The University of the State of New York

The State Education Department
State Review Officer
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No. 12-170

Application of the NEW YORK CITY DEPARTMENT OF EDUCATION for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:
Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for petitioner, Brian J. Reimels, Esq., of counsel

Kule-Korgood, Roff, and Associates, PLLC, attorneys for respondents, Michele Kule-Korgood, Esq., of counsel

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 which found that it failed to offer an appropriate educational program to respondents' (the parents') daughter and ordered it to partially reimburse the parents for their daughter's tuition costs at the Yaldeinu School (Yaldeinu) for the 2011-12 school year. The parents cross-appeal from the impartial hearing officer's determination which reduced their request for tuition reimbursement. 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

I was appointed to conduct this review on October 29, 2014. Although the parties' familiarity with the facts and procedural history of the case is presumed, a brief description of the student's educational history, the parents' due process complaint notice, and the IHO's decision is provided for background purposes.

The hearing record reflects that the student has received diagnoses of a seizure disorder and Desbuquois syndrome and exhibits deficits in the areas of cognition, academic achievement, communication, socialization, self-care, fine and gross motor skills, and also demonstrates rigidity, tantrum behaviors, and attention difficulties (Dist. Exs. 3 at pp. 2-4; 4; 7; 8; 9; Parent Ex. J at p. 7).[1] The student has received special education services since infancy and began attending Yaldeinu during the 2007-08 school year, where she continued to attend through the 2011-12 school year, the year at issue in this appeal (Tr. pp. 1174-77). During the 2011-12 school year, the student was in a 6:1+6 class, received speech-language therapy, occupational therapy (OT), and physical therapy (PT) at Yaldeinu, and received additional PT after school and applied behavior analysis (ABA) services at home (Tr. pp. 878, 998-99, 1001, 1076-77).[2] The clinical director at Yaldeinu described the student's 6:1+6 class as comprised of six students, one master's level teacher, and six instructors (Tr. p. 878).

On May 12, 2011 the CSE convened for the student's triennial review and to develop her IEP for the 2011-12 school year (Dist. Ex. 2).[3] The May 2011 IEP reflected that the CSE deemed the student eligible for special education programs and services as a student with autism and recommended placement in a 12-month 6:1+1 special class in a specialized school (Dist. Ex. 2 at p. 1).[4] With regard to related services, the CSE recommended the student continue to receive three 30-minute individual PT sessions per week; increased her speech-language services to five 30-minute individual sessions per week; and initiated OT services of four 30-minute individual sessions per week, counseling services of two 30-minute sessions per week in a group of two, and the support of a full time 1:1 behavior management paraprofessional (compare Dist. Ex. 2 at p. 12, with Parent Ex. J at p. 15).[5] Additionally, a BIP was developed and attached to the May 2011 IEP (Dist. Ex. 2 at p. 13).[6]

By letter dated June 15, 2011, the district summarized the recommendations made by the May 12, 2011 CSE and notified the parent of the public school site to which the student was assigned for the 2011-12 school year (Dist. Ex. 12). After visiting the school the parents sent the

[1] The hearing record reflects that Desbuquois syndrome is characterized by among other things, peculiar skeletal changes (Parent Ex. J at p. 7). I note that the May 13, 2011 physical therapy progress report reflects that the student's diagnosis of Desbuquois syndrome was pending at that time (Dist. Ex. 10 at p. 1).

[2] Yaldeinu has not been approved by the Commissioner of Education as a school with which districts may contract to provide special education programs and related services (see 8 NYCRR 200.1[d], 200.7).

[3] Although the May 2011 IEP indicated that it was an annual review, the district representative who attended the meeting testified that it was a "triannual" review (Tr. p. 25; Dist. Ex. 2 at p. 2).

[4] The student's classification as a student with autism is not in dispute in this appeal.

[5] The hearing record reflects that during the meeting the CSE was made aware that the student received PT outside of the private school and the parent obtained and forwarded a PT progress report dated May 13, 2011 to the district, and added information therein to the IEP (Tr. pp. 38-39, 1219-20; Dist. Ex. 2 at pp. 6, 8, 12; Parent Ex. X).

[6] According to the district representative at the CSE meeting, she developed a draft functional behavior assessment (FBA) of the student prior to the meeting (Tr. p. 139; Dist. Ex. 6). Also, testimony by the district representative and the district social worker indicate that the social worker completed a social history update on the student just prior to the start of the May 2011 CSE meeting (Tr. pp. 99-100, 343-45: Dist. Ex. 5).

district a letter dated July 7, 2011, indicating that they had determined that the May 2011 IEP and the assigned school were not appropriate to meet the student's needs (Parent Ex. F at p. 1). The parents sent the district an additional letter dated August 18, 2011, in which the parents reiterated their concerns and notified the district that they would place the student at Yaldeinu for the 2011-12 school year and would be requesting an impartial hearing to pursue public funding for the student's tuition (Parent Ex. G at p. 1).

A. Due Process Complaint Notice

Pursuant to a due process complaint notice dated August 26, 2011, the parents requested an impartial hearing seeking tuition reimbursement for the parents' placement of the student at Yaldeinu for the 2011-12 school year, as well as reimbursement for 15 hours per week of home-based ABA services, two hours per week of ABA supervision/consulting services, three 30-minute sessions of PT per week, and 40 hours of home based ABA services per week during the period before and after the student's summer program (Parent Ex. A). The parents asserted that the district failed to offer the student a free appropriate public education (FAPE) for the 2011-12 school year, that Yaldeinu was an appropriate placement for the student, and that equitable considerations weighed in the parents favor (id.). The parents also invoked the students' pendency (id. at p. 4).

Generally, the parents asserted that the district failed to utilize appropriate scientifically-based teaching methods, failed to comply with Section 504 of the Rehabilitation Act of 1973 and 42 U.S.C. § 1983, and failed to conduct adequate evaluations (Parent Ex. A at p. 1). In support of their claim that the district failed to offer the student a FAPE for the 2011-12 school year, the parents raised a number of more specific claims (Parent Ex. A). The parents alleged that (1) the May 2011 CSE failed to conduct a sufficient triennial evaluation, including updated OT, PT and speech-language evaluations; (2) the CSE failed to conduct a functional behavioral assessment (FBA) or develop an adequate behavioral intervention plan (BIP); (3) the CSE made recommendations based on policy rather than the student's educational needs; (4) none of the student's scores in assessments are reported in the district's evaluation; (5) the CSE improperly removed the student's bilingual classification over the parents' objections; and (6) the parents were precluded from full participation in the May 2011 CSE meeting because the program recommendation was not discussed (id. at pp. 2-3). The parents also alleged that the 6:1+1 special class recommendation was inappropriate because the student required more 1:1 instruction than a 6:1+1 student-to-teacher ratio could provide, that the present levels of performance included in the May 2011 IEP were insufficient, did not provide an adequate baseline and were not consistent with the district's evaluation results, and that the student's goals were insufficient, vague, unmeasurable, and lacked methods of measurement (id. at p. 3). Additionally, the parents objected to the public school the student would have attended in September 2011 (id. at p. 3-4). Regarding the assigned public school site, the parents alleged that it would have been inappropriate for the student because the student-to-teacher ratio, curriculum, and level of individualized instruction were inadequate to meet the student's needs (id. at p. 3). More specifically, the parents alleged that the students in the assigned classroom would not have provided a suitable and functional peer group for the student, that the assigned school would not have had a behavior analyst available to conduct an FBA and BIP, and that the physical environment at the assigned school would have been inappropriate because it was too loud and noisy and would not have had the equipment required to meet the student's sensory needs (id. at pp. 3-4).

