



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 16-067

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

### **Appearances:**

Law Offices of Regina Skyer and Associates, attorneys for petitioner, Sonia Mendez-Castro, Esq., and Linda Goldman, Esq., of counsel

Howard Friedman, Special Assistant Corporation Counsel, attorneys for respondent, Alexander Fong, 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 parent) appeals from the decision of an impartial hearing officer (IHO) which denied his request for the costs of his son's tuition at the Rebecca School for the 2015-16 school year. The appeal must be dismissed.

### **II. Overview—Administrative Procedures**

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

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

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

### **III. Facts and Procedural History**

As reported by the parent, the student received a diagnosis of pervasive developmental disorder, not otherwise specified, as early as 18 months of age (Tr. pp. 411, 413; Dist. Exs. 7 at p. 1; 9 at p. 2), and exhibited sensory apraxia and apraxia of speech (Tr. p. 411; Dist. Ex. 15 at p. 3). As of the 2014-15 school year, the student communicated using a combination of verbal and nonverbal means including gesturing, writing, verbal approximations, sign approximations, facial expressions, and picture icons (Dist. Ex. 11 at p. 1). The student had strengths in ambulation and emerging hand skills (Dist. Ex. 1 at p. 1). However, he presented with an under-responsive sensory system and his physical functioning was impacted by his decreased body awareness and core strength (id. at p. 3). The student required sensory motor and oral motor support (id.). He was independent for most activities of daily living (ADLs) including toileting, feeding, dressing and

packing/unpacking his belongings (*id.*). The student also performed in the "[e]xtremely [l]ow range" on tests measuring nonverbal intelligence and academic achievement (*id.* at p. 2).<sup>1</sup> The student has attended the Rebecca School since 2009 (Tr. p. 183).<sup>2, 3</sup> During the 2014-15 school year, the student attended a class with five other students ranging in age from 9 to 12 years old (Dist. Ex. 11 at p. 1). The classroom was staffed by a head teacher and two teaching assistants (*id.*).

On January 12, 2015, the CSE convened for an annual review and to develop the student's IEP for the 2015-16 school year (Dist. Ex. 1 at pp. 1, 13). Finding that the student remained eligible for special education as a student with autism,<sup>4</sup> the January 2015 CSE recommended a 12-month school year program in a 6:1+1 special class placement in a specialized school with the following weekly related services: two 30-minute sessions of individual counseling; one 30-minute session of group counseling; three 30-minute sessions of individual occupational therapy (OT); two 30-minute sessions of group OT; five 30-minute sessions of individual physical therapy (PT), three 30-minute sessions of individual speech-language therapy, and two 30-minute sessions of group speech-language therapy (*id.* at pp. 9-10, 12). The CSE also recommended one 60-minute session per month of parent counseling and training (*id.* at p. 10). In addition, the April 2013 CSE created annual goals with corresponding short-term objectives and recommended supports for the student's management needs, assistive technology, adapted physical education, special transportation services, and that the student participate in the New York State Alternate Assessment (*id.* at pp. 4-9, 11-12).

In a prior written notice, dated May 29, 2015, the district summarized the program and services recommended in the January 2015 IEP (Dist. Ex. 12). Additionally, On May 29, 2015, the district sent the parent a school location letter, by which the district notified the parent of the particular public school to which the student was assigned to attend for the 2015-16 school year and provided the parent with contact information to schedule a visit if desired (Dist. Exs. 13 at p. 1; 14 at p. 1).<sup>5</sup>

On May 29, 2015, the parent entered into an enrollment contract with the Rebecca School, pursuant to which the parent agreed to pay tuition for the student's attendance at the Rebecca School from July 6, 2015 to June 22, 2016 (Parent Ex. E at pp. 1-4).

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<sup>1</sup> The student's verbal intelligence was not assessed due to his lack of expressive language (Dist. Ex. 7 at pp. 2, 3).

<sup>2</sup> The Commissioner of Education has not approved the Rebecca School as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

<sup>3</sup> The student has been the subject of a prior administrative appeal related to the 2011-12 school year (Application of the Dep't of Educ., Appeal No. 12-087).

<sup>4</sup> The student's eligibility for special education programs and related services as a student with autism is not in dispute (see 34 CFR 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

<sup>5</sup> Although the school location letter was dated January 13, 2015, other information in the hearing record indicates that it was sent to the parent on May 29, 2015 (Dist. Exs. 13 at p. 1; 14 at p. 1).

On June 16, 2015, the parent toured the assigned public school site (Tr. pp. 133-34). By letter dated June 16, 2015, the parent advised the district that he intended to unilaterally place the student at the Rebecca School if the district did not cure procedural and substantive defects in the January 2015 IEP (Parent Ex. A at p. 1). The parent asserted that the recommended 12-month, 6:1+1 special class placement would not meet the student's sensory motor, academic, and social/emotional needs, or provide the student with sufficient 1:1 support (id. at p. 2). The parent further asserted that: the student's management needs, academic performance, and social/emotional needs were not adequately described or provided for in the January 2015 IEP; the CSE failed to recommend an appropriate sensory diet; and the IEP failed to address the student's "behaviors and transition issues" (id.). Additionally, the parent indicated that the annual goals in the January 2015 IEP were inappropriate and could not be implemented in the recommended program, which was insufficiently supportive (id.).

