part of a school day program" and that the CSE's "discussion about 'special location' possibly being the [s]tudent's home rendered the recommendation flawed and incapable of acceptance" (*id.* at p. 20). The IHO found that the information contained in the May 18, 2021, and the September 14, 2021 prior written notices "le[ft] no doubt... that the proposed IEP contemplated specialized reading instruction outside of the school day and at home" (*id.*). The IHO further found that "the [d]istrict failed to make clear or appropriate recommendations for specialized reading instruction in the [s]tudent's IEPs, recommending that these services be provided in an unspecified 'Special Location,' including a 5:1 group reading session and failing to specify that these services be provided by a Wilson Reading certified instructor" and that if the district was "concerned that perhaps there were too many pull-

outs in the [s]tudent's program [it] should have resulted in a reset of the IEP content to achieve an appropriate level of services within the school day" (id.).

Next, the IHO considered the recommendation for a 15:1+1 special class with the support of a 1:1 aide (IHO Decision at p. 20). The IHO found that the provision of a 1:1 aide to address the student's academic organization and attending needs was "appropriate and consistent with the triennial evaluations as well as [with the] testimony of V[incent] S[mith] S[chool] staff" (id.). The IHO determined that "the class size [wa]s not too large when coupled with supports to address the [s]tudent's attention and distractibility issues" (id. at p. 21). Turning to the composition of the 15:1+1 special class, the IHO found that during the CSE meeting, the CSE members were unable to provide information to "determine if the grouping proposed would be appropriate" and at the hearing the district witnesses "lacked knowledge of the class profile" at the assigned school site (id.). The IHO determined that "[a]bsent that information, the recommendation [wa]s flawed and inappropriate" (id.).

The IHO then addressed adapted physical education, noting that it was not recommended by the CSE and was not included on the student's IEPs; however, a proposed class schedule listed adapted physical education for the student (IHO Decision at p. 21). The IHO found that the "[adapted physical education] class to which the [s]tudent was assigned for the 2021-2022 school year [wa]s simply not appropriate considering the evaluations and CSE findings of her present levels of performance" (id. at pp. 21-22). The IHO further found that the "programmatic scheduling, while appearing to be an error, suggests that the proposed program was more a function of what was available as opposed to what the individual [s]tudent needed to be successful" (id. at p. 22).

Turning to the issue of methodology, the IHO noted that district's IEP annual goals "were stated in terms of the [s]tudent's progress in the Wilson program" at Vincent Smith (IHO Decision at p. 22). The IHO stated that "[t]he testimony regarding its implementation [wa]s that the outside service provider, DaVinci Collaborative, would provide the service to the [s]tudent. However, it remained unclear at the conclusion of the hearing whether the [d]istrict could have delivered the Wilson reading instruction with certified instructors in the group specialized reading instruction" (id.).

With regard to the student's annual goals, the IHO indicated that the issue was related to whether or not the student had already mastered goals that were included on the 2021-22 IEP (IHO Decision at p. 22). The IHO noted that providers from Vincent Smith disagreed amongst themselves during the CSE meeting (id. at p. 23). On that basis, the IHO found that both the district witnesses and Vincent Smith witnesses were credible "but the recollections on this issue conflicted somewhat" (id.). The IHO resolved the issue in favor of the district finding "that at the time they recorded the [s]tudent's skill levels within Wilson as part of their goals, they did so based on their then-known understanding of those levels" (id.). The IHO found that the goals were not "deficient based on the information shared with the Committee at that time" (id.).

Regarding the parent's claim that the CSE failed to recommend sufficient individual OT, the IHO found the "provision of group services to be appropriate and the [p]arent[s] concern that the [s]tudent c[ould] not succeed in a group setting [wa]s misplaced" (IHO Decision at p. 23). The

IHO further found that the recommendation for two 30-minute counseling sessions per month to assist the student with transitioning back to the district was appropriate (id. at pp. 23-24).

Turning to the parent's allegation that the IEP indicated that the student needed strategies to address behaviors that impeded her learning and that she required redirection from the teacher to demonstrate appropriate behavior, necessitating an FBA and BIP to address the student's, the IHO found that "[c]ontrary to the [p]arent's argument," comments made in a 2019 evaluation related to symptoms of anxiety and depression were not "a sufficient basis for initiating an FBA and development of a BIP for this [s]tudent this school year" (IHO Decision at p. 24). The IHO further found that "[t]he [s]tudent d[id] not demonstrate behaviors requiring that the FBA process be initiated and the testimony of V[incent] S[mith] S[chool] staff about the [s]tudent's behaviors [wa]s inconsistent with an alleged need for an FBA and BIP" (id.).

The IHO then determined that the district's IEP was "appropriate in some respects"; however, "the deficiencies in providing specialized reading support during the school day, the insufficient class profile knowledge base for the CSE's recommendation, and the inappropriate placement of the [s]tudent in [adapted physical education] constitute[d] a denial of a [FAPE]" (IHO Decision at pp. 24; see IHO Decision at pp. 19, 26). Next the IHO found that the parent's unilateral placement of the student at Vincent Smith was "minimally appropriate, and that the [s]tudent ha[d] made some progress" (id. at pp. 24-25). The IHO also found that the parent had participated in all aspects of the CSE process and the development of the student's IEPs and would have considered a public school placement (id. at p. 26). As such, the IHO found "that the equities do not [] bar the [p]arent's claims" (id.).

As relief, the IHO found that the parent was entitled to tuition reimbursement and related expenses for the cost of the student's attendance at Vincent Smith for the 2021-22 school year upon confirmation that the sum billed to the parent was the standard rate for all fulltime students for the 2021-22 school year (IHO Decision at pp. 26, 27). In addition, the IHO found the parent was entitled to mileage reimbursement for daily round trips for regular school days at the IRS-approved mileage reimbursement rate (id. at p. 27).

IV. Appeal for State-Level Review

The district appeals the IHO's determination that it failed to offer the student a FAPE for the 2021-22 school year. The district asserts that the CSEs had sufficient evaluative data to determine the student's strengths and deficits for the 2021-22 school year and that the programs recommended by the district were reasonably calculated to enable the student to receive educational benefit. The district argues that the IHO erred in finding that the deficiencies in providing specialized reading support during the school day, the insufficient information regarding the class profile, and the inappropriate placement of the student in adapted physical education constituted a denial of a FAPE. The district contends that there were no deficiencies in providing specialized reading support during the school day and there was no basis to determine that there was insufficient information regarding the class profile for the CSE's recommendation. Further, the district alleges that the parent's due process complaint notice did not include any claims related to a recommendation for adapted physical education and this issue was beyond the scope of the impartial hearing.

The district also alleges that the IHO erred in finding that it remained unclear at the conclusion of the hearing whether the district could have delivered the student's Wilson reading instruction with certified instructors in the recommended group specialized reading instruction. The district argues that the IHO's finding was inconsistent with the hearing record as both the 15:1+1 classroom teacher and the DaVinci Collaborative representative testified regarding the implementation of the proposed program recommendation.

With regard to the IHO's findings related to the parent's claim that the district should have conducted an FBA and BIP, the district argues that the IHO erred in addressing this issue as it was outside of the scope of the hearing because the parent's due process complaint notice did not include a challenge regarding an FBA or a BIP.

Concerning the CSE meetings held in response to the parent's letters, the district alleges that the IHO erred in finding that the CSEs did not make any substantive changes to the student's IEPs and that the IHO failed to consider the program recommendations, the testimony of the district's witnesses, the CSE meetings, and the evaluative material available to the CSEs.

The district next argues that the IHO erred in determining that Vincent Smith was an appropriate unilateral placement. The district asserts that Vincent Smith failed to provide the student with specially designed instruction which addressed her unique individual needs. In addition, the district contends that the hearing record included general information about the program offered at Vincent Smith; however, neither the testimonial nor documentary evidence established that Vincent Smith adapted, as appropriate to this student's academic and social/emotional needs, the content, methodology, or delivery of instruction to address the unique needs that resulted from the student's disability such that it provided the student with specially designed instruction. Further, the district alleges that minimal evidence was offered regarding the student's performance at Vincent Smith and that the parent's witnesses offered a generalized description of the program and strategies, which failed to establish how Vincent Smith appropriately addressed the student's unique needs.

Next the district asserts that the IHO improperly relied on the student's scores from reading assessments conducted during the 2019-20 and 2020-21 school years as a basis for determining that the student made progress during the 2021-22 school year at Vincent Smith. The district also alleges that the parent did not demonstrate that Vincent Smith provided the student with Wilson reading instruction with fidelity to the necessary components of the program. The district argues that contrary to its highly qualified experts, the witnesses from Vincent Smith maintained that the simultaneous provision of Wilson and SPIRE reading instruction to this student remained appropriate and the IHO failed to offer any rationale for disregarding the testimony of the district's experts. The district also contends that the IHO failed to properly consider and weigh the restrictiveness of Vincent Smith when determining whether Vincent Smith was appropriate to meet the student's educational needs. With regard to equitable considerations, the district claims that the parent did not adequately cooperate with the CSE and did not challenge the appropriateness of the district's recommended program and placement in a timely manner.

As relief, the district requests reversal of the IHO's determinations that the district failed to offer the student a FAPE for the 2021-22 school year, that Vincent Smith was an appropriate

unilateral placement, and that equitable considerations favored direct funding and/or tuition reimbursement.

In an answer and cross-appeal, the parent argues that the IHO correctly determined that the district failed to provide the student a FAPE by failing to provide an appropriate reading program, that the district inappropriately recommended that the student be placed in adapted physical education, and that the district failed to recommend placement for the student in a properly composed class with peers of similar needs. The parent further asserts that the IHO correctly found that the parent's unilateral placement of the student at Vincent Smith was appropriate and that equitable considerations favored full tuition reimbursement.

The parent cross-appeals from the IHO's determination that the district's recommended 15:1+1 special class with the support of a 1:1 aide was appropriate and argues that the student required placement in a smaller classroom to address her distractibility and intensive academic needs. The parent also alleges that the 15:1+1 special class was too large for the student to make educational progress.

The parent next asserts that the IHO failed to address her claims that the district predetermined its recommendations and that the parent was denied meaningful participation in the development of the student's IEP.

The parent also cross-appeals from the IHO's determinations that the district was not required to conduct an FBA or develop a BIP due to the student's behaviors related to anxiety and depression and failed to offer or consider behavioral testing or supports to assist the student with transitioning to a larger classroom. The parent also asserts that the IHO erred by finding that the student's annual goals were appropriate despite evidence that the student had mastered several of the district's proposed goals. Lastly, the parent alleges that the IHO erred by finding that the district's recommendation for individual and group OT was appropriate.

As relief, the parent requests a finding that the district failed to offer the student a FAPE for the 2021-22 school year, that the IHO's determinations that Vincent Smith was appropriate, and that equitable considerations supported an award of tuition reimbursement be affirmed.