B. Impartial Hearing Officer Decision

An impartial hearing convened on September 21, 2011 and concluded on April 4, 2012, after nine nonconsecutive hearing dates (Tr. pp. 1-1370). The IHO issued an interim decision, dated September 22, 2011, awarding the student pendency entitlements retroactive to August 26, 2011 based on an unappealed IHO decision dated October 24, 2008 (Interim IHO Decision).[7] In a decision dated July 24, 2012, the IHO determined that the district failed to offer the student a FAPE for the 2011-12 school year and awarded the parents reimbursement for 75% of the cost of the student's tuition at Yaldeinu (IHO Decision at p. 32-33).[8]

The IHO found in favor of the district on a number of procedural grounds before finding in favor of the parents on a number of substantive issues (IHO Decision at pp. 17-27). The IHO initially determined that the district did not timely conduct a triennial evaluation of the student, but that the district's failure did not result in a denial of FAPE (id. at pp. 17-20). However, the IHO went on to find that the May 2011 IEP included overly broad statements regarding the student's present levels of performance in many areas of need, which resulted in insufficient and unmeasurable goals (id. at pp. 24-25). Additionally, while the IHO rejected the parents' arguments regarding the development of the FBA and BIP, finding that there was no violation because they were in place at the time the IEP was finalized (id. at pp. 20-21), the IHO found that the FBA and BIP were not substantively reliable (id.at p. 24). The IHO further determined that the recommended 6:1+1 special class recommendation was inappropriate because it did not provide the student with sufficient individual instruction (id. at pp. 21-23). Specifically, the IHO rejected the CSE's reasoning that the student would benefit from methodologies other than ABA and found that the IEP would not have fostered independence (id. at pp. 22-23). Intertwined in his findings regarding the appropriateness of the 6:1+1 special class, the IHO also found the curriculum at the assigned school inappropriate because the student would not have been able to attend for long periods and would only receive 20 minutes of 1:1 instruction each day (id. at p. 23). The IHO also found that the public school site would not have been appropriate (id. at pp. 26-27). Additionally, while the IHO found that the CSE improperly relied on teacher input to modify scores from the psychoeducational evaluation report, that the social history was not conducted properly, and that the frequency of pull out services would not allow the student to generalize her skills, the IHO did not separately analyze whether those violations resulted in a denial of FAPE (id. at p. 25-27).

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[7] The IHO determined that the student's pendency entitlements for the September through June portion of the school year included placement at Yaldeinu, along with five hours of ABA services per week, one hour of ABA supervision per week, two weekly 30-minute OT sessions, three weekly 30-minute PT sessions, and two weekly 45-minute speech-language therapy sessions; and for the July and August portion of the school year included 25 hours of ABA services, two hours of ABA supervision, three 60-minute OT sessions, three 60-minute PT sessions, and three 60-minute speech-language therapy sessions per week (IHO Interim Decision at pp. 2-3). Neither party has appealed from the IHO's interim decision on pendency and it has therefore become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]). I note that the only services the parents requested in the due process complaint notice that the student has not already received at district expense through pendency are an additional ten hours per week of home-based ABA services and an additional one hour per week of ABA supervision (compare IHO Interim Decision at pp. 2-3, with Parent Ex. A at p. 4).

[8] On July 25, 2012, the IHO corrected the omission of the April 4, 2012 hearing date from the July 24, 2012 IHO Decision (Corrected IHO Decision at p. 33).

The IHO determined that the parents' placement of the student at Yaldeinu for the 2011-2012 school year was an appropriate placement (IHO Decision at pp. 27-30). The IHO found that the student exhibited progress while attending Yaldeinu and that the private school met the student's academic, social/emotional, speech-language, behavioral, attentional, and physical needs (id. at p. 28-29). The IHO also found the district's allegation that the private school was too restrictive to be speculative based on the IHO's determination that the district did not properly evaluate the student (id. at p. 28). In addition, the IHO determined that although the private school did not offer a 12-month program, he did not find that the lack of a 12-month program rendered the private school inappropriate (id.).

Finally, the IHO determined that although the parents visited the district's proposed placement and sent a timely letter to the district rejecting the offered placement, the parents did not cooperate with the CSE and had no intention of enrolling the student in public school (IHO Decision at pp. 30-32). In particular, the IHO found that the parents and private school staff withheld information from the CSE regarding the student's related services and proposed goals (id. at p. 31). The IHO also noted the parents' failure to inform the CSE that the student was receiving at-home ABA services (id. at p. 32). Based on equitable considerations, the IHO reduced reimbursement by 25% and awarded the parents reimbursement for 75% of the cost of the student's tuition at Yaldeinu, including reimbursement for 75% of the cost of the student's home based PT and ABA services, and the full cost of transportation (id. at pp. 32-33).

IV. Appeal for State-Level Review

The district appeals from the IHO's decision that the district did not offer the student a FAPE for the 2011-12 school year, that Yaldeinu and the additional at-home services were an appropriate placement for the student, and that equitable considerations warranted only a 25% reduction in reimbursement. The parents cross-appeal the IHO's decision to reduce reimbursement by 25%, the IHO's consideration of the district's FBA, and the IHO's finding that the district's failure to conduct a proper triennial evaluation did not result in a denial of FAPE.

The parties' familiarity with the particular issues for review on appeal in the district's petition for review, the parents' answer and cross-appeal, and the district's answer to the cross-appeal is presumed and the parties' arguments will not be fully recited herein. However, upon review of the pleadings, the following issues must be resolved on appeal:

1. Did the IHO err in finding that the district committed a procedural error in failing to reevaluate the student within three years from the student's last evaluation and that such error did not result in a denial of FAPE or prevent the parent from participating in the development of the May 2011 IEP;

2. Did the IHO err in finding that the present levels of performance contained in the May 2011 IEP were overly broad and did not accurately report the student's scores on standardized testing;

3. Did the IHO err in finding that the annual goals contained in the May 2011 IEP were not properly developed and inappropriate to address the student's needs;

4. Did the IHO err in finding that the FBA and BIP developed on the same day as the May 2011 IEP were not procedurally defective;

5. Did the IHO err in finding that the FBA and BIP were substantively defective and did not sufficiently address the student's behavioral needs;

6. Did the IHO err in finding that the recommended program, consisting of a 6:1+1 special class in a specialized school with related services including a full time 1:1 paraprofessional, did not have sufficient 1:1 instruction to provide the student with an educational benefit;

7. Did the IHO err in finding that the May 2011 CSE inappropriately discontinued the student's at-home ABA services and that the student required instruction using ABA methodology in order to receive an educational benefit; and

8. Did the IHO err in considering the parents' arguments related to the assigned public school as reasons for finding a denial of FAPE?

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. 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; 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. Florida 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]). 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., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at *10 [S.D.N.Y. Feb. 9, 2007]). 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; A.H. v. Dep't of Educ., 394 Fed. App'x 718, 720, 2010 WL 3242234 [2d Cir. Aug. 16, 2010]; E.H. v. Bd. of Educ., 2008 WL 3930028, at *7 [N.D.N.Y. Aug. 21, 2008], aff'd, 361 Fed. App'x 156, 2009 WL 3326627 [2d Cir. Oct. 16, 2009]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007], aff'd, 293 Fed. App'x 20, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

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 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]; Perricelli, 2007 WL 465211, at *15). 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 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; G.B. v. Tuxedo Union Free Sch. Dist., 751 F. Supp. 2d 552, 573-80 [S.D.N.Y. 2010], aff'd, 486 Fed. App'x 954, 2012 WL 4946429 [2d Cir. Oct. 18, 2012]; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

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]; Tarlowe v. New York City Bd. of Educ., 2008 WL 2736027, at *6 [S.D.N.Y. July 3, 2008] [noting that a CSE must consider, among other things, the "results of the initial evaluation or most recent evaluation" of the student, as well as the "'academic, developmental, and functional needs'" of the student]), 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]; see also Application of the Dep't of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-059; Application of the Dep't of Educ., Appeal No. 06-029; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9).