### **A. Due Process Complaint Notice**

By due process complaint notice dated September 25, 2015, the parent alleged that the district failed to offer the student a FAPE for the 2015-16 school year (Parent Ex. B at p. 1). The parent alleged that the January 2015 CSE ignored relevant documentation indicating the student needed more support, including input from the parent and the student's then-current educators and service providers, and that the CSE predetermined the student's educational placement by recommending "its generic program for students with Autism" (id. at p. 3).

Turning to resultant IEP, the parent contended that the annual goals and short-term objectives contained in the January 2015 IEP were vague, deficient, and failed to encompass the totality of the student's needs, such as the student's needs related to apraxia and his behavioral, sensory, and socialization needs (Parent Ex. B at p. 3). The parent alleged that, despite the student's interfering behaviors, the district failed to conduct a functional behavioral assessment (FBA) or develop a behavioral intervention plan (BIP) and the CSE failed to include adequate equivalent behavioral supports in the student's IEP, such as a 1:1 paraprofessional (id. at p. 5-6). In addition, the parent alleged that the January 2015 IEP listed "stock" management needs and did not set forth all of the student's needs, such as the student's sensory and feeding related needs (id. at p. 4). With respect to the recommended educational placement, the parent asserted that the 6:1+1 special class was inconsistent with the student's individual needs (id. at p. 2). The parent argued that the student became easily dysregulated and required 1:1 prompting and assistance to appropriately function in the classroom (id.). The parent further contended that the student required instruction in the Developmental Individual Difference Relationship-based (DIR) methodology to receive benefit (id. at p. 3). The parent further claimed that the annual goals appeared to be goals developed by the staff at the Rebecca School and that, because they were written with the intention that they would be implemented with the staffing ratio and methodology used at the Rebecca School, they could not be implemented in the program recommended in the IEP (id.).

The parent lastly contended that the assigned public school site was inappropriate as it "was unclear that the recommended [public school] could meet [the student's] needs with regards to his sensory regulation issues and apraxia" (Parent Ex. B at p. 6). The parent alleged that the school did not have "visible sensory equipment" and "was very noisy" (id.). Additionally, the parent argued that the classroom at the assigned school would have included students whose academic and social/emotional profiles differed greatly from that of the student (id.).

In addition, the parent alleged that the student's unilateral placement at the Rebecca School was appropriate and that equitable considerations weighed in favor of his request for relief (Parent Ex. B at p. 6). For relief, the parent requested that the district pay for the costs of the student's tuition at the Rebecca School for the 2015-16 school year (id.).

### **B. Impartial Hearing Officer Decision**

After a prehearing conference on October 30, 2015, the parties proceeded to an impartial hearing on February 4, 2016, which concluded on June 22, 2016, after four days of proceedings (Tr. pp. 1-487). By decision dated August 30, 2016, the IHO found that the district offered the student a FAPE for the 2015-16 school year (IHO Decision at pp. 10-12).

Crediting the testimony of the district school representative, the IHO found that the 6:1+1 special class placement was not predetermined as not all students classified with autism were recommended for such a class (IHO Decision at p. 10). The IHO further determined that the annual goals and short-term objectives "met the applicable standards" and were "specifically designed to meet the student's needs" (id.). The IHO indicated that the academic goals were not methodology-specific but pertained to the student's skills deficits and could be attained using different methodologies (id. at pp. 10-11). Next, the IHO found that the district's failure to conduct an FBA and develop a BIP did not deny the student a FAPE because neither the parent nor the student's providers believed that the student required an FBA or a BIP (id. at p. 12). The IHO opined that the student's occasional behaviors did not impede his learning or the learning of others and that the IEP addressed his behaviors (id.).<sup>6</sup> The IHO also concluded that the ten management needs listed in the January 2015 IEP provided sufficient support for the student's needs in areas of deficit (id. at p. 10). With respect to the 6:1+1 special class placement, the IHO determined that this recommendation was reasonably calculated to provide the student with some meaningful educational benefit (id.). Finally, the IHO found that the parent's objections to the assigned public school site were speculative and that there was no proof that the district would have deviated from the January 2015 IEP (id. at p. 12).

Although the IHO found that the district offered the student a FAPE, she also made findings that the parent's unilateral placement was appropriate and that equitable considerations would not have warranted a reduction or denial of tuition reimbursement (IHO Decision at pp. 13-15).

### **IV. Appeal for State-Level Review**

The parent appeals, seeking to overturn the IHO's determination that the district offered the student a FAPE for the 2015-16 school year. The parent challenges the entirety of the IHO's decision, arguing that the IHO's decision lacked analysis and improperly credited the district's evidence. Specifically, the parent alleges that that January 2015 CSE ignored relevant documentation and input from the parent and the student's then-current teachers and providers indicating the student's need for more intensive adult support and a smaller school building due to his sensory needs. The parent claims that the annual goals set forth in the January 2015 IEP were vague, deficient, and inappropriate and that the IHO ignored evidence that the goals were outdated

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<sup>6</sup> With respect to the parent's claims relating to annual goals and an FBA and a BIP, the IHO noted that she credited the district's "evidence" (IHO Decision at pp. 10, 12).