In a reply and answer to the parent's cross-appeal, the district responds with general denials and argues that the parent's cross-appeal should be dismissed.

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]).⁶

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

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

VI. Discussion

A. Scope of Impartial Hearing

It is first necessary to address the district's assertion that the parent did not raise an allegation, in her due process complaint notice, that the district denied the student a FAPE by inappropriately recommending adapted physical education for the student, and, therefore, whether the IHO erred in determining that the student was denied a FAPE on this ground.

Generally, the party requesting an impartial hearing has the first opportunity to identify the range of issues to be addressed at the hearing (Application of a Student with a Disability, Appeal No. 09-141; Application of the Dep't of Educ., Appeal No. 08-056). Under the IDEA and its implementing regulations, a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its due process complaint notice unless the other party

⁶ The Supreme Court has stated that even if it is unreasonable to expect a student to attend a regular education setting and achieve on grade level, the educational program set forth in the student's IEP "must be appropriately ambitious in light of his [or her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives" (Endrew F., 137 S. Ct. at 1000).

agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.507[d][3][i], 300.511[d]; 8 NYCRR 200.5[j][1][ii]), or the original due process complaint notice is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.507[d][3][ii]; 8 NYCRR 200.5[i][7][b]). Indeed, "[t]he parent must state all of the alleged deficiencies in the IEP in their initial due process complaint in order for the resolution period to function. To permit [the parents] to add a new claim after the resolution period has expired would allow them to sandbag the school district" (R.E., 694 F.3d 167 at 187-88 n.4; see also B.M. v. New York City Dep't of Educ., 569 Fed. App'x 57, 58-59[2d Cir. June 18, 2014]).

Moreover, it is essential that the IHO disclose his or her intention to reach an issue which the parties have not raised as a matter of basic fairness and due process of law (Application of a Child with a Handicapping Condition, Appeal No. 91-40; see John M. v. Bd. of Educ. of Evanston Tp. High Sch. Dist. 202, 502 F.3d 708, 713 [7th Cir. 2007]). Although an IHO has the authority to ask questions of counsel or witnesses for the purposes of clarification or completeness of the hearing record (8 NYCRR 200.5[j][3][vii]), or even inquire as to whether the parties agree that an issue should be addressed, it is impermissible for the IHO to simply expand the scope of the issues raised without the express consent of the parties and then base his or her determination on new issues raised sua sponte (see Dep't of Educ., Hawai'i v. C.B., 2012 WL 220517, at *7-*8 [D. Haw., Jan. 24, 2012] [finding that the administrative hearing officer improperly considered an issue beyond the scope of the parents' due process complaint notice]).

Here, review of the due process complaint notice demonstrates that the parent did not raise the issue of adapted physical education in the due process complaint notice (see Parent Ex. 1). Additionally, it does not appear that the parent thereafter sought the district's agreement to expand the scope of issues or the IHO's permission to amend the due process complaint notice.

The next inquiry focuses on whether the district through the questioning of its witnesses "open[ed] the door" under the holding of M.H. v. New York City Department of Education (685 F.3d at 250-51; see also B.M. v. New York City Dep't of Educ., 569 Fed. App'x 57, 59 [2d Cir. June 18, 2014]; D.B. v. New York City Dep't of Educ., 966 F. Supp. 2d 315, 327-28 [S.D.N.Y. 2013]; N.K. v. New York City Dep't of Educ., 961 F. Supp. 2d 577, 584-86 [S.D.N.Y. 2013]; A.M. v. New York City Dep't of Educ., 964 F. Supp. 2d 270, 282-84 [S.D.N.Y. 2013]; J.C.S. v. Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, *9 [S.D.N.Y. Aug. 5, 2013]).

In this case, the only mention of adapted physical education occurred when counsel for the parent questioned staff members of Vincent Smith and asserted in the questions that the district had "recommended" adapted physical education for the student (Tr. pp. 352, 366). Counsel for the parent then argued for the first time in her post-hearing brief that the district inappropriately recommended adapted physical education (Parent Post Hr'g Br. at p. 20). The hearing record indicates that no district witnesses testified about the issue, it arose during the parent's case in chief, and the district did not open the door to the parent's challenges (see A.M., 964 F. Supp. 2d at 282-84; J.C.S., 2013 WL 3975942, at *9). I agree with the district that the IHO's findings regarding adapted physical education were beyond the scope of the hearing (see B.P. v. New York City Dep't of Educ., 841 F. Supp. 2d 605, 611 [E.D.N.Y. 2012] [explaining that "[t]he scope of the inquiry of the IHO, and therefore the SRO . . . , is limited to matters either raised in the . . .

impartial hearing request or agreed to by [the opposing party]]"). Therefore, the IHO's findings related to adapted physical education are reversed.⁷

B. CSE Process

1. Predetermination and Parent Participation

In her cross-appeal, the parent argues that the IHO failed to address her claims that the district predetermined its recommendations and that the parent was denied meaningful participation in the development of the student's IEP. Turning back to the parent's due process complaint notice, she had asserted that the district predetermined the student's program by "elevate[ing] the [d]istrict's policy over [the student]'s individual educational needs" and failed to treat the parent as an equal team member in that the district "failed to meaningfully consider her requests and concerns" (Parent Ex. 1 at pp. 6, 7).

As to predetermination, the consideration of possible recommendations for a student prior to a CSE meeting is not prohibited as long as the CSE understands that changes may occur at the CSE meeting (T.P., 554 F.3d at 253; A.P. v. New York City Dep't of Educ., 2015 WL 4597545, at *8-*9 [S.D.N.Y. July 30, 2015]; see 34 CFR 300.501[b][1], [3]; 8 NYCRR 200.5[d][1], [2]). The key factor with regard to predetermination is whether the district has "an open mind as to the content of [the student's] IEP" (T.P., 554 F.3d at 253; see D.D-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at *10-*11 [E.D.N.Y. Sept. 2, 2011], aff'd 506 Fed. App'x 80 [2d Cir. Dec. 26, 2012]; R.R. v. Scarsdale Union Free Sch. Dist., 615 F. Supp. 2d 283, 294 [E.D.N.Y. 2009], aff'd, 366 Fed. App'x 239 [2d Cir. Feb. 18, 2010]). Districts may "prepare reports and come with pre[-]formed opinions regarding the best course of action for the child as long as they are willing to listen to the parents and parents have the opportunity to make objections and suggestions" (DiRocco v. Bd. of Educ. of Beacon City Sch. Dist., 2013 WL 25959, at *18 [S.D.N.Y. Jan. 2, 2013] [alternation in the original], quoting M.M. v. New York City Dept. of Educ. Region 9 (Dist. 2), 583 F. Supp. 2d 498, 506; [S.D.N.Y. 2008]; see B.K., 12 F. Supp. 3d at 358-59 [holding that "active and meaningful" parent participation undermines a claim of predetermination]).

With regard to participation, 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

⁷ Even if this claim had been properly raised, it would have required a reversal of the IHO's determination. The May 2021 IEP did not include a recommendation for adapted physical education (Dist. Ex. 6 at pp. 25-27). The IHO acknowledged in his decision that the class schedule emailed to the parent likely included adapted physical education in error, nonetheless he found this resulted in a denial of a FAPE (IHO Decision at pp. 21-22). Accordingly, the IHO's finding on this issue was an improper conclusion based on speculation that the district would not have adhered to the May 2021 IEP (R.E., 694 F.3d at 195; see E.H. v. New York City Dep't of Educ., 2015 WL 2146092, at *3 [2d Cir. May 8, 2015]; R.B. v. New York City Dep't of Educ., 2015 WL 1244298, at *3 [2d Cir. Mar. 19, 2015]).

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., 2015 WL 4597545 at *8, *10; 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., 2011 WL 3919040, at *11 [E.D.N.Y. Sept. 2, 2011], 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 addition to the parent attending the May 2021 CSE via video/teleconference, district attendees via video/teleconference included the CSE chairperson, the school psychologist, a regular education teacher, two special education teachers, and an occupational therapist from the district (Dist. Ex. 6 at p. 1). Attendees from Vincent Smith, via video/teleconference, included the Vincent Smith school administrator, a teacher, a reading teacher, a school psychologist, and an occupational therapist (id.).

The CSE chairperson testified that the May 2021 CSE reviewed the evaluations from the April 2021 CSE, reviewed previous evaluations, reviewed the student's present levels of performance, and discussed the continuum of services from "resource room related service only programs, all the way to our self-contained . . . and we determined that the class size ratio of 15 was appropriate for [the student], as well as an additional teaching assistant in the room, so a 15:1:1 program" (Tr. pp. 64-65). The CSE chairperson further testified that the CSE determined that due to the student's academic organization and attending needs, an individual aide was necessary for her core classes (Tr. p. 65). The CSE chairperson also described the other programs considered during the meeting, which were determined to be insufficiently supportive for the student or too restrictive (Tr. pp. 65-66).

The CSE chairperson denied that the May 2021 CSE's recommendations were predetermined, as he testified that the entire continuum of services was discussed during the May 2021 CSE meeting, that the staff from Vincent Smith was provided the opportunity to share the student's present levels of performance, that the parent cooperated, and that the CSE "went through all the services and supports available at [the district]" (Tr. pp. 62, 78). Additionally, the CSE chairperson testified that the May 2021 IEP was a draft IEP and contained proposed goals, which he read aloud and "in collaboration with the team at Vincent Smith . . . went through each of the individual goals" (Tr. pp. 61-62, 99, 101).

The hearing record further reflects that the CSE reconvened on September 14, 2021, in response to the parent's August 16, 2021 letter, and the CSE reconvened on January 18, 2022, in response to the parent's December 3, 2021 letter (Parent Exs. 11 at pp. 1-2; 12; Dist. Exs. 9; 10).

The district's director of special education (director of special education) testified that the parent did not outwardly express any negative concerns regarding the May 2021 CSE's recommendations and the director did not believe that the parent said she disagreed (Tr. pp. 21, 35). The director of special education stated that "all along in the meetings" the parent was a participant, asked questions and voiced her desire that the student remain at Vincent Smith (Tr. p. 35). The director of special education also testified that the staff of Vincent Smith voiced concerns (Tr. pp. 41-42).

The Vincent Smith dean of students (dean of students) testified that the staff of Vincent Smith discussed amongst themselves, during the April 2021 CSE meeting, their views that the district's psychoeducational evaluation was "inappropriate" but did not recall whether those opinions were shared with the rest of the CSE (Tr. pp. 327, 429-31). She confirmed that Vincent Smith staff was asked for input regarding how the student was progressing (Tr. p. 431). When asked about the May 2021 CSE's counseling recommendation, the dean of students stated that "[w]e can only give our opinion of our program. It may be appropriate in a 15:1:1 in a school with a thousand students, so we would not render our opinion of whether it's appropriate or not. It's not appropriate in our program" (Tr. p. 436).