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; M.P.G. v. New York City Dep't of Educ., 2010 WL 3398256, at *7 [S.D.N.Y. Aug. 27, 2010]).

VI. Discussion

A. Preliminary Matters

1. Scope of Impartial Hearing and Review

To the extent that the IHO considered the frequency and location of related services offered in the May 2011 IEP as a contributing factor to his determination that the district did not offer the student a FAPE, the IHO exceeded his jurisdiction as the parents did not raise any allegations regarding the recommended related services in their due process complaint notice (compare IHO Decision at pp. 26-27, with Parent Ex. A). 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 agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.508[d][3][i], 300.511[d]; 8 NYCRR 200.5[j][1][ii]), or the original due process complaint is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.508[d][3][ii]; 8 NYCRR 200.5[i][7][b]; B.M. v New York City Dep't of Educ., 2014 WL 2748756, at *2 [2d Cir. 2014]; N.K. v. New York City Dep't of Educ., 961 F. Supp. 2d 577, 584-586 [S.D.N.Y. 2013]; J.C.S. v Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, at *8-*9 [S.D.N.Y. Aug. 5, 2013]; C.H. v. Goshen Cent. Sch. Dist., 2013 WL 1285387, at *9 [S.D.N.Y. Mar. 28, 2013]; B.P. v. New York City Dep't of Educ., 841 F. Supp. 2d 605, 611 [E.D.N.Y. 2012]; M.R. v. S. Orangetown Cent. Sch. Dist., 2011 WL 6307563, at *12-*13 [S.D.N.Y. Dec. 16, 2011]; C.D. v. Bedford Cent. Sch. Dist., 2011 WL 4914722, at *13 [S.D.N.Y. Sept. 22, 2011]; R.B. v. Dep't of Educ., 2011 WL 4375694, at *6-*7 [S.D.N.Y. Sept. 16, 2011]; M.P.G., 2010 WL 3398256, at *8; see K.L. v. New York City Dep't of Educ., 530 Fed. App'x 81, 87 [2d Cir. 2013]). 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., 502 F.3d 708 [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 those issues (see Dep't of Educ. 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]).

The parents did not raise any allegations in the due process complaint notice regarding the related services recommended in the May 2011 IEP and it cannot reasonably be read to include a claim that the frequency or location of the related services was inappropriate (Parent Ex. A). Further, the issue of the frequency or location of the recommended related services did not come up during the hearing until after the district had rested its case (see Tr. pp. 43, 602). The district did not agree to an expansion of the issues and the parent did not attempt to amend the due process complaint notice to include related services as an additional issue (see Tr. pp. 602-05, 760, 763, 935-36, 1013, 1323). Therefore, the IHO exceeded his jurisdiction in addressing the frequency of the related services recommendations and the IHO's finding on that point must be annulled (see B.M., 2014 WL 2748756, at *2; N.K., 961 F. Supp. 2d at 584-86; C.H., 2013 WL 1285387, at *9; B.P., 841 F. Supp. 2d at 611; M.P.G., 2010 WL 3398256, at *8).

2. Finality of Unappealed Determinations

Prior to addressing the merits of the instant case, I note that neither party has appealed from or otherwise raised the IHO's findings that the district was not required to provide the student with a bilingual program or bilingual support and that the CSE's failure to include parent counseling and training on the IEP did not rise to the level of a denial of FAPE (IHO Decision at pp. 25-26). Accordingly, these determinations have become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]).

3. Response to Due Process Complaint Notice

The parents' argument that the district should be estopped from asserting that it conducted an FBA in May 2011 because it did not specifically respond to the allegation contained in the parent's due process complaint notice that the district failed to conduct one is unavailing. Contrary to the parent's argument, a response to a due process complaint notice is "qualitatively different than a federal or state court pleading" and does not require affirmative defenses or specific denials of the allegations contained in the due process complaint (see R.B., 2011 WL 4375694, at *5).

The district responded to the due process complaint notice on September 16, 2011 (Dist. Ex. 1). Although the district's response comports with federal and State regulations, if the May 2011 CSE relied on the FBA as a basis for making the recommendations contained in the May 2011 IEP, the due process response should have so indicated (Parent Ex. C; see 20 U.S.C. §1415[c][2][B][i][I]; 34 CFR 300.508[e][1]; 8 NYCRR 200.5[i][4][i]). However, any insufficiency in the substance of the due process complaint notice did not, in this instance, affect the student's substantive rights. The parents had an opportunity to object to the district's submission of the FBA into evidence, the district presented a witness who testified regarding the FBA, and the parents had an opportunity to cross-examine the witness and present their own evidence regarding the FBA (see Tr. pp. 130-36, 138-49, 154-58, 175-81, 407, 781, 944-50, 1204-05; Dist. Ex. 6; Parent Ex. MM). Under these circumstances, while it would have been a better

practice for the district to have identified the May 2011 FBA in its response to the due process complaint notice, the district's failure to identify the FBA did not affect the student's substantive rights and is not a sufficient basis for excluding the FBA from evidence (see 20 U.S.C. §1415[c][2][B][i][I]; 34 CFR 300.508[e][1]; 8 NYCRR 200.5[i][4][i]; see, e.g., Jalloh v. Dist. of Columbia, 535 F. Supp. 2d 13, 20 [D.D.C. 2008]).

B. May 2011 IEP Process

1. Evaluative Information and Parental Participation

The parents assert that the district failed to conduct a reevaluation of the student within three years from the student's last evaluation and upon beginning the evaluation process failed to include the parents in deciding what evaluations were necessary. Although the IHO agreed with the parents that a reevaluation was not conducted within the applicable time period, he also determined that it was a procedural violation which did not rise to the level of a denial of FAPE (IHO Decision at pp. 17-20). Upon review, the hearing record supports the IHO's determination.

A district must conduct an evaluation of a student where the educational or related services needs of a student warrant a reevaluation or if the student's parent or teacher requests a reevaluation (34 CFR 300.303[a][2]; 8 NYCRR 200.4[b][4]); however, a district must conduct a reevaluation at least once every three years unless the district and the parent agree in writing that such a reevaluation is unnecessary (34 CFR 300.303[b][2]; 8 NYCRR 200.4[b][4]). As part of an initial evaluation or reevaluation, a group, which includes the CSE, must review existing evaluation data (8 NYCRR 200.4[b][5][i]; see 20 U.S.C. 1414[c][1][A]). Based on that review, the CSE with input from the student's parents must determine whether and what additional data are needed (8 NYCRR 200.4[b][5][ii]; see 20 U.S.C. 1414[c][1][B]).

The May 2011 CSE convened for a "triennial review" of the student's program (Parent Ex. W at p. 1). Participants at the May 2011 CSE meeting included a school psychologist, who also served as the district representative, a social worker, a parent member, the student's mother, and various staff members from Yaldeinu, including the student's special education teacher, the school director, the clinical director, the student's OT provider, and the student's speech-language therapy provider (Tr. pp. 27-28; Dist. Ex. 2 at p. 2). The minutes from the May 2011 CSE meeting reflect that a "triennial assessment" had been completed, that the CSE reviewed reports and obtained verbal input from Yaldeinu staff, and that Yaldeinu staff participated in the development of the student's goals (Parent Ex. W at p. 1). The minutes also reflected the CSE's program and related services recommendations and noted the parent's disagreement with the CSE's determination that the student was monolingual in English for academic purposes (id. at pp. 1-2).