and had already been mastered by the student. The parent also asserts that the IHO ignored testimony that the goals would be too difficult for the student and that he would only be able to attain the goals by receiving instruction with DIR methodology. The parent alleges that the IHO failed to analyze his claims with respect to the student's need for an FBA and a BIP and ignored evidence that a 1:1 health/crisis management paraprofessional was warranted. The parent asserts that the student had interfering behaviors which the January 2015 IEP failed to address and the district did not conduct an FBA or develop a BIP. The parent alleges that the IHO offered no analysis regarding the parent's claim that the management needs were insufficient and asserts that the IEP failed to list strategies addressing the student's needs regarding transitions, social interactions, communication, feeding, sensory input, behaviors, and navigating a school building. The parent claims that the IHO failed to analyze how the recommended class placement would address the student's needs, noting that the January 2015 CSE recommended the 6:1+1 special class placement without discerning the student's ability to be placed in this type of educational environment and that the complexity of the student's needs required a greater amount of individualized teacher support throughout the school day. The parent asserts that the district did not meet its burden to establish that the recommended placement was appropriate. The parent also alleges that the district failed to offer evidence regarding the methodology it intended to employ and asserts that the student benefitted from the DIR methodology for several years. Finally, the parent asserts that the IHO erred in finding that the parent's challenges to the public school site were speculative.

The district answers, denying the parent's allegations and requesting that the IHO's determination that the district offered the student a FAPE for the 2015-16 school year be upheld in its entirety.

## **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; 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. 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. of 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; A.H. v. Dep't of Educ., 394 Fed. App'x 718, 720 [2d Cir. Aug. 16, 2010]).

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]). 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).

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]).

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. CSE Process**

#### **1. Parent Participation/Predetermination**

To the extent the parent includes allegations in his petition relating to his participation in the January 2015 CSE meeting or the CSE's predetermination of the recommended placement recommendation, these claims shall be examined first. Specifically, the parent alleges that the district ignored his input and the input of the student's teacher and providers at the January 2015 CSE meeting regarding the student's needs for intensive adult support and a smaller school building for his sensory needs. The parent also alleges that the district recommended a "generic program for students with Autism," which was the same program the district had recommended for the student "year after year" (Pet. ¶¶ 14, 21).

The IDEA sets forth procedural safeguards that include providing parents an opportunity "to participate in meetings with respect to the identification, evaluation, and educational placement of the child" (20 U.S.C. § 1415[b][1]). Federal and State regulations governing parental participation require that school districts take steps to ensure that parents are present at their child's IEP meetings or are afforded the opportunity to participate (34 CFR 300.322; 8 NYCRR 200.5[d]). Although school districts must provide an opportunity for parents to participate in the development of their child's IEP, mere parental disagreement with a school district's proposed IEP and placement recommendation does not amount to a denial of meaningful participation (see J.E. & C.E. v. Chappaqua Cent. Sch. Dist., 2016 WL 3636677, at \*11 [S.D.N.Y. June 28, 2016]; T.F. v. New York City Dep't of Educ., 2015 WL 5610769, at \*5 [S.D.N.Y. Sept. 23, 2015]; A.P. v. New York City Dep't of Educ., 2015 WL 4597545, at \*8, \*10 [S.D.N.Y. July 30, 2015]; E.F. v. New York City Dep't of Educ., 2013 WL 4495676, at \*17 [E.D.N.Y. Aug. 19, 2013] [stating that "as long as the parents are listened to," the right to participate in the development of the IEP is not impeded, "even if the [district] ultimately decides not to follow the parents' suggestions"]; P.K. v. Bedford Cent. Sch. Dist., 569 F. Supp. 2d 371, 383 [S.D.N.Y. 2008] ["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] ["Meaningful 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).

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., 2015 WL 4597545, at \*8-\*9; 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, 2013 WL 25959, at \*18 [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. v. New York City Dep't of Educ., 12 F. Supp. 3d 343, 358-59 [E.D.N.Y. 2014] [holding that "active and meaningful" parent participation undermines a claim of predetermination]).

The district representative testified that, with respect to the parent's participation in determining the student's placement, the parent "listened, but he also expressed concern about the amount of support that a 6-1-1 would provide" (Tr. p. 54). She noted that the parent was "at the meeting," but that she did not "think he agreed" with the CSE's determination (id.; see Tr. pp. 114-15). The district representative reported that the parent's concern was recorded on the IEP (Tr. p. 55; see Tr. pp. 470-71; Dist. Ex. 1 at p. 14). The district representative further indicated that the recommendation for a 6:1+1 special class placement was "definitely not" predetermined as a generic program that the district offered to students with a disability classification of autism (Tr. pp. 55-56). She testified that, while a 6:1+1 special class is a common recommended placement for students with autism depending on the student's functional levels and the severity of cognitive impairment (Tr. p. 121), a "6-1-1 would absolutely, unequivocally not be appropriate for all [students with autism]" (Tr. p. 56).<sup>7</sup> Furthermore, she testified that there was not time for her and the district special education teacher to "pre-conference" their meetings, nor was it warranted (id.).

The district representative acknowledged that the parent had a longstanding objection to a 6:1+1 special class recommendation (Tr. p. 88). She noted that the parent had mentioned it in 2010 or 2011 and they had talked about it (id.). She further acknowledged that the CSE had continued to recommend a 6:1+1 special class placement for the student, despite the parent's objection (id.). She stated that the parent's objection had to do with the "amount of supports

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<sup>7</sup> The IHO "credit[ed]" this testimony from the district representative (IHO Decision at p. 10). Generally, an SRO gives due deference to the credibility findings of an IHO, unless non-testimonial evidence in the hearing record justifies a contrary conclusion or the hearing record, read in its entirety, compels a contrary conclusion (see Carlisle Area Sch. v. Scott P., 62 F.3d 520, 524, 528-29 [3d Cir. 1995]; P.G. v. City Sch. Dist. of New York, 2015 WL 787008, at \*16-\*17 [S.D.N.Y. Feb. 25, 2015]; M.W. v. New York City Dep't of Educ., 869 F. Supp. 2d 320, 330 [E.D.N.Y. 2012], aff'd, 725 F.3d 131 [2d Cir. 2013]; Bd. of Educ. v. Schaefer, 84 A.D.3d 795, 796 [2d Dept 2011]). As described above, the evidence in the hearing record provides no reason to disturb that finding.

available in the program, and [the student's] needs" (Tr. p. 89). The district representative confirmed that the CSE did not discuss deferring the student's placement recommendation to the central based support team (CBST) or placement in a State-approved school (id.).