When asked about the district's psychoeducational evaluation and reading evaluation, the student's reading teacher at Vincent Smith testified that she could not recall if she raised any concerns during the April 2021 CSE meeting but knew that "as a team we did discuss that privately. We did talk about how those scores were not a representation of her" (Tr. pp. 454-55, 512-13).

The parent was asked what her reaction to the May 2021 CSE recommendations was and she testified that she "always asked them to please consider Vincent Smith, as [she] would consider their recommendations" (Tr. p. 601). The parent also testified that when the CSE reconvened on September 14, 2021 and January 18, 2022, the CSE reviewed her letters and discussed the recommendations, and each time the parent requested that the CSE consider Vincent Smith (Tr. pp. 601-02). The parent further testified that during the April 2021 CSE meeting, she did not raise any objections to the assessments or evaluative data reviewed during the meeting (Tr. pp. 612-13). The parent also indicated that she was given an opportunity to discuss the student's evaluations (Tr. p. 613). The parent further testified that she and the staff of Vincent Smith raised concerns about the district's recommendations regarding the specialized reading services, the 15:1+1 special class, and the 1:1 aide (Tr. pp. 615-16).

Given the above discussion, the evidence in the hearing record demonstrates that both the parent and staff of Vincent Smith were given the opportunity to participate in the development of the student's educational program for the 2021-22 school year. Contrary to the parent's contention, once a CSE determines that an appropriate class placement for the student is available within the district, the district is not obligated to consider a more restrictive setting, such as a nonpublic school (see B.K. v. New York City Dep't of Educ., 12 F. Supp. 3d 343, 359 [E.D.N.Y. 2014] [indicating that "once the CSE determined that a 6:1:1 placement was appropriate for [the student], it was under no obligation to consider more restrictive programs"]; E.F. v. New York City Dep't of Educ.,

2013 WL 4495676, at *15 [E.D.N.Y. Aug. 19, 2013] [explaining that "under the law, once [the district] determined . . . the [LRE] in which [the student] could be educated, it was not obligated to consider a more restrictive environment"]; A.D. v. New York City Dep't of Educ., 2013 WL 1155570, at *7-*8 [S.D.N.Y. Mar. 19, 2013] [finding that "[o]nce the CSE determined that [the public school setting] would be appropriate for the [s]tudent, it had identified the [LRE] that could meet the [s]tudent's needs and did not need to inquire into more restrictive options"). The parent's preference for the student to remain at Vincent Smith is understandable; however, the district was not required to consider placement of the student in a nonpublic school once it determined that a less restrictive placement was appropriate to address the student's needs. Although the hearing record reflects parental disagreement with the school district's proposed IEP and placement recommendation that does not amount to a denial of the parent's meaningful participation in the development of the program (see E.H. v. Bd. of Educ. of the Shenendehowa Cent. Sch. Dist., 361 Fed. App'x 156, 160 [2d Cir. 2009]; E.F., 2013 WL 4495676, at *17; DiRocco, 2013 WL 25959, at *18-*20; P.K., 569 F. Supp. 2d at 383; Sch. for Language & Commc'n Dev., 2006 WL 2792754 at *7). Therefore, the hearing record does not support the parent's claims that the district predetermined its recommendations and prevented the parent from meaningfully participating in the development of the student's educational program.

C. FAPE for the 2021-22 School Year

In the due process complaint notice, the parent alleged that the district failed to offer the student a FAPE for the 2021-22 school year (Parent Ex. 1 at p. 1). The parent generally asserted that the district failed to develop an appropriate IEP, failed to offer an appropriate placement, and failed to recommend appropriate reading instruction (id.).

In her answer with cross-appeal, the parent argues that the IHO correctly determined that the district failed to offer the student a FAPE by failing to provide an appropriate reading program, by inappropriately recommending that the student be placed in adapted physical education, and by failing to recommend placement of the student in a properly composed class with peers of similar needs.⁸ Next, the parent asserts that the IHO erred by finding that the district's recommended 15:1+1 special class with the support of a 1:1 aide was appropriate and argues that the student required placement in a smaller classroom to address her distractibility and intensive academic needs. The parent also alleges that the 15:1+1 special class was too large for the student to make educational progress.

The parent further cross-appeals from the IHO's determinations that the district was not required to conduct an FBA or develop a BIP due to behaviors related to anxiety and depression and failed to offer or consider behavioral testing or supports to assist the student with transitioning to a larger classroom. The parent asserts that the IHO erred by finding that the student's annual goals were appropriate despite evidence that the student had mastered several of the district's proposed goals. Lastly, the parent alleges that the IHO erred by finding that the district's recommendation for individual and group OT was appropriate.

⁸ As noted above, the IHO's findings related to adapted physical education were outside the scope of the hearing and will not be further addressed.

The May 2021 IEP reflected that it was based on results from a January 17, 2017 physical examination, a January 12, 2021 reading evaluation, a February 5, 2021 psychoeducational evaluation, a February 5, 2021 social history, a February 26, 2021 OT evaluation, and an April 14, 2021 classroom observation (Tr. pp. 27-28; Dist. Ex. 6 at p. 2).⁹ The May 2021 IEP included reports of specific formal test results consistent with the evaluations listed, as well as evaluation results obtained via previous evaluations conducted in the 2017-18 school year (compare Tr. pp. 28-29; Dist. Exs. 1-3, with Dist. Ex. 6 at pp. 2-8). The parties do not dispute the adequacy of the evaluative information before the May 2021 CSE or the sufficiency of the May 2021 IEP present levels of performance, a description of which is necessary to determine whether the May 2021 CSE's recommendation of a 15:1+1 special class with 1:1 aide support in conjunction with specialized reading instruction, related services and other supports provided the student with an appropriate educational program for the 2021-22 school year.

1. Present Levels of Performance and Student Needs

With respect to the student's academic achievement, functional performance, and learning characteristics, the May 2021 IEP included detailed information discussed during the April 19, 2021 CSE meeting about the student's cognitive, spelling, reading, writing, math, and "other" (i.e., art, music, social studies, science) skills from the Vincent Smith trimester one and trimester two progress reports, and subtest scores from the February 2021 psychoeducational evaluation and the January 2021 reading evaluation reports (Dist. Ex. 6 at pp. 9-15).¹⁰

With regard to spelling skills, the May 19, 2021 IEP included trimester one Vincent Smith teacher reports that the student had been doing well with decodable words but struggled to recall the spelling of sight words (Dist. Ex. 6 at p. 9). Trimester two comments reflected that the student continued to do better spelling decodable words but struggled to hear the blends when trying to sound out certain words (id.). At the time of the May 2021 CSE meeting, a Vincent Smith teacher reported that the student was slowly making academic progress since the April 2021 CSE meeting (id.). In writing, the student used her "Wilson" strategies for everything; however, she struggled with sight words that she could not sound out (id.). Once the student had words memorized, "she [wa]s great and c[ould] move on" (id.).

Specific to reading the May 2021 IEP reflected results from the January 2021 reading evaluation, which indicated that the student's comprehension skills were stronger than her decoding ability (Dist. Ex. 6 at pp. 9-10). Vincent Smith progress report information included in the IEP indicated that the student attended four 40-minute sessions per week of 1:1 reading instruction and the IEP described her progression through various steps in the Wilson Program and

⁹ The director of special education testified that she observed the student in the classroom at Vincent Smith via a videoconference on April 13 or April 15, 2021, but she did not write a report of the observation because "it was not for administrative purposes" (Tr. pp. 27-28). The director of special education reported the purpose of the classroom observation was to see the classroom, how the student interacted, and what she was gaining with her peers (Tr. p. 28). During the impartial hearing, the director of special education described what she observed in the student's ELA class and she testified that "nothing" stood out to her (Tr. pp. 28-29).

¹⁰ With regard to art and music, the May 2021 IEP included detailed information from the April 2021 CSE meeting (Dist. Ex. 6 at pp. 14-15). There appeared to be no updated information from Vincent Smith for art and music at the time of the May 2021 CSE meeting (see id.).

what she could read and spell (*id.* at p. 11). At the time of the May 2021 CSE meeting, the reading teacher reported that the student was starting "Wilson 3.1" and was learning two-syllable words with compound words (*id.* at p. 12). The IEP included reports that the student made progress during the school year, but her progress was slow for reading (*id.*). According to the reading teacher, the student was doing much better with spelling in comparison to reading (*id.*). The reading teacher further reported that Wilson had been very helpful to the student because she used the strategies and skills; however, due to her struggles with memory, words she could not use Wilson skills to "tap out or use her key words" were much harder for her (*id.*). According to the IEP the student could read approximately 67 words per minute with controlled texts, and 50 words per minute with uncontrolled texts (*id.*). The IEP reflected the reading teacher's recommendation that the student continue working with high frequency words and suggestions to post the words around the student's house and work throughout the summer at home with the parent (*id.*). The reading teacher reiterated that the student struggled with memory, "so when she [did not] have a skill or tool to decode the word, she struggle[d]"; noting that the student tried to spell words like "should," "could," and "would" phonetically, which continued to be "a big struggle for her" (*id.*).

The student's reading needs set forth in the May 2021 IEP included multiple recommendations specific to reading instruction that were consistent with the recommendations from the January 2021 reading evaluation report (compare Dist. Ex. 2 at pp. 11-16, with Dist. Ex. 6 at pp. 16-17). Of note, the May 2021 IEP indicated that the student "should continue to participate in an Orton Gillingham-based (O-G) program to improve her sound-symbol association and syllable awareness for reading and spelling" (Dist. Ex. 6 at p. 16). The IEP advised that the student's program should include daily practice segmenting and blending word parts and phonemes, phoneme manipulation and memory, word retrieval and rapid naming drills, and tactile and kinesthetic strategies to solidify new concepts, and that her progress should be closely monitored and paced according to her individual response to intervention (*id.*). Further, the IEP reflected that the student's program should include: data collection, development of skills in rapid naming, categorization and storage of information, linear sequential memory, fluency and prosody, concept imagery skills, specific techniques for improving reading comprehension, gross motor activities and multisensory manipulatives, direct instruction in metacognition while reading, and new vocabulary including multiple meaning words and idiomatic language (*id.* at p. 17). In addition, the May 2021 IEP noted that mastery of skills should be demonstrated before moving on, modifications or supplementations to the program may be required as determined by the student's day-to-day performance and ongoing diagnostic and prescriptive instruction (*id.* at pp. 16-17).¹¹

With regard to writing, the May 2021 IEP included results of a formal assessment of the student's written language skills, which yielded scores in the very poor range as compared to her same age and grade peers; she lacked the tools for spelling, punctuation, and writing mechanics and her weak vocabulary skills also affected her written expression (Dist. Ex. 6 at p. 12). Information in the IEP provided by the Vincent Smith classroom teacher in April 2021 indicated that the student continued to struggle with writing and needed graphic organizers and reminders

¹¹ The February 2021 reading evaluation report indicated that Orton-Gillingham programs (e.g., Wilson Reading Program) are structured, sequential, and cumulative, and all components of language are directly and explicitly taught (Dist. Ex. 2 at p. 13).

about the mechanics of writing, grammar, and structure (*id.* at pp. 12-13). While the student was verbally able to express her ideas, she struggled to get her ideas down on paper (*id.* at p. 13). During the May 2021 CSE meeting, the student's classroom teacher reported the student was "definitely opposed" to writing because "she [did not] love it" (*id.*). The student was reportedly able to write a paragraph and write multiple paragraphs for an essay with graphic organizers; however, "everything need[ed] to be broken down into chunks and organized for her to help her write" cohesively (*id.*). The student also required help with grammar and using punctuation (*id.*). The classroom teacher noted that the student knew there was a capital letter at the beginning of a sentence and for proper nouns (*id.*). The student also knew ending punctuation but needed help with commas and run on sentences (*id.*). The CSE determined that the student required direct and explicit instruction for writing, writing assist tools, and text to speech tools (*id.* at p. 17).