The parents assert that the district failed to evaluate the student in all areas of need because it did not conduct updated OT, PT, or speech-language evaluations. However, the hearing record indicates that the CSE had sufficient information regarding the student to develop an IEP for the 2011-12 school year. Information available to the CSE included a September 2007 psycho-educational evaluation, the student's April 2010 IEP, an October 2010 classroom observation, a January 2011 progress report from Yaldeinu, a March 2011 OT progress report, a March 2011 speech-language therapy progress report, an April 2011 psycho-educational evaluation, and a May

2011 social history update (Tr. pp. 30-31, 95-96, 99-100; Dist. Exs. 3; 4; 5; 7; 8; 9; 11).[9] The CSE also discussed the student's PT services and the parent obtained a May 2011 PT progress report and provided it to the district two days after the CSE meeting (Tr. pp. 38-39, 115-16, 1219-21, 1241-42; Dist. Ex. 10). The CSE incorporated the goals from the PT progress report into the May 2011 IEP after the meeting but prior to sending the IEP to the parents (Tr. pp. 116-17, 1321; compare Dist. Ex. 2 at p. 8, with Dist. Ex. 10 at p. 2). The parents received a copy of the May 2011 IEP in June 2011 (Tr. pp. 1241-42).

According to the hearing record, the May 12, 2011 CSE also considered input from the student's related service providers, the student's teacher, and the parent in addition to the reports listed above (Tr. pp. 42-44, 95-96, 107-08, 110, 122, 1210-11, 1304, 1313, 1323-24; Parent Ex. W at p. 1). In addition, while the parents argued in their due process complaint notice that the May 2011 CSE did not conduct updated OT, PT, or speech-language evaluations, the parents did not raise any objections to the use of the OT, PT, or speech-language progress reports during the May 2011 CSE meeting (see Tr. pp. 1320-24). Further the student's mother acknowledged that she was advised of her rights during the CSE meeting and was informed that she could obtain an independent educational evaluation if she was not happy with the district's evaluations (Tr. pp. 1210, 1217-18; Parent Ex. W at p. 1). Additionally, although a physical therapist was not present at the CSE meeting, the student's mother conceded that she did not disagree with the PT recommendation included in the May 2011 IEP and did not believe the CSE needed to reconvene to discuss physical therapy (Tr. pp. 1331-34). Overall, the parents participated in the May 2011 CSE meeting and had an opportunity to voice their concerns over whether additional data was necessary (see Tr. pp. 1210-11, 1304, 1313, 1323-24, 1331-34).

Under these circumstances, especially considering that the May 2011 CSE had sufficient evaluative information regarding the student's needs to develop an IEP for the 2011-12 school year, the parents were afforded the opportunity to participate in the May 2011 CSE meeting and to participate in a discussion as to whether additional data was necessary. The IDEA, rather than requiring parental consent to an IEP, "'only requires that the parents have an opportunity to participate in the drafting process'" (D.D-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at *11 [E.D.N.Y. Sept. 2, 2011], quoting A.E. v. Westport Bd. of Educ., 463 F. Supp. 2d 208, 216 [D. Conn. 2006]; see E.F., 2013 WL 4495676, at *17 [noting 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"]; see also 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]).

[9] The district representative testified that the social worker conducted an updated social history with the parents during the May 2011 CSE meeting (Tr. pp. 99-100). The social worker testified that he conducted the social history update right before the start of the May 2011 CSE meeting with some of the CSE members present (Tr. pp. 371, 383-85). While the parent testified that no one mentioned a social history update during the CSE meeting, she did remember the social worker asking some basic questions about the student's home life during the meeting (Tr. pp. 1227-28). Based on the testimony from the participants at the CSE meeting, even though the IHO was correct in finding that the social history update was not performed correctly (IHO Decision at p. 25), the parent was available during the May 2011 CSE meeting to provide any information that may have been missing from the student's social history (Tr. pp. 389-91, 902, 1227-28; see 8 NYCRR 200.1[tt]).

C. May 2011 IEP

1. Present Levels of Performance

The parents asserted that the present levels of performance included in the May 2011 IEP were insufficient, did not provide an adequate baseline, and were not consistent with the results of the district's April 2011 psychoeducational evaluation. Among the elements of an IEP is a statement of a student's academic achievement and functional performance and how the student's disability affects his or her progress in relation to the general education curriculum (20 U.S.C. § 1414[d][1][A][i][I]; 34 CFR 300.320[a][1];8 NYCRR 200.4[d][2][i]; see 8 NYCRR 200.1[ww][3][i]). Contrary to the parents' contentions and the IHO's findings, the May 12, 2011 IEP reflects that the CSE appropriately described the student based on the reports available to the CSE and input from the student's teacher and related service providers, identified the student's needs, and developed goals and short-term objectives aligned to her needs (compare Dist. Ex. 2 at pp. 4-9, with Dist. Exs. 3-5; 7-11).

The district asserts that the IHO erred in finding an inconsistency between the student's academic scores set forth in the May 2011 IEP and her scores reported in an April 2011 psychoeducational evaluation (IHO Decision at p. 25). In accordance with State regulations, the May 2011 IEP reflected that the student's academic skills were at an early kindergarten level; that her level of intellectual functioning was in the moderately deficient range; that the student's ability to cope with the natural and social demands of her environment, or her adaptive behavior, was such that she demonstrated "very limited awareness of her environment and was not able to negotiate on her own" and that she demonstrated "significant difficulties with recognizing the implications of different situations and making decisions accordingly" (Dist. Ex. 2 at p. 3). Although the psychoeducational evaluation reports the student's academics as being at a below early kindergarten level, the district representative testified that the May 2011 IEP indicated the student's academic level as being early kindergarten based on input from the student's teacher (Tr. p. 30, 301-03; Dist. Exs. 2 at p. 3; 3 at p. 3). The district representative testified that the May 2011 CSE listed the student's academic functional levels at an early kindergarten level in order to reflect the teacher's input that the student "functions a little higher" (Tr. p. 302). The district representative's testimony regarding the student's functioning at an early kindergarten level also comports with the description of the student's academic skills contained in the present levels of performance and the January 2011 progress report (Dist. Exs. 2 at p. 4; 7 at p. 1).[10] Accordingly, the hearing record indicates that the May 2011 CSE exercised its discretion in including information from the psychoeducational evaluation as well as input from the student's teacher in the IEP and that the present levels of performance accurately reflected the student's academic functional levels.

The present level of social/emotional performance section of the May 2011 CSE included a description of the student's social development, which described the degree and quality of her relationships with peers and adults, and her social adjustment to school and community environments (Dist. Ex. 2 at p. 5). The student was described as having difficulty with reciprocal

[10] The May 2011 IEP also included a summary of the student's test scores taken directly from the psychoeducational evaluation report indicating that the student's "[a]cademic skills are still at the pre-school level" (compare Dist. Ex. 2 at p. 3; with Dist. Ex. 3 at p. 4).

conversations; as an active member of group lessons, who engages in discussions with three to four word responses; as able to wait her turn and take turns with peers; and as requiring prompts to not grab and cues to ask for desired items (id.). With regard to social adjustment to school and community environments, the May 2011 IEP reflected that the student displayed rigidity, struggled with unexpected changes, and often displayed tantrum behaviors such as crying, screaming, hitting and/or stomping her feet (id.). The student was described as having difficulty accepting "no," often crying in response to being refused a preferred item or activity and as having difficulty making transitions during a preferred activity (id.). The IEP also noted that the student engaged in self-stimulatory behavior when holding small objects such as a pen (id.).