The student's father testified that the focus of the January 2015 CSE meeting was to find an appropriate placement for the student "whether it be a 6:1:1, 8:1:1, 12:1:1, private school setting [or] homeschooling" (Tr. p. 429). He further testified that "all of those things were broad-based mentioned, but at the end of the day the team felt [the student] could be serviced in a 6:1:1" but he disagreed (id.). In addition, the parent recalled that the CSE "discussed everything" and members of the CSE "just legitimately felt that 6:1:1 works," and he "legitimately in [his] experience" felt that it would not (Tr. p. 430). The parent confirmed that the CSE discussed 6:1+1, 8:1+1, and 12:1+1 special class placements and specifically explained to the parent why they rejected each one of those placements (Tr. p. 432). He reported that the team was respectful when he voiced his objections to a 6:1+1 special class placement but that they disagreed and felt the placement would be appropriate for the student (id.). The parent stated that the Rebecca School social worker and teacher felt differently from the district members of the CSE, as did he (id.; see Dist. Ex. 3 at p. 2). The parent testified that he would consider an appropriate 6:1+1 special class placement, if one was available in the borough in which he resided, and reported that the CSE discussed a private school placement as a "fallback option" (Tr. pp. 429-30, 433).

While, the parent and the Rebecca School representatives held a different opinion of what was appropriate for the student than the district members of the CSE and the final recommendations of the CSE were not what the parent desired, the evidence in the hearing record supports a finding that the district afforded the parent an opportunity to participate in the development of the January 2015 IEP and the January 2015 CSE did not ignore parental input in considering a 6:1+1 special class placement for the student or otherwise predetermine the recommendation (see T.F., 2015 WL 5610769, at \*5 [disagreement with the opinions of the parents and outside professionals does not support finding that parents were denied the opportunity to participate in the development of the IEP or that the recommendations were predetermined]; E.F., 2013 WL 4495676, at \*17 [parents had opportunity for meaningful participation, even though district did not agree to the parents' preferred placement]).

## **2. Evaluative Information**

The parent asserts that the January 2015 CSE inappropriately relied on older evaluative information and progress reports and ignored other relevant documentation.

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 need not conduct a reevaluation more frequently than once per year unless the parent and the district otherwise agree and at least once every three years unless the district and the parent agree in writing that such a reevaluation is unnecessary (8 NYCRR 200.4[b][4]; see 34 CFR 300.303[b][1]-[2]). A CSE may direct that additional evaluations or assessments be conducted in order to appropriately assess the student in all areas related to the suspected disabilities (8 NYCRR 200.4[b][3]). Any evaluation of a student with a disability must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information

provided by the parent, that may assist in determining, among other things the content of the student's IEP (20 U.S.C. § 1414[b][2][A]; 34 CFR 300.304[b][1][ii]; see Letter to Clarke, 48 IDELR 77 [OSEP 2007]). In particular, a district must rely on technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors (20 U.S.C. § 1414[b][2][C]; 34 CFR 300.304[b][3]; 8 NYCRR 200.4[b][6][x]). A district must ensure that a student is appropriately assessed in all areas related to the suspected disability, including, where appropriate, social and emotional status (20 U.S.C. § 1414[b][3][B]; 34 CFR 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]). An evaluation of a student must be sufficiently comprehensive to identify all of the student's special education and related services needs, whether or not commonly linked to the disability category in which the student has been classified (34 CFR 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]; see Application of the Dep't of Educ., Appeal No. 07-018).

In developing the recommendations for a student's IEP, the CSE must consider: the results of the most recent evaluation of the student; the student's strengths; the concerns of the parent for enhancing the education of their child; the academic, developmental and functional needs of the student, including, as appropriate, the student's performance on any general State or district-wide assessments as well as any special factors as set forth in federal and State regulations (34 CFR 300.324[a]; 8 NYCRR 200.4[d][2]). However, neither the IDEA nor State law requires a CSE to "consider all potentially relevant evaluations" of a student in the development of an IEP or to consider "every single item of data available" about the student in the development of an IEP (T.G. v. New York City Dep't of Educ., 973 F. Supp. 2d 320, 340 [S.D.N.Y. 2013], quoting F.B. v. New York City Dep't of Educ., 923 F. Supp. 2d 570, 581-82 [S.D.N.Y. 2013]; see L.O. v. New York City Dep't of Educ., 822 F.3d 95, 110-11 [2d Cir. 2016]; M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at \*8 [S.D.N.Y. Mar. 21, 2013]). In addition, while the CSE is required to consider recent evaluative data in developing an IEP, so long as the IEP accurately reflects the student's needs, the IDEA does not require the CSE to exhaustively describe the student's needs by incorporating into the IEP every detail of the evaluative information available to it (20 U.S.C. § 1414[d][3][A]; see M.Z., 2013 WL 1314992, at \*9; D.B. v. New York City Dep't of Educ., 2011 WL 4916435, at \*7-\*9 [S.D.N.Y. Oct. 12, 2011]).