The May 2021 IEP also included information from the Vincent Smith trimester one and two progress reports about the student's math skills that was provided during the April 2021 CSE meeting (Dist. Ex. 6 at p. 13). According to April 2021 classroom teacher reports reflected in the May 2021 IEP, the student could complete most lessons independently after a few days of practice, she struggled with word problems that were not read to her, she used a multiplication chart for the seven, eight, and nine tables, and she required some word problems to be broken down (*id.* at p. 14). At the May 2021 CSE meeting the student's classroom teacher reported that math was the subject in which the student excelled the most, and she was able to independently add and subtract decimals, lining up the decimal points (*id.*). The student required reminders to check for regrouping when subtracting, and to work neatly as she, at times, worked quickly when writing, and her work could get sloppy (*id.*). The student was most successful when given mnemonic devices or visual ways to remember steps like long division or converting for measurements, and she worked best with a calculator for solving problems with the basic functions (*id.*). Word problems needed to be broken down into steps and read to the student (*id.*). It was important that words were highlighted for the student, so that after the problem was read to her, she could go back and look for the highlighted words (*id.*).

With regard to the student's social development, the May 2021 IEP reflected information from the 2020-21 Vincent Smith report card that the student required support to complete various "personal development" tasks in categories such as respect for peers, personal responsibility for actions and belongings, attention to classroom rules and procedures, response to correction/corrective criticism, independent and group work habits, self-control of impulses and emotions, and organization of time and work (Dist. Ex. 6 at p. 18). The IEP indicated that the April 2021 CSE reviewed information from October 2020 and found that there were no changes, including that the parent reported that she did not have "social concerns" regarding the student and Vincent Smith indicated that the student did not have any social needs (*id.*). Additionally, the April 2021 CSE determined that the student continued to make positive relationships, distinguished between a peer relationship and an adult relationship, made positive peer and adult relationships, and was a pleasure to have in class (*id.*). The May 2021 CSE determined that the student needed the support of counseling to "re-acclimate into a public school setting" (*id.*).

The CSE developed the student's present levels of physical development from a physical education progress report provided during the April 2021 CSE meeting, a February 26, 2021 OT evaluation report and an OT progress report (Dist. Ex. 6 at pp. 19-20). The May 2021 IEP included information from the physical education progress report that indicated the student demonstrated

average skills in fitness related components, she participated fully in physical education class and required no modifications (id. at pp. 16, 19, 20). The student was observed and reported to run around and "do all of the activities" (id. at p. 16).

The May 2021 IEP included a report from the Vincent Smith occupational therapist that indicated the student received two individual sessions of OT per week and described her as eager to participate in sessions, which mainly focused on organizational skills and writing needs (Dist. Ex. 6 at p. 19). The student required cues to slow down and focus during sessions, and the occupational therapist worked on making the student more independent and less reliant on teacher assistance, noting that she often asked for help and needed to be redirected (id.). The May 2021 IEP also indicated that according to the February 2021 OT evaluation, the student exhibited deficits in fine manual control, manual coordination and visual skills, which might interfere with the acquisition and mastery of many skills necessary for being successful in the classroom environment (id.). During the May 2021 CSE meeting, the occupational therapist updated the student's present levels of OT performance to reflect that the student came prepared to the sessions, brought her own equipment, and was excellent in following verbal directions (id.). The IEP noted that the student's reading skills made it difficult for her to follow written directions, and although her work was posted on the board, the student needed prompts (id.). The student worked on the fluidity of her writing as there were lots of omissions with near and far point copying (id.). The student often omitted words and when asked to read words back and self-edit, and she was inconsistent with recognizing omissions (id.). The student's attending skills and confidence impeded her progress; she was quick to respond, "I can't do it" and required positive reinforcement and prompting (id.). The student was working on tracing, near and far point copying, and uppercase and lowercase work (id.). The student's handwriting speed was reportedly slow and she participated in "blind writing" for similar letters (e.g., b, d, p), "to feel how those letters are written differently" (id. at p. 20). Reportedly, the student had done very limited keyboarding in OT and keyboarding was challenging for her (id.). The occupational therapist reported on the student's progress towards her 2020-21 IEP OT annual goals and identified which specific goals the student achieved and the specific goals for which she was progressing inconsistently (id.).

With regard to management needs, the May 2021 IEP included information from a Vincent Smith report card and from teacher comments previously discussed during the April 2021 CSE meeting, including that the student enjoyed a reward system used at Vincent Smith (Dist. Ex. 6 at p. 20). The IEP noted that during the May 2021 CSE meeting, Vincent Smith staff reported that the student did not have any management needs (id.). However, the May 2021 CSE recommended that the student's management needs include a small-structured environment to attend to task, differentiated instruction of the general education curriculum, the support of counseling and a special education teacher, direct instruction in reading and writing, use of various organizers for organization and classwork, assistive technology for reading and writing, and a 1:1 aide to assist in organization, academic prompting, refocusing and redirection (id. at pp. 20-21).

In addition, the May 2021 CSE determined that the student's disability in the areas of reading and writing, attending, and memory adversely affected her ability to participate fully in the general education curriculum and required modification and the accommodations of a special education teacher in a 15:1+1 special education class with the support of a 1:1 aide and related services (Dist. Ex. 6 at p. 21).

2. Annual Goals and OT

The IHO determined that based on conflicting information provided by Vincent Smith staff during the CSE meeting as to whether or not the student had mastered specific annual goals, the district correctly included the annual goals on the May 2021 IEP (IHO Decision at pp. 22-23). The parent alleges on appeal that the IHO erred by finding the annual goals were appropriate because the IEP included goals the student had mastered.

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

In her answer and cross-appeal, the parent did not identify which annual goals the student had allegedly mastered; however, she cited to one page of transcript wherein the student's occupational therapist at Vincent Smith testified that the student had mastered annual goals numbered 22, 23, and 24 in the May 2021 IEP (see Tr. pp. 540, 555, 559; Dist. Ex. 6 at p. 24).¹² According to the May 2021 IEP, the Vincent Smith occupational therapist reported at that time, that the student was progressing inconsistently towards annual goals 23, 25, 27, and 28, and that she had achieved goals 24 and 26 from the "2020-2021 IEP" (Dist. Ex. 6 at p. 20).¹³

The CSE chairperson testified that during the May 2021 CSE meeting, he "went through each one of the proposed goals, [he] read them as well [as] shared the screen, and in collaboration with the team at Vincent Smith we went through each of the individual goals" (Tr. p. 61). When asked how the district's OT evaluation was utilized in the development of the May 2021 IEP, the CSE chairperson stated that the district's OT evaluation was used to develop the present levels of

¹² The parent's memorandum of law in support of her answer and cross-appeal identifies other annual goals alleged to be inappropriate; however, these were not raised in the parent's answer and cross-appeal. This is notwithstanding that the parent utilized only approximately five and one-half pages of the ten permissible pages for setting forth her claims in an answer and cross-appeal (8 NYCRR 279.8[b]). Further, incorporation by reference is specifically prohibited by the practice regulations (8 NYCRR 279.8[b]), and, as a general matter, it has long been held that a memorandum of law is not a substitute for a pleading (8 NYCRR 279.4; 279.6; 279.8[c][3]; [d]; see Davis, 2021 WL 964820, at *11; see, e.g., Application of a Student with a Disability, Appeal No. 15-070). Thus, any arguments included solely within the memorandum of law have not been properly raised and will not be considered. As a result of the parent's failure to properly cross-appeal these claims and that the district has not appealed the IHO's determination that the student's reading goals were appropriate, this determination has become final and binding on the parties (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-7, *10 [S.D.N.Y. Mar. 21, 2013]).

¹³ It is unclear from this statement in the May 2021 IEP which "2020-2021" IEP the occupational therapist was referring to, an IEP resulting from the October 2020 CSE meeting that was not included in the hearing record (see Dist. Ex. 6 at p. 18), or the April 2021 IEP, which had a "[p]rojected IEP [s]tart [d]ate" of April 19, 2021 (see Dist. Exs. 4 at p. 1; 6 at p. 20).

performance, the needs of the student, as well as the IEP goals (Tr. p. 62). The CSE chairperson further testified that the May 2021 CSE "used feedback from the occupational therapist at Vincent Smith to discuss where [the student] was in her IEP goals and . . . I read each of the goals out and we adjusted them at the meeting as appropriate" (Tr. p. 80).

The Vincent Smith dean of students testified that she attends all CSE meetings for Vincent Smith students (Tr. pp. 327, 358). With regard to the April 2021 CSE meeting, the dean of students testified that she attended by telephone along with the student's Vincent Smith providers (Tr. p. 359). She further testified that "each of our people described [the student]'s progress and how she's doing in our location" and that "the district made goals for her, and the goals were read over" (*id.*). The dean of students also testified that she attended the student's annual review on May 18, 2021 and that the annual "[g]oals remain[ed] the same" (Tr. pp. 364-65).

The student's Vincent Smith occupational therapist did not recall specifics about the April 19, 2021 CSE meeting; however, according to the April 2021 IEP she was in attendance and provided the student's present levels of performance (*see* Tr. pp. 569-70; Dist. Ex. 4 at pp. 1, 17-18). When asked about the student's May 2021 CSE meeting, she testified that she did not recall whether the student's proposed goals had been reviewed, then stated that she did not think that the CSE "went over those IEP goals," and further that she did not recall the district's occupational therapist reviewing the proposed annual goals; however, as noted above, the May 2021 IEP reflects the occupational therapist's report regarding the student's progress toward the goals she was working on with her at that time (*compare* Tr. pp. 555-56, 574-75, *with* Dist. Ex. 6 at p. 20).