The May 2011 IEP described the student's physical development in the present levels of health and physical development section of the IEP including the student's diagnosis of Desbuquois syndrome and her need for medication to address a seizure disorder (Dist. Ex. 2 at p. 6). The IEP further reflected the student's deficits in fine motor control and strength and noted the student's particular struggles with cutting, prewriting skills, in-hand manipulation, and ADL skills, specifically dressing (id.). The IEP noted that the student's gross motor skills were delayed both functionally and qualitatively, that she presented with generalized hypotonia and hypermobility at her major joints, and that she had sensory processing and auditory processing deficits (id.).

Based on the level of detail included in the descriptions of the student's present levels of performance, I do not find that they were overly broad but rather, as required by State regulation, provided sufficient information with which to provide the basis for written annual goals, direction for the provision of appropriate educational programs and services, and development of an IEP for the student (see 8 NYCRR 200.1[ww][3][i]).

2. Annual Goals

The district alleges that the IHO erred in finding that the annual goals contained in the May 2011 IEP were inappropriate. The district argues that the goals were based on progress reports provided by Yaldeinu and that the goals were distributed to the Yaldeinu staff during the CSE meeting for comments. Additionally, as the Yaldeinu staff returned the goals during the CSE meeting without objecting to them being unmeasurable, the district alleges that the goals were measurable and capable of being implemented. Upon review, I find that the goals were appropriately developed during the May 2011 CSE meeting. The hearing record reflects that the district representative circulated a draft of the proposed annual goals to the student's teacher and related service providers during the May 2011 CSE meeting, that the teacher and service providers made changes on the draft pages, and that after the CSE meeting the district representative went back and incorporated the changes into the annual goals included on the IEP (Tr. pp. 97-98, 277-78, 285-87; 765-66, 911, 1218-19, 1324-25).[11]

The May 2011 IEP contained nine annual goals and 43 short-term objectives which addressed the student's areas of need as identified in the IEP, including adapted physical education, social interaction, participation in school and classroom activities, mathematics, reading, writing, OT and fine motor skills, ADL and ocular motor skills, PT and gross motor skills, sensory

[11] A written copy of the goals was not circulated to the parent; however, the parent testified that she did not ask to see the goals during the May 2011 CSE meeting (Tr. p. 1325).

processing, and expressive, receptive, and pragmatic language skills (Dist. Ex. 2 at pp. 7-9). 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]).

The May 2011 CSE developed annual goals and short-term objectives designed to address the student's deficits in academics including mathematics, reading, writing; a goal and short-term objectives addressing the student's sensory processing and her ability to participate in school and classroom activities; and a goal and short-term objectives related to the student's need for adapted physical education (Dist. Ex. 2 at pp. 7-9). The May 2011 CSE also developed an annual goal and short-term objectives to address the student's deficits in social interactions supported by the provision of counseling services (Dist. Ex. 2 at pp. 7). Related to OT and PT, the CSE developed annual goals and short-term objectives to address the student's deficits in fine motor skills including ADL and ocular motor skills and in gross motor skills (Dist. Ex. 2 at p. 8). With respect to speech-language, the May 2011 CSE developed an annual goal with nine short-term objectives that targeted the student's deficits in expressive, receptive and pragmatic language skills (Dist. Ex. 2 at p. 9).

Although the annual goals did not include evaluative criteria, the criteria of mastery is reflected in each short-term objective, which identified the target levels against which to measure the student's progress over the course of the 2011-12 school year (Dist. Ex. 2 at pp. 7-9). The May 2011 IEP also indicated that the student's progress would be reported four times per year (id.). In addition, while the specific goals did not include methods of measurement, the participation in assessments portion of the May 2011 IEP indicated that the student would be assessed based on "teacher made materials, student data folio, teacher/provider observations, check lists/charts and performance assessment tasks" (Dist. Ex. 2 at pp. 7-9, 12). Accordingly, overall the annual goals, when read in conjunction with the short-term objectives, targeted the student's identified areas of need and provided sufficient information to guide a teacher in instructing the student and measuring her progress and the IHO's decision on this point must be overturned (see R.B. v. New York City Dep't of Educ., 2013 WL 5438605, at *13-*14 [S.D.N.Y. Sept. 27, 2013]; D.A.B. v. New York City Dep't of Educ., 973 F. Supp. 2d 344, 360 [S.D.N.Y. 2013] ["failure to designate specific methods of measurement for the annual goals and short-term objectives in the IEP did not result in the denial of a FAPE"]).

3. Special Factors—Interfering Behaviors

I next turn to the appropriateness of the FBA and BIP. The district contends that the IHO erred in determining that the FBA and BIP were inadequate and asserts that the FBA and BIP were based on the information available to the May 2011 CSE and were reviewed during the CSE meeting with the private school staff. Additionally, the district argues that if the FBA was not adequate, there should not be a denial of a FAPE because the May 2011 IEP and BIP sufficiently

identified the student's behaviors, the reasoning for the behaviors, and strategies to address the behaviors.

In New York State, policy guidance explains that "[t]he IEP must include a statement (under the applicable sections of the IEP) if the student needs a particular device or service (including an intervention, accommodation or other program modification) to address [among other things, a student's interfering behaviors,] in order for the student to receive a [FAPE]" ("Guide to Quality Individualized Education Program [IEP] Development and Implementation," at p. 22, Office of Special Educ. [Dec. 2010], available at http://www.p12.nysed.gov/specialed/publications/iepguidance/IEPguideDec2010.pdf). "The behavioral interventions and/or supports should be indicated under the applicable section of the IEP" and, if necessary, the "student's need for a behavioral intervention plan [BIP] must be documented in the IEP" (id.). State procedures for considering the special factor of a student's behavior that impedes his or her learning or that of others may also require that the CSE consider having an FBA conducted and a BIP developed for a student (8 NYCRR 200.4[d][3][i]; 200.22[a], [b]).

The May 2011 IEP included a BIP (Dist. Ex. 2 at p. 13).[12] Additionally, on the same day as the May 2011 CSE meeting, the district developed an FBA (Dist. Ex. 6). The district representative testified that she wrote the FBA on the same day as the CSE meeting, that the FBA was based on teacher reports and the classroom observation, and that she passed a copy of the FBA around at the meeting for comments (Tr. pp. 139-40). She also testified that she specifically remembered handing a copy of the FBA to the Yaldeinu clinical director for comments because the clinical director added language regarding the functions of the student's problematic behaviors (Tr. pp. 146-47). However, the clinical director testified that the May 2011 CSE did not discuss the FBA (Tr. p. 943).

An FBA is defined in State regulations 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]). State regulations require that 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

[12] Although the May 2011 IEP included a BIP and the district developed an FBA during the May 2011 CSE meeting, the Yaldeinu clinical director testified that, at the time beginning of the 2011-12 school year, the student's behaviors had decreased and were mostly being addressed programmatically (Tr. pp. 855-58, 863-65). I note that conducting an FBA to determine how the student's behavior related to the student's environment at Yaldeinu, especially considering that most of the student's behaviors were being addressed programmatically, would have diminished value where, as here, the CSE did not have the option of recommending that the student be placed at Yaldeinu and was charged with identifying an appropriate publicly funded placement for the student (see 8 NYCRR 200.1[r]; see also Cabouli v. Chappaqua Cent. Sch. Dist., 202 Fed. App'x 519, at 522 [2d Cir. 2006] [stating that it may be appropriate to address a student's behaviors in an IEP by noting that an FBA and BIP will be developed after a student is enrolled at the proposed district placement]).

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]).