Here, the hearing record shows that the January 2015 CSE used the following evaluations to develop the student's IEP for the 2015-16 school year: a speech-language evaluation, an OT evaluation, a PT evaluation, a psychoeducational evaluation, and a classroom observation, all conducted in October 2013 (Dist. Ex. 12 at p. 2; see Dist. Exs. 1 at pp. 1-2; 3 at p. 1). The district representative and parent both indicated that, although the October 2013 evaluations were not reviewed in detail, they were "referenced" by the CSE (Tr. pp. 96-97, 100, 426). Because the October 2013 evaluation reports were less than three years old at the time of the January 2015 CSE meeting, the district was in compliance with State regulations that mandate triennial reevaluation of students with disabilities (Dist. Exs. 5-9; see 34 CFR 300.303[b][1]-[b][2]; 8 NYCRR 200.4[b][4]). The hearing record does not show that the parent requested updates to the evaluations considered by the CSE or that he disputed evaluative results at the time of the January 2015 CSE meeting, when the student's IEP was developed for the 2015-16 school year.

The January 2015 CSE also considered a December 2014 Rebecca School interdisciplinary report of progress update (Rebecca School progress report), as well as testing data from the student's triennial evaluations, as it was recorded in the student's prior IEP (Tr. p. 45; Dist. Exs.

11; 15).<sup>8</sup> Furthermore, in conjunction with the information available in the December 2014 Rebecca School progress report, the student's Rebecca School teacher reported via telephone on the student's academic achievement, functional performance and learning characteristics, social development, and physical development during the January 2015 CSE meeting (Tr. pp. 47, 94-95, 101; Dist. Exs. 1 at pp. 2-4; 2; 11). With respect to developing the student's IEP, the district representative testified that the January 2015 CSE "essentially went through the IEP page by page, discussing [the student's] functioning level in reading, math, and writing," with information provided by the student's Rebecca School teacher, and additionally reviewed the student's "social functioning, physical functioning, related services, [and] goals" (Tr. p. 47). Further, the student's Rebecca School teacher for the 2015-16 school year testified that, while she found the "evaluation scores" included in the January 2015 IEP to be "old," the description of the student's present levels of performance as reported by the student's then-current Rebecca School teacher accurately described the student's needs both at the time of the CSE meeting and in July 2015, when the student entered her classroom (Tr. pp. 386-87, 395-98, 399). Thus, the Rebecca School teacher's participation offered the CSE more updated information about the student's functioning and the evidence in the hearing record does not support the parent's assertion that the CSE failed to account for the student's progress since the date of the October 2013 evaluations or the December 2014 Rebecca School progress report.

To the extent the parent's concern related to the timing of the October 2013 evaluative information and the December 2014 Rebecca School progress report as compared to the proposed July 2015 date of implementation of the IEP (see Dist. Ex. 1 at pp. 1, 9-10),<sup>9</sup> the parent does not identify any changes in the student's functional levels between the time of the January 2015 CSE meeting and the time the IEP was to be implemented that would have caused the information in the IEP to be inaccurate or outdated by July 2015.<sup>10</sup> The district representative testified that it was the job of the CSE to review the student's present levels and rate of progress to determine what to expect from the student "moving forward" (Tr. p. 120). Further, the evidence in the hearing record does not reflect that the parent objected to the timing of the January 2015 CSE meeting, requested to meet later in the school year to update the student's performance levels or annual goals, or that the district thereafter denied any request by the parent for another CSE meeting.

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<sup>8</sup> A district may rely on information obtained from the student's private school personnel, including sufficiently comprehensive progress reports, in formulating the IEP (see *D.B. v. New York City Dep't of Educ.*, 966 F. Supp. 2d 315, 329-31 [S.D.N.Y. 2013]; *G.W. v. Rye City Sch. Dist.*, 2013 WL 1286154, at \*23-\*24 [S.D.N.Y. Mar. 29, 2013]; *S.F. v. New York City Dep't of Educ.*, 2011 WL 5419847, at \*10 [S.D.N.Y. Nov. 9, 2011]).

<sup>9</sup> According to the May 2015 prior written notice, the CSE recommended that the provision of the program and services included in the January 2015 IEP "be deferred" because "[i]t [wa]s not educationally appropriate for [the student] to change his[] educational program at th[at] time" (Dist. Ex. 12 at p. 2).

<sup>10</sup> A school district must have an IEP in effect for each student with a disability within its jurisdiction at the beginning of each school year (see 20 U.S.C. § 1414[d][2][A]; 34 CFR 300.323[a]; 8 NYCRR 200.4[e][1][ii]). While the IDEA and federal and State regulations require a CSE to review and, if necessary, revise a student's IEP at least annually (see 20 U.S.C. § 1414[d][4][A]; 34 CFR 300.324[b][1]; 8 NYCRR 200.4[f]), neither the IDEA nor State regulations preclude additional CSE meetings, prescribe when a CSE meeting should occur, or prevent later modification of an IEP during the school year through use of the procedures set forth for amending IEPs in the event a student progresses at a different rate than anticipated (see 20 U.S.C. § 1414[d][3][D], [F]; 8 NYCRR 200.4[f]-[g]).