During her testimony, the Vincent Smith occupational therapist was asked to review the motor skills goals listed on the May 2021 IEP for the 2021-22 school year (Tr. p. 558). The student's occupational therapist testified that with regard to annual goal numbered 22 which targeted motor skills, she had "not seen reversal from [the student] in this year, so [she] d[id]n't think that [was] an appropriate goal for her" (Tr. p. 559). With regard to the annual goal numbered 23 directed at motor skills, the occupational therapist testified that the student "achieved that goal. That's a mastery goal" (*id.*). In addition, the occupational therapist testified that the student had mastered the annual goal numbered 24 also directed at motor skills (*id.*). During cross-examination, the occupational therapist testified that the student had mastered annual goal number 23 "[s]ometime last year or maybe prior. [she] d[id]n't recall" (Tr. p. 581). When asked if she recalled when the student had mastered annual goal number 24, the occupational therapist testified, "[n]ot a specific day" (*id.*).

It is unclear from the occupational therapist's testimony when the student mastered the May 2021 IEP annual goals numbered 22, 23, and 24, and there is no indication in the hearing record that the occupational therapist objected to these goals at the time of the May 2021 CSE meeting. Additionally, review of the occupational therapist's testimony shows that she did not recall the May 2021 CSE's discussion about the student's annual goals as testified to by the CSE chairperson, and documentation prepared contemporaneously with the May 2021 CSE meeting indicated that her report regarding which annual goals the student had achieved by that date related to the annual goals from the "2020-21" school year IEP (Tr. pp. 61-62, 80, 555-56, 574-75; Dist. Ex. 6 at p. 20).

While the CSE should design annual goals that are achievable within the time period that the proposed IEP is in effect (*see* "Guide to Quality Individualized Education Program (IEP)

Development and Implementation," at p. 18, Office of Special Educ. Mem. [Dec. 2010], available at <https://www.p12.nysed.gov/specialed/publications/iepguidance/IEPguideDec2010.pdf> at p. 30), in this instance even if the student had mastered some of the annual goals included on the May 2021 IEP, the inclusion of those annual goals does not rise to the level of denying the student a FAPE, as the goals that are being complained of are limited to addressing the student's motor skills, there are additional appropriate goals that also address motor skills, and an IEP does not need to identify annual goals as the vehicle for addressing each and every need in order to conclude that the IEP offered the student a FAPE. (see J.B. v. New York City Dep't of Educ., 242 F. Supp. 3d 186, 199 [E.D.N.Y. 2017]; see also P.K. v. New York City Dep't of Educ. (Region 4), 819 F. Supp. 2d 90, 109 [E.D.N.Y. 2011] [noting the general reluctance to find a denial of a FAPE based on failures in IEPs to identify goals or methods of measuring progress], aff'd, 526 Fed. App'x 135 [2d Cir. May 21, 2013]). Based on the forgoing, there is no basis in the hearing record to disturb the IHO's finding that the student's annual goals were appropriate.

Relatedly, the parent asserts that the IHO erred by finding that the May 2021 CSE's recommendation for one session per week of group OT and one session per week of individual OT was appropriate. The IHO determined that the district's recommendation of group OT was appropriate and that the parent's concern that the student could not succeed in a group setting was "misplaced" (IHO Decision at p. 23).

According to results of the February 2021 OT evaluation, the student exhibited deficits in fine manual control, manual coordination, and visual skills, which might interfere with the acquisition and mastery of many skills necessary for being successful in the classroom environment (Dist. Ex. 3 at pp. 2-4, 5). The district's occupational therapist who conducted the evaluation recommended that the student continue to receive OT services (id. at p. 5). The May 2021 CSE recommended that the student receive one 30-minute session per week of individual OT, and one 30-minute session per week of OT in a small group (5:1) (Dist. Ex. 6 at p. 25).

The student's Vincent Smith occupational therapist testified that she disagreed with the recommendation for the student to receive one session per week of group OT and that she did not think it was appropriate for the student because of the student's distractibility, her skill level, and that she "really need[ed] a lot more one on one" (Tr. pp. 556, 562, 578). The occupational therapist conceded during cross-examination that one of the student's annual goals was to improve "attending and independence to conduct age-appropriate work"; however, she stated that the student required individual OT to work on those skills (Tr. pp. 578-79). The Vincent Smith occupational therapist testified that she did not recall whether she voiced her disagreement with the recommendation for group OT during the May 2021 CSE meeting (Tr. p. 575).

The Vincent Smith occupational therapist also testified that she had reviewed the district's February 2021 OT evaluation report, did not have any concerns regarding which assessments were administered or about its validity, and concurred that it was an accurate reflection of the student's needs (Tr. pp. 567-68). Review of the report shows that although, during the 2020-21 school year, the Vincent Smith occupational therapist provided two sessions per week of individual OT to the student, the February 2021 OT evaluation report indicated that the student was receiving one session per week of OT individually and one session per week of OT in a group (compare Tr. p. 566, with Dist. Ex. 3 at p. 1). At the end of the evaluation report, the district's occupational

therapist indicated that the final decision regarding the delivery of OT services was at the discretion of the CSE (Dist. Ex. 3 at p. 5).

While the student's occupational therapist may have disagreed with the May 2021 CSE's recommendation for one session of group OT, the evidence in the hearing record does not provide adequate support to overturn the IHO's determination. The evaluative information available to the CSE indicated that at Vincent Smith the student was receiving one session of group OT, an apparent error that the Vincent Smith occupational therapist did not correct during the meeting. Further, there is nothing in the review of the district's OT evaluation report that indicated the student's needs addressed by OT could only be met during individual sessions—of which the CSE recommended one per week—and that she would not receive any benefit from OT in a small group. To the contrary, the evidence in the hearing record indicated that the student was very social and needed to work on improving attending and independent work completion (Tr. pp. 578-79; Dist. Ex. 6 at p. 18), needs which could be addressed in a small group setting.

3. Consideration of Special Factors-Interfering Behaviors

Next, the parent argues that the IHO erred in determining that the district was not required to conduct an FBA or develop a BIP due to the student's behaviors related to anxiety and depression and failed to offer or consider behavioral testing or supports to assist the student with transitioning to a larger classroom.

Under the IDEA, a CSE may be required to consider special factors in the development of a student's IEP. Among the special factors in the case of a student whose behavior impedes his or her learning or that of others, the CSE shall consider positive behavioral interventions and supports, and other strategies, to address that behavior (20 U.S.C. § 1414[d][3][B][i]; 34 CFR 300.324[a][2][i]; see 8 NYCRR 200.4[d][3][i]; see also E.H. v. Bd. of Educ., 2009 WL 3326627, at *3 [2d Cir. Oct. 16, 2009]; A.C., 553 F.3d at 172; J.A. v. East Ramapo Cent. Sch. Dist., 603 F. Supp. 2d 684, 689 [S.D.N.Y. 2009]; M.M. v. New York City Dep't of Educ., 583 F. Supp. 2d 498, 510 [S.D.N.Y. 2008]; Tarlowe, 2008 WL 2736027, at *8; W.S., 454 F. Supp. 2d at 149-50). To the extent necessary to offer a student an appropriate educational program, an IEP must identify the supplementary aids and services to be provided to the student (20 U.S.C. § 1414[d][1][A][i][IV]; 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v][a], [b][3]; Piazza v. Florida Union Free Sch. Dist., 777 F. Supp. 2d 669, 673 [S.D.N.Y. 2011]; Gavriety v. New Lebanon Cent. Sch. Dist., 2009 WL 3164435, at *30 [N.D.N.Y. Sept. 29, 2009] [discussing the student's IEP which appropriately identified program modifications, accommodations, and supplementary aids and services]; P.K. v. Bedford Cent. Sch. Dist., 569 F. Supp. 2d 371, 380 [S.D.N.Y. 2008]).

State regulation defines an FBA as the process of determining why a student engages in behaviors that impede learning and how the student's behavior relates to the environment" and include[s], but is not limited to, the identification of the problem behavior, the definition of the behavior in concrete terms, the identification of the contextual factors that contribute to the behavior (including cognitive and affective factors) and the formulation of a hypothesis regarding the general conditions under which a behavior usually occurs and probable consequences that serve to maintain it (8 NYCRR 200.1[r]). According to State regulations, an FBA shall be based on multiple sources of data and must be based on more than the student's history of presenting problem behaviors (8 NYCRR 200.22[a][2]). An FBA must also include a baseline setting forth

the "frequency, duration, intensity and/or latency across activities, settings, people and times of the day," so that a BIP (if required) may be developed "that addresses antecedent behaviors, reinforcing consequences of the behavior, recommendations for teaching alternative skills or behaviors and an assessment of student preferences for reinforcement" (8 NYCRR 200.22[a][3]).

Although State regulations call for the procedure of using an FBA when developing a BIP, the Second Circuit has explained that, when required, "[t]he failure to conduct an adequate FBA is a serious procedural violation because it may prevent the CSE from obtaining necessary information about the student's behaviors, leading to their being addressed in the IEP inadequately or not at all" (R.E., 694 F.3d at 190). The Court also noted that "[t]he failure to conduct an FBA will not always rise to the level of a denial of a FAPE," but that in such instances particular care must be taken to determine whether the IEP addresses the student's problem behaviors (id.).

On appeal the parent points to the December 2019 neuropsychological reevaluation report that purportedly demonstrated that the student "exhibited numerous behaviors related to anxiety and depression which should have been monitored and addressed" as a reason why the district should have conducted an FBA (see Parent Ex. 3 at p. 4). Review of the evaluation report reflects that during testing the student "presented as a sweet and polite young girl" who developed a positive working relationship with the evaluator (id.). At that time, the student described herself as "a happy child" who was well liked by peers and who got along with others (id.). In interviews and formal rating measures, the parent endorsed "mild concern" that the student experienced symptoms of anxiety and depression (id.). However, the evaluator concluded that the student did not meet the criteria for any anxiety or depressive disorder at that time and suggested that those symptoms be "monitored" (id.). Therefore, this evidence does not show that the student's anxiety and depression symptoms were such that the district was required to conduct an FBA. Further, the May 2021 IEP does not list the December 2019 neuropsychological evaluation report among the evaluative information considered by the May 2021 CSE, nor does the parent assert a claim that she requested consideration of that evaluation report and the CSE failed to consider it (Dist. Ex. 6 at p. 2).

The parent's argument that the district failed to consider conducting social/emotional testing is also not supported by the evidence in the hearing record. The district school psychologist—who was familiar with the student and conducted the February 2021 psychoeducational evaluation—testified that after referring to the student's IEP for the 2020-21 school year which indicated that there were no social/emotional needs, speaking to the parent, and reviewing the social history, in conjunction with his experience attending the CSE meetings, "there really were no significant social emotional concerns that were presented, and that's why I did not include testing in that area in my report" (Tr. pp. 228, 236-38; Dist. Ex. 1).