Based on the manner in which the district developed the FBA and the lack of specificity regarding the identified behaviors and their functions, the FBA did not conform with State regulations (see 8 NYCRR 200.22[a][2], [3]). Pertinently, the district did not provide a baseline of the student's problem behaviors (see Dist. Ex. 6). Moreover, although the FBA correctly identified the function of the student's interfering behaviors as an escape function, the FBA did not describe the student's behaviors with specificity (Tr. pp. 861, 866, 946-48; Dist. Ex. 6). However, while the 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," the district's failure to conduct a proper FBA does not, by itself, automatically render an IEP deficient (R.E., 694 F3d at 190; see C.F. v. New York City Dep't of Educ., 746 F.3d 68, 80 [2d Cir. 2014]; F.L. v. New York City Dep't of Educ., 553 Fed. App'x 2, 6-7 [2d Cir. 2014]; M.W. v. New York City Dep't of Educ., 725 F.3d 131, 139-41 [2d Cir. 2013]). Instead, the May 2011 IEP and BIP must be closely examined to determine whether they otherwise addressed the student's interfering behaviors (C.F., 746 F.3d at 80; F.L., 553 Fed. App'x at 6-7; M.W., 725 F.3d at 139-41).

If the CSE determines that a BIP is necessary for a student "the [BIP] shall identify: (i) the baseline measure of the problem behavior, including the frequency, duration, intensity and/or latency of the targeted behaviors . . .; (ii) the intervention strategies to be used to alter antecedent events to prevent the occurrence of the behavior, teach individual alternative and adaptive behaviors to the student, and provide consequences for the targeted inappropriate behavior(s) and alternative acceptable behavior(s); and (iii) a schedule to measure the effectiveness of the interventions, including the frequency, duration and intensity of the targeted behaviors at scheduled intervals (8 NYCRR 200.22[b][4]). Neither the IDEA nor its implementing regulations require that the elements of a student's BIP be set forth in the student's IEP (see "Questions and Answers on Individualized Education Program [IEP] Development, the State's Model IEP Form and Related Requirements," at p. 16, Office of Special Educ. [Apr. 2011], available at http://www.p12.nysed.gov/specialed/formsnotices/IEP/training/QA-411.pdf). However, once a student's BIP is developed and implemented, "such plan shall be reviewed at least annually by the CSE or CPSE" (8 NYCRR 200.22[b][2]). Furthermore, implementation of a student's BIP is required to include "regular progress monitoring of the frequency, duration and intensity of the behavioral interventions at scheduled intervals, as specified in the [BIP] and on the student's IEP," with the results of the progress monitoring documented and reported to the student's parents and the CSE (8 NYCRR 200.22[b][5]).

A review of the May 2011 IEP and the BIP attached to it reveals that together they adequately described the student's interfering behaviors and provided strategies to address them (Dist. Ex. 2 at pp. 4-5, 7, 12-13). The BIP included intervention strategies to be used to alter antecedent events in order to prevent the occurrence of the target behavior, to teach alternative and adaptive behaviors to the student, and to provide consequences for the targeted inappropriate behaviors and alternative acceptable behaviors (Dist. Ex 2 at p. 13). For example, the BIP reflected strategies that would be tried in order to change the student's behaviors including the modeling of social language; provision of prompts, cues, and pacing; opportunity to earn reinforcers and

desired activities for appropriate behaviors; provision of prompting to focus; slower presentation and repetition of material; supervised partnered activities; advanced notification and explanation for changes in routines and introduction of new material; provision of short work sessions and frequent changes of activities; and the use of "if-then" negotiations to address the student's inflexibility (id.). However, although the BIP describes several behaviors related to the student's noncompliance and rigidity the BIP does not include the required components of a baseline measure of the problem behaviors or a schedule to measure the effectiveness of the interventions (see 8NYCRR200.22[b][4][i], [iii]).

A careful review of the May 2011 IEP reveals that it contained management needs and annual goals directed towards addressing the student's behaviors and would have provided an instructor with sufficient information about the student to allow the instructor to address the student's behavioral needs in the classroom (Dist. Ex. 2 at pp. 4-5, 7). The academic management needs section of the student's IEP includes strategies that would address the student's behavioral needs including the provision of frequent prompts for refocusing and redirection; tasks broken down into small increments with repetition until mastered; use of a token reinforcement system as needed; provision of preview and review of material; a multisensory approach; preferential seating to minimize distractions; modeling of language; and sentences started or paced for her (id. at p. 4). The social/emotional management needs section of the IEP also addressed the student's behavioral needs with the provision of prompts to maintain focus and to initiate interactions with peers; frequent changing of tasks; advance preparation and warning of changes in routines; the use of social stories; and the provision of supervision (id. at p. 5). To this end, the IEP reflects that the student would have been provided with the support of a full time 1:1 behavior management paraprofessional (id. at p. 12). Additionally, the IEP contained annual goals and short-term objectives that would have addressed the student's behavioral needs (id. at p. 7). For example, the IEP included an annual goal that addressed the student's ability to participate in school and classroom activities with the aid of a paraprofessional (id.). This goal included corresponding short-term objectives that focused on the student's ability to respond to a paraprofessional's prompts to sit, focus, and continue tasks until completion in 4/5 tries; transition in class without resistance when given advance preparation in 4/5 tries; initiate and move forward to develop reciprocal conversation when language is paced or prompted by the paraprofessional in 3/4 tries; demonstrate greater flexibility to changes in routines, sequences of an activity, or need for a preferred object when "if-then" negotiations are used 75% of the time; and walk safely with the paraprofessional during transitions throughout the building (id.). In addition, the annual counseling goal included a short-term objective that addressed increasing the student's compliance and flexibility to changes in sequences of an activity or changes in routines in 3/5 tries (id.).

Based on the foregoing, contrary to the IHO's determinations, I find that the CSE's failure to follow procedural requirements in conducting an FBA does not rise to the level of a denial of a FAPE—as the May 2011 IEP and the BIP developed in conjunction with the May 2011 IEP identified the student's behaviors and included management needs and supports that would have allowed an instructor to address the student's behavioral needs in the classroom (see C.F., 746 F.3d at 80; A.C., 553 F.3d at 172-73).

4. 6:1+1 Special Class

The hearing record demonstrates that a 6:1+1 special class with a 1:1 behavior management paraprofessional was reasonably calculated to provide the student with an educational benefit. State regulations provide that a 6:1+1 special class placement is designed to address students "whose management needs are determined to be highly intensive, and requiring a high degree of individualized attention and intervention" (8 NYCRR 200.6[h][4][ii][a]).

Based on the evaluative materials that were discussed in detail above which were available to the CSE at the time of the May 2011 CSE meeting, the student exhibited significant deficits in cognition, academic achievement, communication skills including expressive, receptive and pragmatic language, socialization skills, self-care, and motor skills along with demonstrated rigidity, tantrum behaviors, and attention difficulties (Tr. pp. 26, 31, 51-53; Dist. Exs. 3 at pp. 2-4; 4; 7; 8; 9).

Consistent with the student's needs and Sate regulations, the May 2011 CSE recommended a 12-month placement in a 6:1+1 special class in a specialized school with the assistance of a full time 1:1 behavior management paraprofessional (Dist. Ex. 2 at pp. 1, 2, 12). Additionally, as discussed in more detail above, the CSE developed a BIP as well as an annual goal and short-term objectives to address the student's behaviors related to her ability to participate in school and classroom activities with the aid of the paraprofessional and incorporated a number of management needs within the IEP (Dist. Ex. 2 at pp. 4-7, 13).[13]

Although the impartial hearing officer found that the student required more individual instruction than would have been provided in a 6:1+1 placement with a 1:1 behavior management paraprofessional, the hearing record does not bear this out. The May 2011 CSE's recommendation for the provision of a full-time behavior management paraprofessional rather than a 1:1 teacher was supported by information available to and considered by the CSE (see Tr. pp. 30-31, 43; Dist. Ex. 7 at p. 1). Although the student's teacher at Yaldeinu and the parent testified that they believed the recommended program was not appropriate for the student because it did not provide enough 1:1 instruction time (Tr. pp. 1140-41, 1253-54, 1341-42), a review of the hearing record indicates that the student received some instruction in a group setting at Yaldeinu and could have benefitted from being educated in a small group with supports (see Tr. pp. 42-43, 124-26; Dist. Ex. 7 at p.