The student's present levels of performance, as described in the January 2015 IEP, were consistent with the Rebecca School teacher's description of the student as recorded in the CSE meeting minutes (Dist. Exs. 1 at pp. 2-4; 3). Similarly, the parent's input and concerns, as recorded during the January 2015 CSE meeting, were reflected in the present levels of performance in the IEP, specifically as they related to the student's language and ability to speak, ability to engage in playdates, hand strength, and behavior (Dist. Exs. 1 at pp. 2-4; 3 at p. 2).

Based on the foregoing, the hearing record indicates that the January 2015 CSE adequately and appropriately considered sufficient evaluative information about the student. The parent's specific concerns about the extent to which the recommendations in the IEP were consistent with the information in the evaluative information are discussed further below.

## **B. January 2015 IEP**

### **1. Sensory and Feeding Needs**

On appeal, the parent challenges the sufficiency of the January 2015 IEP in relation to the student's sensory and feeding needs. Specifically, the parent argues that the annual goals and supports for management needs failed to adequately address the student's sensory and feeding challenges. The parent's allegations about the CSE's failure to address the student's sensory and feeding needs also relate to his claims pertaining to the student's need for an FBA and a BIP and/or additional adult support in the classroom, as well as the appropriateness of the assigned public school site. Given the pervasiveness of these areas of need to the parent's claims, they will be given separate treatment.

The district representative testified that the student required sensory supports throughout the day by way of a sensory diet and sensory stimulation to "make sure that he's ready to learn" (Tr. pp. 53, 101). The district representative explained that the student became dysregulated during unanticipated changes in routine, when he didn't get something he wanted, or when his peers were loud, and that the parent and the Rebecca School teacher who attended the January 2015 CSE meeting believed that the student needed sensory supports to address these needs (Tr. pp. 56-57). Evaluative information before the January 2015 CSE also reflected the student's sensory-related needs. For example, the October 2013 classroom observation described the student's responses in a classroom at the Rebecca School in which the other students were loud and/or not following directions (Dist. Ex. 5). The observation described that, although the student was focused and motivated to learn, he "seemed frustrated and annoyed by loud noises" and responded to the volume or behavior of other students by putting his fingers in his mouth or in his ears, rocking back and forth, or turning away from the source of the loud noise (*id.* at pp. 1-3). The October 2013 OT evaluation also noted that the student became distracted by auditory and visual stimuli (Dist. Ex. 6 at p. 1). As summarized in the January 2015 IEP, the occupational therapist who conducted the October 2013 OT evaluation described the student's sensory-motor processing skills based on an administration of a clinical observation, which revealed that the student exhibited weaknesses in the areas of sensory motor (proprioception, kinesthetic, and vestibular awareness skills) and motor planning (Dist. Exs. 1 at p. 1; 6 at pp. 2-3).

According to the December 2014 Rebecca School progress report, the student "benefit[ed] from sensory supports in order to remain regulated and available for interactions" (Dist. Ex. 11 at

p. 2-4, 8-12). The report noted that the student could present as under-regulated and would seek a place to lie down (id. at p. 2). Examples of sensory support that the student sought included jumping, spinning, and crashing activities, as well as input from adults such as squeezes/deep pressure (id. at pp. 2, 4). The report also indicated that the student participated in movement-based activities and received a sensory diet designed by the occupational therapist (id. at p. 2). The report described that the student relied heavily on routines throughout the school day and could become dysregulated when a peer was loud or not following directions, a change in schedule occurred, he spilled something during lunch, could not find or have a preferred item, or was blocked from fixing something when a peer did not want him to do so (id.). According to the report, when the student was dysregulated, he would, at times, cry, act out physically, or push objects or people (id.). During these instances, the student would seek out routines such as fixing an item in the classroom or reordering the classroom schedule to calm himself (id.). The report indicated that the student could "re-regulate" with sensory support and emotional support from a familiar adult (id.). The report also described the student's progress in his ability to re-regulate between May and December 2014 (id.).

The student's occupational therapist for the 2014-15 school year also discussed the student's sensory needs in the December 2014 Rebecca School progress report (Dist. Ex. 11 at pp. 8-9). According to the occupational therapist, the student received three 30-minute sessions of OT per week, twice individually and once in a group, and also participated in "additional groups led or co-lead by the [occupational] therapist" (id. at p. 8). The occupational therapist noted the student's under-responsive sensory system and described that the student benefited from movement activities, "regular sensory input throughout his day by an individualized sensory diet," and "intense vestibular and proprioceptive input," such as rotary input on a swing or jumping on a trampoline (id.). The student's sensory diet had been modified to a self-regulation sensory diet due to his "improved ability to stay regulated and engaged . . . more consistently throughout the day" and was implemented at least twice a day (id.). The occupational therapist described the student's sensory diet as beginning with tactile input (i.e., brushing) followed by joint compressions, followed by specific active linear vestibular input (i.e., a ball pass activity), followed by active proprioceptive input (i.e., animal walks or propelling a scooter board in the prone position), following lastly by an oral motor activity (i.e., blowing bubbles) (id.).

The January 2015 IEP acknowledged that the student received a sensory diet three times per day and as needed (Dist. Ex. 1 at p. 3; see Dist. Ex. 3 at p. 3). Consistent with the December 2014 Rebecca School progress report, the January 2015 IEP noted that the student required sensory support to read aloud with a familiar staff member, "in order to focus his attention" when in a group, to "remain regulated and available for interactions," and when he exhibited behaviors such as crying or acting out physically either in school or at home (Dist. Ex. 1 at pp. 2, 3; see Dist. Ex. 11 at p. 2). The IEP described that the student "present[ed] with an under-responsive sensory system and require[d] intense vestibular and proprioceptive input" (Dist. Ex. 1 at p. 3; see Dist.