The May 2021 IEP reflected information about the student's social/emotional skills from the April 2021 CSE meeting, at which time information from an October 2020 CSE meeting was reviewed (Dist. Ex. 6 at p. 18). Following review of the student's social/emotional strengths, the April 2021 CSE "noted no changes from the previous CSE," referring to the October 2020 discussion (id.). As such, according to the May 2021 IEP, the parent reported that the student was a "social butterfly," had made friends, and that she had no social concerns (id.). The May 2021

IEP reflected reports from Vincent Smith, which indicated that the student did not have any social needs, she could distinguish between a peer relationship and an adult relationship, she made positive peer and adult relationships, and that she was a pleasure to have in class (*id.*).

Further, the dean of students, who participated in the May 2021 CSE meeting, denied that the student had social/emotional "issues" (Tr. p. 342; Dist. Ex. 6 at p. 1). The CSE chairperson testified that an FBA was not conducted and a BIP was not developed based on the feedback the May 2021 CSE received from Vincent Smith staff indicating that the student did not present with behavior that was impeding her learning or the learning of others (Tr. pp. 75-76). As such, the hearing record shows that the need for additional social/emotional testing was considered, and the evaluative information available to the May 2021 CSE did not demonstrate the need to conduct an FBA.

Additionally, contrary to the parent's assertion that the IEP failed to offer behavior supports while simultaneously recommending "a significantly larger class size than [the student] had attended for several years," the May 2021 CSE developed a social/emotional annual goal and recommended supports and other strategies to address behaviors, including "the support of counseling to re-acclimate into a public school setting" (Dist. Ex. 6 at pp. 18, 21, 23). Further, the May 2021 CSE recommended twice monthly counseling for the student and as discussed further below, the support of a 1:1 aide during instructional time because, according to the school psychologist, the student "was coming back from a very different setting, [and] we wanted to provide some additional support to help transition into the school district setting" (Tr. p. 254; Dist. Ex. 6 at pp. 25, 26).¹⁴

Based on the above, the hearing record supports the IHO's finding that the district was not required to conduct an FBA or develop a BIP for the student for the 2021-22 school year, and also that the district provided supports and services to meet her social/emotional needs.

4. 15:1+1 Special Class and 1:1 Aide

The parent appeals from the IHO's finding that the district's recommendation for a 15:1+1 special class with the support of a 1:1 aide was appropriate. The district argues that the IHO's determination was correct.

According to State regulation, a 15:1 special class placement derives from the provision which states that "[t]he maximum class size for those students whose special education needs consist primarily of the need for specialized instruction which can best be accomplished in a self-contained setting shall not exceed 15 students, or 12 students in a State-operated or State-supported

¹⁴ The IEP includes a checkmark indicating the student required "strategies, including positive behavioral interventions, supports and other strategies to address behaviors that impede the student's learning or that of others" (Dist. Ex. 6 at p. 18). While the language contained within this checkbox tracks with the language for conducting an FBA as part of an initial evaluation (*see* 8 NYCRR 200.4[b][5]), as discussed above, the CSE had sufficient information regarding the student's behavioral and emotional needs to develop an appropriate program for the student and based on the rest of the IEP, it does not appear that the student exhibited behaviors that impeded the student's learning or that of others such that the district was required to conduct an FBA.

school" (8 NYCRR 200.6[h][4][i]). With regard to increasing adult support beyond a 15:1 special class setting, State regulation further provides that a 15:1+1 special class placement is designed for students "whose management needs interfere with the instructional process, to the extent that an additional adult is needed within the classroom to assist in the instruction of such students" (8 NYCRR 200.6[h][4][i]). In turn, "management needs" are defined as "the nature of and degree to which environmental modifications and human or material resources are required to enable the student to benefit from instruction" (8 NYCRR 200.1[ww][3][i][d]). A student's "management needs" shall be determined by factors which related to the student's (a) academic achievement, functional performance and learning characteristics; (b) social development; and (c) physical development (see 8 NYCRR 200.1[ww][3][i][a]-[d]).

State regulation includes as a special factor a CSE's consideration of "supplementary school personnel (or one-to-one aide) to meet the individualized needs of a student with a disability" (8 NYCRR 200.4[d][3][vii]; see 20 U.S.C. § 1414[d][3][B]; 34 CFR 300.324[a][2]). A CSE must consider a number of factors before recommending a 1:1 aide on a student's IEP, including: the student's management needs, goals for reducing the need for 1:1 support, the specific support the 1:1 aide would provide, other supports or accommodations that could meet the student's needs, the extent (e.g., portion of the day) or circumstances (e.g., transitions between classes) the student needs the 1:1 aide, staffing ratios, how the support of a 1:1 may enable the student to be educated with nondisabled peers, any potential harmful effect of having a 1:1 aide, and training and support that will be provided to the aide to help the aide understand and address the student's needs (8 NYCRR 200.4[d][3][vii]). Further, a State guidance document, dated January 2012 contemplates that a "goal for all students with disabilities is to promote and maximize independence," and provides examples of student needs that may require a CSE to consider a recommendation for the services of a one-to-one aide, including: the student "presents with serious behavior problems with ongoing (daily) incidents of injurious behaviors to self and/or others or student runs away and student has a functional behavioral assessment and a behavioral intervention plan that is implemented with fidelity"; the student "cannot participate in a group without constant verbal and/or physical prompting to stay on task and follow directions"; the student "needs an adult in constant close proximity for direct instruction," "requires individualized assistance to transition to and from class more than 80 percent of the time," and "needs an adult in close proximity to supervise social interactions with peers at all times" ("Guidelines for Determining a Student with a Disability's Need for a One-to-One Aide," Office of Special Educ. Field Advisory [Jan. 2012], at p. 1 & Attachment 2, available at <http://www.p12.nysed.gov/specialed/publications/1-1aide-jan2012.pdf>).

The May 2021 CSE recommended 10-month services consisting of a district 15:1+1 special class for ELA, math, science and social studies, one 30-minute session per week of individual OT, one 30-minute session per week of group OT, one hour per day of individual specialized reading instruction in a special location, five 40-minute sessions per week of group specialized reading instruction in a special location, two 30-minute sessions per month of individual counseling, and the support of a 1:1 aide during instructional time, which the IEP specifically indicated was not

needed during transitions, lunch, physical education, leisure activities, afterschool, or field trips (Dist. Ex. 6 at pp. 1, 25-26).¹⁵

In order to further support the student in a 15:1+1 special class with a 1:1 aide for instructional time and related services, the May 2021 CSE recommended supplementary aids and services, program modifications, and accommodations such as a copy of class notes (ongoing as needed at school and home), use of a graphic organizer (ongoing as needed across all academic settings), preferential seating (ongoing on a daily basis throughout the school day across all academic settings), refocusing and redirection (ongoing as needed across academic settings and with assistance of a 1:1 aide), proximity to teacher (ongoing throughout the school day in the classroom), books on tape or other recording device (ongoing yearly as needed on a district provided device), and in addition to the 1:1 aide, access to additional adult support as needed across all academic settings (Dist. Ex. 6 at p. 26). The May 2021 IEP provided details about the student's recommended access to assistive technology on an individual district provided device (e.g., speech-to-text, books on tape), and direct and indirect assistive technology consults (*id.*). The May 2021 IEP also included supports for school personnel on behalf of the student consisting of two one-hour sessions twice per year regarding information on disability and implications for instruction (online resources and professional development), and one hour per month of assistance with curriculum modifications (assistive technology support) (*id.*).

Further, the May 2021 CSE recommended multiple testing accommodations for all State, classroom, and all formal and computer-based testing (Dist. Ex. 6 at p. 27). Recommended testing accommodations indicated that test passages, questions, items and multiple-choice responses would be read to the student by a human reader and the student would receive extended time (1.5), use of breaks (five minutes for every 30 minutes of testing), record answers (student records answers in test booklet), special location (up to five students with minimal distractions and a 1:1 aide), and on-task focusing prompts (as needed during testing) (*id.*).

As indicated above, the CSE chairperson testified that after the May 2021 CSE considered the continuum of services, and after determining other options were not appropriate for the student, the May 2021 CSE recommended a 15:1+1 special class with the support of a 1:1 aide for the student to help her address her organizational and attentional needs in her core classes (Tr. pp. 65-66). Specifically, the district school psychologist testified that the student was not successful in the "integrated co-teaching program," which he described as a "lesser restricted environment" than the 15:1+1 special class (Tr. p. 255). The school psychologist described "two 15:1 programs"; one 15:1 had a special education teacher and a maximum of 15 students, the other was a 15:1+1 program which had the addition of a teaching assistant in the classroom, and the material was presented in a more modified fashion than in the 15:1 program (*id.*). He explained that in the 15:1+1 special class, students with reading difficulties may have more opportunities for the teacher to read aloud than in the 15:1 class (Tr. pp. 255-56). Additionally, the school psychologist testified that the student needed "differentiating instruction" of the general education curriculum and that the 15:1+1 special class program was "significantly modified compared to the other educational programs" (Tr. pp. 265-66). When asked why the CSE recommended 1:1 aide services "on top"

¹⁵ The May 2021 IEP 12-month services for summer 2021 consisted of three hours per day of 15:1+1 special class instruction, one hour per day of individual specialized reading instruction, one 30-minute session per week of individual OT, and one 30-minute session per week of individual counseling (Dist. Ex. 6 at p. 27).

of the 15:1+1 special class program, the school psychologist testified one reason was to help the student transition back into the district and adjust to the middle school, and also because "due to the [student's] significant reading and writing deficits, that aide could provide some additional support as well should she need help in those areas" (Tr. p. 256).¹⁶

Although the parent preferred the "small" class sizes Vincent Smith provided during the 2020-21 school year, the hearing record reflects that the district developed a comprehensive program to address the student's needs, albeit in a larger 15:1+1 special class, and articulated appropriate reasons related to the student's needs to recommend that the student receive the support of a 1:1 aide if she decided to transition back into the district schools (see Tr. pp. 64-65; Dist. Exs. 2 at p. 1; 6 at pp. 25, 26).¹⁷ Based on the above, there is no reason to depart from the IHO's finding that the district's recommendation of a 15:1+1 special class with the additional support of a 1:1 aide were sufficient to meet the student's needs and provide her with an educational benefit (IHO Decision at pp. 20-21).

5. Specialized Reading Instruction

The district appeals from the IHO's determinations regarding the recommended specialized reading support (IHO Decision at p. 24).