[13] The clinical director at Yaldeinu testified that while many of the student's interfering behaviors such as attention span, distractibility, rigidity, and transitioning were addressed at Yaldeinu programmatically, the student's noncompliant behaviors, including whining, saying "no," kicking feet, grabbing, and dropping to the floor, were addressed through a behavior protocol specifically for the student (Tr. pp. 855-57). However, she further testified that these behaviors had significantly decreased and were not high frequency behaviors (Tr. p. 857).

1).[14] The Yaldeinu clinical director described the student's class at Yaldeinu as a 6:1+6 classroom, containing six students with one head teacher and six ABA instructors (Tr. pp. 1023-24). She explained that each student was generally working with one of the ABA instructors at a time (id.). However according to the testimony of the Yaldeinu clinical director, the student also received group instruction for a portion of the day, during which time the student's 1:1 instructor faded back and provided minimal support (Tr. pp. 1024-27). In addition, the district representative testified that at the time of the May 2011 CSE meeting, both she and the district social worker believed that the student did not require the intensive 1:1 ABA instruction she had been receiving at Yaldeinu and was ready for a different type of program that would have allowed the student to increase her independence (Tr. pp. 43, 125-26). According to the January 2011 progress report prepared by the student's then-current classroom teacher, the student was able to participate in group lessons as an active member, able to engage in most discussions with three to four word responses, give an independent novel response as opposed to repeating what the person before her said, and was able to follow instructions presented to her as well as to the group (Tr. pp. 94-95; Dist. Ex. 7 at p. 1). The report also indicated that the student had shown "significant improvement in her ability to attend during group and learning time" (Dist. Ex. 7 at p. 1). The student was also reported to be able to wait her turn as well as tell her peers when it was their turn and was more successfully controlling her hands from grabbing and responding to prompts to ask for desired items (id. at p. 2).

Additionally, the hearing record reflects that the type and level of individualized support the student required could have been adequately provided by a 1:1 behavior management paraprofessional. For example, the strategies listed in the IEP to address the student's academic and social/emotional management needs included the provision of supports such as prompting for refocusing and redirection, breaking down of tasks, repetition until mastery, use of token reinforcement system, preview and review, a multisensory approach, preferential seating to minimize distractions, language modeled and sentences started or paced, prompts to maintain focus and to initiate interactions with peers, supervision and frequent changes of tasks, advance preparation and warning of changes in routines and the use of a social story book (Dist. Ex. 2 at pp. 4, 5). Consistent with this, a review of the Yaldeinu reports also reflects that the student required modeling of language, prompts to use language to express herself, to retell events, interact with peers, and make requests, and hand over hand assistance to draw shapes, all which could be provided by a paraprofessional (Dist. Exs. 7 at pp. 1,2; 8 at p. 1; 9 at pp. 1-2). Furthermore, the student's teacher at Yaldeinu testified that the student required 1:1 support to "help redirect her, keep her on task, keep her focused," and "keep her time in school productive," (Tr. p. 1142). The Yaldeinu teacher testified that with regard to instruction, the student required "multiple repetitions" and "multiple teaching opportunities", which were also provided for in the academic management

[14] With regard to 1:1 home-based ABA services, testimony by the parent indicated that the purpose of the services was two-fold: first, to generalize what the student learned at school to the home environment and second, to carry over the school's behavioral component to the home setting (Tr. pp. 1275-76). The hearing record does not reflect that the student required the home-based services in order to receive an educational benefit from her school program and, as such, they were not required for the provision of a FAPE (see A.D. v. New York City Dep't of Educ., 2008 WL 8993558, at *7 [S.D.N.Y. Apr. 21, 2008]; see also Thompson R2-J Sch. Dist. v. Luke P., 540 F.3d 1143, 1152-53 [10th Cir. 2008]; Gonzalez v. Puerto Rico Dep't of Educ., 254 F.3d 350, 353 [1st Cir. 2001]; Devine v. Indian River County Sch. Bd., 249 F.3d 1289, 1293 [11th Cir. 2001]; JSK v. Hendry County Sch. Bd., 941 F.2d 1563, 1573 [11th Cir 1991]).

needs section of the May 2011 IEP (Tr. pp. 1140-41; Dist. Ex. 2 at p. 4). All of these strategies and management needs could have been provided in a 6:1+1 classroom with the support of a 1:1 paraprofessional and would not have required the additional support a 1:1 teacher (see 8 NYCRR 200.6[h][4][ii][a] [a 6:1+1 special class placement is designed for students "whose management needs are determined to be highly intensive, and requiring a high degree of individualized attention and intervention"]; see also F.L., 553 Fed. App'x at 8-9 [a 1:1 paraprofessional was sufficient where student's need for 1:1 support was primarily for attention, prompting, and interfering behaviors]; K.L., 530 Fed. App'x at 86 [a 1:1 paraprofessional was sufficient where student's need for 1:1 assistance related to behavioral and attentional rather than academic needs]).

Based on the student's ability to function in a group setting as described above, the May 2011 CSE's recommendation that the student could obtain an educational benefit from the small, highly structured environment provided in a 6:1+1 special class with the support of a 1:1 paraprofessional and related services was reasonably calculated to enable the student to receive an educational benefit.[15] While I can sympathize with the parents' desire for the student to have a more intensive level of services for their daughter, the district is not required to "furnish . . . every special service necessary to maximize each handicapped child's potential" (Rowley, 458 U.S. at 199).

5. Methodology

Generally, 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 (Rowley, 458 U.S. at 204; M.M. v. Sch. Bd. of Miami-Dade County, 437 F.3d 1085, 1102 [11th Cir. 2006]; Lachman v. Illinois State Bd. of Educ., 852 F.2d 290, 297 [7th Cir. 1988]; A.S. v New York City Dep't of Educ., 10-cv-00009 [E.D.N.Y. May 26, 2011] [noting the "broad methodological latitude" conferred by the IDEA]). However, where the use of a specific methodology is required for a student to receive an educational benefit, it should be indicated in the student's IEP (R.E., 694 F.3d at 192-94 [found IEP adequate where there was no evidence that the student would not benefit from another methodology, but inadequate where there was "a clear consensus" that the student required a specific methodology]). In this instance, the May 2011 IEP does not include any specific references to a methodology to be used in the classroom; however, as described in more detail above, the May 2011 IEP did include detailed management needs, which would have provided an instructor with direction in developing an individualized program to enable the student to benefit from instruction (see Dist. Ex. 2). In addition, the district representative testified that the student did not "exclusively" require ABA methodology and would have benefitted from the incorporation of other strategies (Tr. pp. 42-43, 124-25). The district representative explained that the student had been receiving ABA for many years; however, she was concerned that the exclusive use of ABA fostered dependence and believed the student was ready for the introduction of other strategies (Tr. pp. 125-26). Although the Yaldeinu clinical director testified that the student required a program based on ABA because "[t]hat is how she learns," the clinical director also testified that the student has never received non-ABA instruction

[15] In addition to the 1:1 paraprofessional, the student would have received 1:1 support during most of her related services as almost all of the student's related services recommendations were for delivery in a 1:1 setting (Dist. Ex. 2 at p. 12).

at Yaldeinu (Tr. pp. 1069-71).[16] Under these circumstances, although the student benefitted from ABA instruction at Yaldeinu, the hearing record does not support a finding that the student required ABA instruction to receive an educational benefit, and the CSE's decision not to incorporate ABA instruction into the May 2011 IEP did not result in a denial of a FAPE (see e.g., R.B., 2013 WL 5438605, at *11).