Ex. 11 at p. 8). The IEP noted that the student benefited from brushing, joint compression, and an oral motor protocol (id.).<sup>11</sup>

Among the supports for the student's management needs, the January 2015 IEP indicated that the student benefited from sensory support and movements incorporated into the curriculum (Dist. Ex. 1 at p. 4). Although the parent alleges that the annual goals failed to sufficiently address the student's sensory needs, the January 2015 IEP included an OT goal that targeted the student's sensory processing ability (id. at p. 7). The sensory processing goal had four corresponding short-term objectives that addressed the student's ability to effectively: utilize sensory input to increase his regulation and attention to tasks 90 percent of the time with decreasing adult support; recognize the need for a movement break or sensory input and make a request to an adult 50 percent of the time with maximum to moderate adult support; execute a sensory diet made specifically for him 80 percent of the time with minimal adult support; and engage in sensory activities and apply a sensory diet throughout the day to maintain a regulated state (id. at p. 7). In addition, an annual goal relating to the student's social/emotional/behavioral needs included a corresponding short-term objective that indicated the student would accept spontaneous and unexpected changes in his routine and schedule by exhibiting appropriate behaviors (without behavioral over-reactions) when given sensory support and visual and verbal cues (id. at p. 8). The Rebecca School occupational therapist testified that the OT annual goal was vague and immeasurable; however, she also indicated that an occupational therapist would be able to implement the goal if he or she was "aware of [the student's] previous level of functioning" (Tr. pp. 285-87).

The parent objects to the lack of support in the IEP for the student to accomplish the annual goal pertaining to his sensory needs and, in particular, objects to the lack of specificity with respect to a sensory diet (Pet. ¶ 7 n.9). The particularity with which the parent preferred the January 2015 IEP to describe the specific strategies to address the student's sensory needs is such that it more closely resembles a methodological approach or lesson plan that a teacher or special education provider would use on a daily basis to address the student's sensory needs. 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'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 [the district is imbued with "broad discretion to adopt programs that, in its educational judgment, are most pedagogically effective"]; see M.L. v. New York City Dep't of Educ., 2014 WL 1301957, at \*12 [S.D.N.Y. Mar. 31, 2014] [finding in favor of a district where

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<sup>11</sup> Testimony from staff at the Rebecca School regarding the student's sensory needs was generally consistent with the evaluative information before the January 2015 CSE and the description in the IEP (e.g., Tr. pp. 182, 225-26, 250-51, 304-05, 313, 345-46, 349-51). To the extent such descriptions offered additional specifics about the student's sensory needs or detailed the student's needs as they presented after the January 2015 CSE meeting, the testimony is retrospective and cannot be used to assess the CSE's recommendations (see C.L.K. v. Arlington Sch. Dist., 2013 WL 6818376, at \*13 [S.D.N.Y. Dec. 23, 2013] [finding that "a substantively appropriate IEP may not be rendered inadequate through testimony and exhibits that were not before the CSE about subsequent events . . . that seek to alter the information available to the CSE"], citing R.E., 694 F.3d at 186-87).

the hearing record did not "demonstrate[] that [the student] would not be responsive to a different methodology"). Likewise, an IEP generally would not include the level of specificity found in a teacher's lesson plans (see Opportunity To Examine Records; Parent Participation in Meetings, 71 Fed. Reg. 46,689 [Aug. 14, 2006] [explaining a change of language in 34 CFR 300.501[b][3] in order to avoid the impression "that teaching methodologies and lesson plans must be included in the IEP"]; see also Avila v. Spokane Sch. Dist. 81, 2014 WL 5585349, at \*6 [E.D. Wash. Nov. 3, 2014] [finding that "[a]n IEP is not a lesson plan and does not provide the specific methodology to be utilized, but is instead a broad overview or roadmap of a student's special education program, setting forth the present level of education performance, goals, objectives, and special services and staff to be provided"])).

As described above, the hearing record supports the district's assertion that the January 2015 IEP specifically identified the student's sensory needs and included provision for appropriate special education services and supports to address those needs. The Rebecca School occupational therapist defined a sensory diet as "a specific sequence of sensory integration techniques or input that is designed to be provided on a schedule to assist the child in maintaining a state of regulation and achieving an optimal arousal level throughout the day. . . ." (Tr. p. 255). The Rebecca School director described the sensory diet that the student received at Rebecca as consisting of "vestibular input then active proprioceptive input then passive proprioceptive with a brushing protocol and joints" (Tr. p. 193; see also Tr. pp. 256, 261-62, 345). The district representative offered a similar definition of a sensory diet and indicated that an occupational therapist would generally develop the specific activities, the order of such activities, and the times of day a particular student needed regulation (Tr. p. 65). Although the January 2015 IEP did not specify every method of sensory input from which the student benefited at the Rebecca School, it referenced vestibular and proprioceptive input, a brushing protocol, joint compressions, and an oral motor protocol and the information included was sufficient to allow an occupational therapist to develop a sensory diet consistent with the student's needs (see Tr. pp. 65-66; Dist. Ex. 1 at p. 7). Further, the January 2015 CSE recommended that the student received OT on a daily basis to address the student's sensory needs (Tr. p. 96; Dist. Ex. 1 at pp. 9-10).