At the outset, the IHO's specific findings related to the district's recommendation for specialized reading instruction included the following: (1) that it "was not clearly delineated as part of a school day program" and that the CSE's "discussion about 'special location' possibly being the [s]tudent's home rendered the recommendation flawed and incapable of acceptance"; (2) that the information contained in the May 18, 2021, and the September 14, 2021 prior written notices "le[ft] no doubt . . . that the proposed IEP contemplated specialized reading instruction outside of the school day and at home"; (3) that "the [d]istrict failed to make clear or appropriate recommendations for specialized reading instruction in the [s]tudent's IEPs, recommending that these services be provided in an unspecified 'Special Location,' including a 5:1 group reading session and failing to specify that these services be provided by a Wilson Reading certified instructor"; and (4) that if the district was "concerned that perhaps there were too many pull-outs in the [s]tudent's program [it] should have resulted in a reset of the IEP content to achieve an appropriate level of services within the school day" are legally flawed and must be reversed (IHO Decision at p. 20).

¹⁶ During the hearing the CSE chairperson confirmed that in the district "all of the aides are certified teaching assistants," a representation that was made during the May 2021 CSE meeting (Tr. p. 107).

¹⁷ The district school psychologist testified that regarding the May 2021 IEP "as far as the management needs, a small structured environment was recommended, which is what the 15:1+1 classroom is" (Tr. p. 265), illustrating a common predicament: that often what is considered "small" in terms of class size is in the eye of the beholder (M.W. v. New York City Dep't of Educ., 869 F. Supp. 2d 320, 335 [E.D.N.Y. 2012] [holding "[t]hat the size of the class in which [the student] was offered a placement was larger than his parents desired does not mean that the placement was not reasonably calculated to provide educational benefits"], aff'd, 725 F.3d 131 [2d Cir. 2013]), but a parent's decision to provide a smaller classroom ratio is not in and of itself conclusive evidence of the question of whether a public placement provides appropriate services to meet a student's needs (see Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 452 [2d Cir. 2015]).

The district argues that there were no deficiencies in providing specialized reading support during the school day, and asserts that the IHO erred in finding "that it remained unclear at the conclusion of the hearing whether the [d]istrict could have delivered the [student's] Wilson reading instruction with certified instructors in the group specialized reading instruction" sessions. The district argues that the IHO's finding was inconsistent with the hearing record as both the 15:1+1 special class teacher and the DaVinci Collaborative representative testified regarding the implementation of the proposed program recommendation. The parent argues that the IHO correctly determined that the district failed to provide the student a FAPE by failing to provide an appropriate reading program.

In addition to the special class recommendation discussed above, the May 2021 IEP included a recommendation for one hour per day of individual specialized reading instruction in a special location and five 40-minute sessions per week of group specialized reading instruction in a special location beginning September 2, 2021 (Dist. Ex. 6 at p. 25). The IEP also included a recommendation for one hour of specialized reading instruction at home from July 1, 2021 through August 11, 2021 (*id.* at p. 27). The May 18, 2021 prior written notice indicated that the student's daily individual specialized reading instruction would be delivered at home and the daily group specialized reading instruction would be delivered during the school day (Dist. Ex. 5 at p. 1). State regulation defines "specially designed reading instruction" as "specially designed individualized or group instruction or special services or programs . . . in the area of reading . . . which is provided to a student with a disability who has significant reading difficulties that cannot be met through general reading programs" (8 NYCRR 200.6[b][6]). State guidance discussing specialized reading instruction notes that the term "specialized reading instruction" need not appear on an IEP and that such instruction may be provided through various means, including via a resource room program, as a consultant teacher service, in a special class, or as a related service ("Guidelines on Implementation of Specially Designed Reading Instruction to Students with Disabilities and Clarification About 'Lack of Instruction' in Determining Eligibility for Special Education," VESID Mem. [May 1999], available at <http://www.p12.nysed.gov/specialed/publications/policy/readguideline.html>).¹⁸ In addition, the guidance specifies that the CSE should "consider what prior instructional methods and strategies have been utilized with the student to avoid reinstating programs that have not proven effective in the past" and further indicates that "[i]nstructional methodology may be discussed at the [CSE] but is not specified on an IEP" (*id.*).

The IHO's determination that the district was required to provide all of the student's specialized reading services during a regular school day is contradicted by guidance from the United States Department of Education. In Letter to Irby, a district inquired whether it could remove physical education from a student's schedule in order to provide specialized reading

¹⁸ State guidance specific to students with disabilities resulting from dyslexia, dysgraphia, and dyscalculia emphasizes that "[t]he specially designed instruction that is appropriate to the unique needs of each student with a disability resulting from dyslexia, dysgraphia, and/or dyscalculia may vary across individual students with each of these specific learning disabilities" and that "[b]ecause of this, there is no single approach, product, or method of delivering specially designed instruction to such students that is required in federal or State law and regulations" ("Students with Disabilities Resulting from Dyslexia, Dysgraphia, and Dyscalculia: Questions and Answers, at p. 6, Office of Special Educ. [Aug. 2018], available at <http://www.p12.nysed.gov/specialed/publications/documents/q-and-a-students-with-dyslexia-dysgraphia-dyscalculia.pdf>; see generally Educ. Law § 305[56]; Dear Colleague Letter, 66 IDELR 188 [OSERS 2015]).

instruction during the school day (55 IDELR 231 [OSEP 2010]). The Office of Special Education Programs (OSEP) advised the school district that it was inappropriate to deny a student access to nondisabled peers in State-mandated physical education in order to provide additional reading instruction (*id.*). OSEP stated that a CSE should consider additional strategies and scheduling, such as extended school day or extended school year services, if the student required such instruction in order to receive a FAPE (*id.*). Here, the district, in its prior written notice, advised the parent that the student would have received group specialized reading instruction during the school day and individual specialized reading instruction after school, which is consistent with OSEP's guidance (*see* Dist. Ex. 5 at p. 1).

Nevertheless, the location of the delivery of the service should have been a determination made by the May 2021 CSE and noted in the student's IEP rather than merely referencing "special location" with respect to the location of the student's reading instruction. The "location" of services in the context of a student's IEP generally refers to the type of environment that is the appropriate place where a particular service, program modification or accommodation would be provided." ("Guide to Quality Individualized Education Program (IEP) Development and Implementation," at p. 18, Office of Special Educ. Mem. [Dec. 2010], available at <https://www.p12.nysed.gov/specialed/publications/iepguidance/IEPguideDec2010.pdf> at p. 44). "Frequency, duration and location must be stated with sufficient clarity to be understood by all persons involved in the development and implementation of the IEP" (*id.* at p. 43).

However, any failure to be more specific in identifying the location of services amounts to a procedural violation, , which only results in a denial of a FAPE if the procedural inadequacy (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; *Winkelman*, 550 U.S. 516, 525-26 [2007]; *R.E.*, 694 F.3d at 190; *M.H.*, 685 F.3d at 245).

In reviewing why the May 2021 CSE noted the location of the student's reading instruction as a "special location" the CSE chairperson described a discussion and shared concern during the May 2021 CSE meeting about the student possibly having too many pull-out sessions during the school day (Tr. p. 74). He testified that the CSE discussed the potential of having the specialized reading instruction provided after school (*id.*). According to the CSE chairperson, no final decision was made, but review of the May 2021 IEP reveals the IEP specified "special location" for specialized reading instruction beginning in September 2021 and "home" for summer services provided from July through August 2021 (Tr. pp. 74-75; Dist. Ex. 6 at pp. 25, 27). According to the CSE chairperson, the May 2021 IEP delineation of "special location" for specialized reading instruction was to give providers flexibility in where they could provide the service (e.g., provider's classroom, therapy room, or push-in into a classroom) (Tr. pp. 72-74).

As noted above, there is nothing intrinsically wrong with providing reading instruction after school, accordingly the delivery of reading instruction after school in and of itself is not a basis for finding that the service impeded the student's right to a FAPE or caused a deprivation of educational benefit. Turning to the parent's reasoning for disagreeing with the provision of reading

instruction after school, the dean of students at Vincent Smith testified that she believed the student would be overly fatigued by having an hour of reading instruction after the school day and felt that it was in conflict with a recommendation that the student participate in after school activities (Tr. pp. 360-61, 368). Additionally, the student's reading instructor at Vincent Smith testified that she believed the student would be "completely fatigued" if she received an hour of reading instruction after school and that it would not allow her to have any social life (Tr. pp. 524-25). Certainly, these are concerns that should have been discussed at the May 2021 CSE meeting; however, the hearing record shows that the CSE discussed the delivery of reading services after school, that the May 2021 CSE explicitly recommended home services during the summer, and that the district provided the parent with prior written notice showing the student would have received reading instruction at home during the 10-month school year (Tr. Pp. 72-75; Dist. Exs. 5 at p. 1; 6 at pp. 25, 27); yet, there is no indication that these concerns were raised at the meeting or otherwise communicated to the district.

Based on the foregoing, the IHO's determination that "deficiencies in providing specialized reading support during the school day" resulted in a denial of a FAPE to the student must be reversed.

Next, the district asserts that the IHO erred by finding that it was "unclear at the conclusion of the hearing whether the [d]istrict could have delivered the Wilson reading instruction with certified instructors in the group specialized reading instruction" (IHO Decision at p. 22).

In general, a CSE is not required to specify methodology on an IEP, and 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], aff'g 2011 WL 12882793, at *16 [E.D.N.Y. May 26, 2011] [noting the "broad methodological latitude" conferred by the IDEA]; 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 [indicating the district's "broad discretion to adopt programs that, in its educational judgment, are most pedagogically effective"]). As long as any methodologies referenced in a student's IEP are "appropriate to the [student's] needs" (34 CFR 300.39[a][3]), the omission of a particular methodology is not necessarily a procedural violation (see R.B., 589 Fed. App'x at 576; R.E., 694 F.3d at 192-94 [upholding an IEP when there was no evidence that the student "could not make progress with another methodology"]). However, where the use of a specific methodology is required for a student to receive an educational benefit, the student's IEP should indicate this (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]; see also A.M. v. New York City Dep't of Educ., 845 F.3d 523, 544-45 [2d Cir. 2017]; R.B., 589 Fed. App'x at 576; A.S., 573 Fed. App'x at 66 [finding that it could not "be said that [the student] could only progress in an ABA program"]).

The CSE chairperson testified that Wilson reading instruction was "a multisensory approach [to] reading and writing intervention and as a methodology, it follow[ed] the Orton-Gillingham methodologies for reading and writing instruction" (Tr. p. 79). The CSE chairperson

further testified that as a matter of practice, specific methodology or pedagogy were not referenced on an IEP; however, in the case of this student, the goals were developed with Wilson-based reading instruction in mind because the CSE "felt it necessary to capture the [student]'s present levels of performance in the program that she was currently working on at Vincent Smith" (Tr. p. 70; see Dist. Ex. 6 at pp. 22-23). Review of the May 2021 IEP shows that it explicitly indicated the student "should continue to participate in an Orton Gillingham-based (O-G) program to improve her sound-symbol association and syllable awareness for reading and spelling" (Dist. Ex. 6 at p. 16).