D. Challenges to the Assigned School

As discussed above, the May 2011 IEP was reasonably calculated to offer the student a FAPE; however, the parents also raised a number of allegations regarding the implementation of the May 2011 IEP at the assigned public school site (Parent Ex. A at pp. 3-4). While the IHO did not make any specific findings regarding implementation, the IHO appears to have found in favor of the parents on some of their allegations regarding the assigned public school site (IHO Decision at pp. 23, 26-27). For instance, intertwined in the IHO's findings regarding the appropriateness of the 6:1+1 special class, the IHO found that the curriculum at the assigned school was inappropriate and that the school would not have provided sufficient individualized attention (id. at p. 23). The IHO also found that the student would not have been able to learn at the assigned public school site because of the school environment being too loud and because the school would not have addressed the student's sensory needs or behaviors (id. at pp. 26-27). For the reasons set forth in other State-level administrative decisions involving similar disputes (see, e.g., Application of the Dep't of Educ., Appeal No. 14-106; Application of the Dep't of Educ., Appeal No. 14-091), the parents' allegations regarding implementation of the May 2011 IEP at the assigned public school site are without merit and the IHO's findings must be overturned.

Specifically, the parent's claims regarding functional grouping, the curriculum, and the physical environment at the assigned public school, turn on how the May 2011 IEP would or would not have been implemented (Parent Ex. A at pp. 3-4).[17] However, it is undisputed that the parent rejected the assigned public school site and the May 2011 IEP and enrolled the student in a nonpublic school prior to the time the district became obligated to implement the May 2011 IEP (see Parent Exs. F at p. 1; G at p. 1; T). Under these circumstances, the parent cannot prevail on claims regarding implementation of the May 2011 IEP because a retrospective analysis of how the district would have implemented the student's May 2011 IEP at the assigned public school site is not an appropriate inquiry (K.L., 530 Fed. App'x at 87; R.E., 694 F.3d at 186; R.C., 906 F. Supp. 2d at 273). In a case in which a student has been unilaterally placed prior to the implementation of an IEP, it would be inequitable to allow a parent to acquire and rely on information that post-dates the relevant CSE meeting and IEP and then use such information against a district in an impartial hearing while at the same time confining a school district's case to describing a snapshot of the special education services set forth in an IEP (C.L.K. v. Arlington Sch. Dist., 2013 WL 6818376, at *13 [S.D.N.Y. Dec. 23, 2013] [stating that in addition to districts not being permitted

[16] The Yaldeinu clinical director also conceded that the effectiveness of ABA generally diminishes as a student ages (Tr. p. 1045).

[17] A number of the parents' allegations regarding the implementation of the May 2011 IEP at the assigned public school site, such as the amount of 1:1 instruction and the use of ABA methodologies, were also raised as reasons why the May 2011 IEP was not appropriate and were addressed as such above (Parent Ex. A at pp. 3-4). For example, the analysis of the appropriateness of the recommendation for a 6:1+1 class addresses the parents' arguments related to the level of 1:1 instruction required for the student to obtain an educational benefit.

to rehabilitate a defective IEP through retrospective testimony, "[t]he converse is also true; a substantively appropriate IEP may not be rendered inadequate through testimony and exhibits that were not before the CSE about subsequent events and evaluations that seek to alter the information available to the CSE"]). Based on the foregoing, it would be inappropriate to consider the parents' allegations regarding implementation of the student's program at the assigned public school site or retrospective evidence regarding the how the May 2011 IEP might have been implemented at the assigned public school site (see K.L., 530 Fed. App'x at 87; R.E., 694 F.3d at 186; R.C., 906 F. Supp. 2d at 273). Accordingly, the parents cannot prevail on claims that the assigned public school site would not have properly implemented the May 2011 IEP.

Additionally, even assuming for the sake of argument that the parents could make such claims or that the student had attended the district's recommended program at the assigned public school site, the evidence in the hearing record does not support the conclusion that the district would have violated the legal standard related to IEP implementation—that is, that the district would have deviated from the student's IEP in a material or substantial way (A.P. v. Woodstock Bd. of Educ., 370 Fed. App'x 202, 205 [2d Cir. Mar. 23, 2010]; Van Duyn v. Baker Sch. Dist., 502 F.3d 811, 822 [9th Cir. 2007]; Houston Indep. Sch. Dist. v. Bobby R., 200 F.3d 341, 349 [5th Cir. 2000]; see D.D-S., 2011 WL 3919040, at *13; A.L. v. New York City Dep't of Educ., 812 F. Supp. 2d 495, 502-03 [S.D.N.Y. 2011]).

In further support of their argument that the student would not have been grouped with similarly functioning peers in the classroom indicated on the FNR, the parents present three class profiles as additional evidence on appeal (Dist. Ex. 12; Answer Exs. II-V). However, rather than support the parent's contention that the district was formulating "inconsistent and mutually exclusive profiles," the class profiles highlight the difficulty in developing classes for students prior to the start of the school year and how the composition of a classroom can change over time (Answer Exs. II-V). Pertinently, the first two class profiles—which refer to the same set of students—indicate that all of the students were offered placement in the class on June 15, 2011 (June 2011 class profile) and that their status is "[a]waiting [a]uthorization" (Answer Exs. II; III). The next class profile, containing an entirely different set of students, indicates that the students were offered placement in August and September 2011 (September 2011 class profile), and indicates the students' status as "[a]ttending" (Answer Ex. IV). Finally, an attendance sheet dated July 6, 2011 lists four students, only two of whom were included in the September 2011 class profile (Answer Exs. IV; V).

Some information about an assigned school is inherently speculative (see 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]). Generally, the identification of the particular students in a proposed classroom is the same type of information as the identification of a specific teacher of the classroom, to the extent that, like a teacher, a district cannot guarantee that a particular student will not relocate or otherwise become unavailable (see R.E., 694 F.3d at 187; M.S. v. New York City Dep't of Educ., 2 F. Supp. 3d 311, at 332 n.10 [E.D.N.Y. Nov. 5, 2013] [claims regarding the composition of a proposed class are speculative as the district cannot guarantee the composition of the class that the student would have attended]). Some or all of the students offered a class may not accept it (compare Answer Ex. II, and Answer Ex. III, with Answer Ex. IV), and some or all of the students who attend a class during the summer may not continue in the same class at the start of the 10-month school year (compare Answer Ex. IV, with

Answer Ex. V). Accordingly, the parents claim that the student would not have been grouped with similarly functioning peers in the assigned class is speculative and the additional evidence provided by the parents on appeal does not make it any less speculative.

VII. Conclusion

Having determined that the evidence in the hearing record establishes that the district sustained its burden to establish that it offered the student a FAPE for the 2011-12 school year, it is unnecessary to address the appropriateness of Yaldeinu, or whether equitable considerations weigh in favor of granting the parents' requested relief (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 that I need not address them in light of the determinations made herein.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

THE CROSS-APPEAL IS DISMISSED.

IT IS ORDERED that the IHO's decision dated July 24, 2012, is modified, by reversing those portions of the decision finding that the district did not offer the student a FAPE for the 2011-12 school year and directing the district to reimburse the parents for 75 percent of the costs of the student's unilateral placement.

Dated: **Albany, New York**
November 28, 2014

STEVEN KROLAK
STATE REVIEW OFFICER