The CSE chairperson testified that the May 2021 CSE recommended both daily 60-minute individual and 40-minute small group specialized reading instruction to provide a level of service that would meet the student's individualized needs and also give her opportunity to work in a group (Tr. p. 73). The director of special education testified at the May 2021 CSE meeting "[t]here was a lot of conversation" about the January 2021 reading evaluation, what the student was doing in the classroom, the reading methodologies used with the student, and what her then-current levels were (Tr. pp. 33-34). She testified that the student's classroom teacher and staff from DaVinci Collaborative would be responsible for implementing the student's specialized reading mandate (Tr. p. 34).

As indicated above, reading teachers are expected to be "knowledgeable about developmentally appropriate and well-balanced instructional methodologies in reading" ("Guidelines on Implementation of Specially Designed Reading Instruction to Students with Disabilities and Clarification About "Lack of Instruction" in Determining Eligibility for Special Education," VESID Mem. [May 1999], available at <http://www.p12.nysed.gov/specialed/publications/policy/readguideline.html>). State regulation provides the qualifications for who may provide specially designed reading instruction (8 NYCRR 200.6[b][6]; see 8 NYCRR 52.21[b][3][xi], 80-2.7, 80-3.3, 80-3.7[a][3][iv]). Additionally, when "[w]hen a remedial service is included in the individualized education program, such service shall be provided by appropriately certified or licensed individuals" (8 NYCRR 200.6[b][1]).

In finding that the district did not prove that it could have provided the student with instruction provided by "certified instructors in the group specialized reading," the IHO did not reference any part of the hearing record indicating that the district's proposed reading instruction would not have been delivered by professionals with the certification required by State regulation to provide specially designed reading instruction (IHO Decision at p. 22; see Tr. pp. 158-59, 173, 179, 196). Rather, review of the hearing record shows that the district could have provided an instructor certified in the Wilson program for the individual reading instruction (Tr. pp. 172-74). Additionally, for the group instruction, the student would have received instruction through a special education teacher, although that teacher would not have been trained in Wilson (Tr. Pp. 178-79). According to State regulation, the proposed providers were properly licensed or certified to provide the student with specially designed reading instruction (see 8 NYCRR 200.6[b][1], [6]; Ganje v. Depew Union Free Sch. Dist., 2012 WL 5473491, at *15 [W.D.N.Y. Sept. 26, 2012], adopted, 2012 WL 5473485 [W.D.N.Y. Nov. 9, 2012]). Accordingly, the IHO's finding on this point must be overturned.

6. 15:1+1 Special Class Profile

The IHO determined that at the time of the CSE meeting with regard to the 15:1+1 special class placement recommendation, "information was not available to help the CSE determine if the grouping proposed would be appropriate and, at the hearing, the [d]istrict was not able to provide adequate detail of the class profile" (IHO Decision at p. 21). In addition, the IHO found that district witnesses lacked knowledge of the class profile at the assigned school and "[a]bsent that information, the recommendation [wa]s flawed and inappropriate" (*id.*). In its appeal, the district contends that an insufficient class profile was not a reason for challenging the May 2021 CSE's recommendation.

Generally, the sufficiency of the program offered by the district must be determined on the basis of the IEP itself (R.E., 694 F.3d at 186-88). The Second Circuit has explained that "[s]peculation that the school district will not adequately adhere to the IEP is not an appropriate basis for unilateral placement" (R.E., 694 F.3d at 195; see *E.H. v. New York City Dep't of Educ.*, 611 Fed. App'x 728, 731 [2d Cir. May 8, 2015]; *R.B. v. New York City Dep't of Educ.*, 603 Fed. App'x 36, 40 [2d Cir. Mar. 19, 2015] ["declining to entertain the parents' speculation that the 'bricks-and-mortar' institution to which their son was assigned would have been unable to implement his IEP"], quoting *T.Y. v. New York City Dep't of Educ.*, 584 F.3d 412, 419 [2d Cir. 2009]; *R.B. v. New York City Dep't of Educ.*, 589 Fed. App'x 572, 576 [2d Cir. Oct. 29, 2014]). However, a district's assignment of a student to a particular public school site must be made in conformance with the CSE's educational placement recommendation, and the district is not permitted to deviate from the provisions set forth in the IEP (*M.O. v. New York City Dep't of Educ.*, 793 F.3d 236, 244 [2d Cir. 2015]; *R.E.*, 694 F.3d at 191-92; *T.Y.*, 584 F.3d at 419-20; see *C.F. v. New York City Dep't of Educ.*, 746 F.3d 68, 79 [2d Cir. 2014] [holding that while parents are entitled to participate in the decision-making process with regard to the type of educational placement their child will attend, the IDEA does not confer rights on parents with regard to the selection of a school site]). The Second Circuit has held that claims regarding an assigned school's ability to implement an IEP may not be speculative when they consist of "prospective challenges to [the assigned school's] capacity to provide the services mandated by the IEP" (*M.O.*, 793 F.3d at 245; see *Y.F. v. New York City Dep't of Educ.*, 659 Fed. App'x 3, 6 [2d Cir. Aug. 24, 2016]; *J.C. v. New York City Dep't of Educ.*, 643 Fed. App'x 31, 33 [2d Cir. 2016]; *B.P. v. New York City Dep't of Educ.*, 634 Fed. App'x 845, 847-49 [2d Cir. 2015]). Such challenges must be "tethered" to actual mandates in the student's IEP (see *Y.F.*, 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 *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.*, 2016 WL 3981370, at *13; *Q.W.H. v.*

New York City Dep't of Educ., 2016 WL 916422, at *9 [S.D.N.Y. Mar. 7, 2016]; N.K. v. New York City Dep't of Educ., 2016 WL 590234, at *7 [S.D.N.Y. Feb. 11, 2016]).

Neither the IDEA nor federal regulations require students who attend a special class setting to be grouped in any particular manner. The United States Department of Education has opined that a student must be assigned to a class based upon his or her "educational needs as described in his or her IEP" and not on "a categorical placement," such as one based on the student's disability category (Letter to Fascell, 18 IDELR 218 [OSEP 1991]). While unaddressed by federal law and regulations, State regulations set forth some requirements that school districts must follow for grouping students with disabilities. In particular, State regulations provide that in many instances the age range of students in a special education class in a public school who are less than 16 years old shall not exceed 36 months (8 NYCRR 200.6[h][5]). State regulations also require that in special classes, students must be suitably grouped for instructional purposes with other students having similar individual needs (8 NYCRR 200.1[ww][3][ii]; 200.6[a][3], [h][3]; see Walczak, 142 F.3d at 133 [approving an IEP that placed a student in a classroom with students of different intellectual, social, and behavioral needs, where sufficient similarities existed]).¹⁹ State regulations further provide that determinations regarding the size and composition of a special class shall be based on the similarity of the individual needs of the students according to levels of academic or educational achievement and learning characteristics, levels of social development, levels of physical development, and the management needs of the students in the classroom (see 8 NYCRR 200.6[h][2]; see also 8 NYCRR 200.1[ww][3][i][a]-[d]). SROs have often referred to grouping in the areas of academic or educational achievement, social development, physical development, and management needs collectively as "functional grouping" to distinguish that set of requirements from grouping in accordance with age ranges (see, e.g., Application of a Student with a Disability, Appeal No. 17-026).

The principal of the assigned school site testified that she met with the parent when she visited the school and shared with her that she was not able to answer the parent's questions that pertained to specific students, their learning disability, or academic needs that could identify them, as she did not believe it was appropriate to share that information with the parent due to the privacy rights of the students in the class (Tr. pp. 113, 119-20, 127). However, the principal informed the parent that at the time of her visit there were eight students enrolled in the 15:1+1 special class and regarding the functioning level of the students enrolled in the 15:1+1 special class, "there could be various disabilities, but the students had similar academic levels" (Tr. pp. 122, 123, 128-29). The principal further testified that she informed the parent what the students would be working on, how the teachers would differentiate instruction based on the student's needs, and that the school used a Regents track curriculum that followed State standards (Tr. pp. 121, 127). The principal described the student's teachers to the parent and informed her that she "was going to make sure that [the student] had a [certified teaching assistant] . . . [who] was also a certified teacher" to provide the student's 1:1 aide support (Tr. p. 121).

While the district must implement a student's IEP consistent with the grouping requirements of State regulation, the Second Circuit has held that the IDEA does "not expressly require school districts to provide parents with class profiles" (Cerra, 427 F.3d at 194; see N.K.,

¹⁹ To be clear, there is no requirement in the IDEA or State regulation requiring that grouping be conducted in accordance with a student's chronological grade.

961 F. Supp. 2d at 590 [noting that a district is not required to provide parents with "details about the specific group of children with which their child will be placed"]; E.A.M. v New York City Dep't of Educ., 2012 WL 4571794, at *11 [S.D.N.Y. Sept. 29, 2012]). Here, concerns about the likelihood that the student would be appropriately grouped with other students are speculative given that the student never attended the assigned public school site (M.C. v. New York City Dep't of Educ., 2015 WL 4464102, at *7 [S.D.N.Y. July 15, 2015]; R.B. v. New York City Dep't of Educ., 15 F. Supp. 3d 421, 436 [S.D.N.Y. 2014], aff'd, 603 Fed. App'x 36 [2d Cir. Mar. 19, 2015]; B.K. v. New York City Dep't of Educ., 12 F. Supp. 3d 343, 371 [E.D.N.Y. 2014]; N.K., 961 F. Supp. 2d at 590; see J.L. v. City Sch. Dist. of New York, 2013 WL 625064, at *11 [S.D.N.Y. Feb. 20, 2013] [noting that the "IDEA affords the parents no right to participate in the selection of . . . their child's classmates"]). Indeed, claims regarding grouping are inherently speculative as the district cannot guarantee the composition of the class that the student would have attended (M.S. v. New York City Dep't of Educ., 2 F. Supp. 3d 311, 332 n.10 [E.D.N.Y. 2013]; cf. R.E., 694 F.3d at 187, 192 [noting that at the time of the placement decision, a parent cannot have any guarantee that a specific teacher will be available to implement an IEP]).

Based on the foregoing, the IHO's determination that the district's recommendation was flawed and inappropriate because it was not able to provide a class profile of the other students in the proposed 15:1+1 special class was erroneous.

VII. Conclusion

Having found that the evidence in the hearing record supports a finding 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 issue of whether Vincent Smith was an appropriate unilateral placement for the student or whether equitable considerations support an award of tuition reimbursement (Burlington, 471 U.S. at 370; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 66 [2d Cir. 2000]).

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

THE APPEAL IS SUSTAINED.

THE CROSS-APPEAL IS DISMISSED.

IT IS ORDERED that the IHO's decision dated June 15, 2022, is modified by reversing those portions which found that the district failed to offer the student a FAPE for the 2021-22 school year and ordered the district to fund the student's tuition costs at Vincent Smith.

Dated: Albany, New York
August 26, 2022

STEVEN KROLAK
STATE REVIEW OFFICER