Absent evidence that the specific methods of delivering sensory input in a particular environment were necessary for the student to receive educational benefit, the hearing record supports the conclusion that the sensory management techniques utilized by the Rebecca School and preferred by the parent were simply one methodology or series of approaches by which the student's sensory needs could be met and the omission thereof did not deny the student a FAPE (see N.B. & C.B. v. New York City Dep't of Educ., 2016 WL 5816925, at \*5 [S.D.N.Y. Sept. 29, 2016] [finding that the omission of certain sensory management techniques from the student's IEP did not deny the student a FAPE]; E.P. v. New York City Dep't of Educ., 2016 WL 3443647, at \*12 n.8 [S.D.N.Y. June 10, 2016] [declining to find an IEP inappropriate on the basis that it did not include the same sensory regimen that the student received at a private school placement]; T.C. v. New York City Dep't of Educ., 2016 WL 1261137, at \*15 [S.D.N.Y. Mar. 30, 2016] [noting that the law does "not require every aspect of a child's specific educational needs to be detailed in the IEP, as long as the IEP is designed to address those issues"]). The January 2015 IEP described and addressed the student's sensory needs consistent with the evaluative information available to it. The parent's claims regarding the insufficiency of the CSE's other recommendations to address the student's sensory needs (i.e., the lack of an FBA or BIP and the level of adult support in the



classroom) and the lack of observed sensory equipment during a visit to the assigned public school site are further discussed below.

With respect to the student's feeding needs, the December 2014 Rebecca School Progress report indicated that the student was independent during most activities of daily living, including feeding (Parent Ex. 11 at p. 7). The report indicated that the student's speech-language therapist consulted with the classroom staff and incorporated oral motor exercises in order to help the student expand his limited food repertoire, which included foods such as chicken, vegetables, pasta, meatballs, and preferred snacks (id.). Additionally, the student's speech-language therapist included information in the December 2014 Rebecca School report indicating that she supported the student's oral motor skills in order to prepare his mouth for feeding (id. at p. 11). The speech-language therapist further detailed the strategies she used to do so, which included facial massage with lotion, cheek stretch exercises, and use of a chewy tube (id. at p. 12). According to the speech-language therapist, the student would then display increased oral awareness and an increased ability to stabilize food using his teeth, cheeks and tongue for chewing (id.).

The Rebecca School program director testified that the student's diet was very limited and he needed reminders to chew (Tr. p. 194). She reported that the student had an oral motor protocol that was administered several times throughout the day and included such things as facial massages and use of a therapeutic toothbrush to "wake up" the student's oral motor cavity before eating (Tr. pp. 194-95). While it is unclear the extent to which the student's progress in the area of feeding was communicated to the January 2015 CSE, the Rebecca School program director testified that, in 2009 when the student began attending Rebecca School, he only ate pureed baby food and he was not chewing and "his whole oral motor mechanisms were not working well," but, at the time of the impartial hearing, although the student's diet was limited and he "still need[ed] reminders," the student was "significantly better," he was chewing, and no longer eating baby food (Tr. pp. 183, 194; see also Tr. p. 316). Likewise, the parent testified that the student's sensitivities to food were improving, particularly when new foods were introduced by a familiar adult (Tr. pp. 411-13).

The district representative testified that the student required oral motor support, which was included in the IEP, but that he was independent in terms of feeding (Tr. p. 72). The district representative testified that the speech-language goals addressed the student's potential issues with "overstuffing," specifically the goal and objectives related to improving the student's oral motor skills through oral motor exercises and exploring, tolerating, and tasting new foods (Tr. p. 74; see Tr. p. 75).

The January 2015 IEP indicated that the student's diet "continue[d] to be limited" but that he "no longer require[d] a chew tube" (Dist. Ex. 1 at p. 3). Consistent with the December 2014 Rebecca School progress report, the January 2015 IEP noted that the student was independent with most activities of daily living including feeding and that he was working on "expanding his food repertoire" (Dist. Ex. 1 at p. 3 see Tr. pp. 72-73; Dist. Ex. 11 at p. 7). Although the parent correctly notes that the student's feeding-related needs were not addressed in the management needs section of the January 2015 IEP (Tr. p. 442), in the section describing the student's present levels of physical development, the IEP indicated that the student benefited from "oral motor support" (Dist. Ex. 1 at p. 3; see Tr. pp. 72-73).

Additionally, while the parent claims that the January 2015 IEP failed to address the student's apraxia and feeding needs, a review of the IEP shows that the CSE recommended three 30-minute sessions of individual speech-language therapy and two 30-minute sessions of group speech-language therapy per week for the student (Dist. Ex. 1 at p. 10). Additionally, the IEP included a speech-language goal that addressed the student's need to improve his oral motor skills in support of promoting improved feeding and speech skills (id. at p. 8; see Tr. p. 74). The IEP included short-term objectives that were aligned with the goal and which addressed the student's ability: to tolerate oral motor exercises including vibratory input and proprioceptive input for 15 minutes per session to improve overall awareness, functioning, and coordination with his oral mechanism; to explore 15 new foods consisting of various tastes and textures with minimal support across two consecutive weeks; to tolerate 15 new foods consisting of various tastes and textures with minimal support across two consecutive weeks; to taste 15 new foods consisting of various tastes and textures with minimal support across two consecutive weeks; and to produce bilabial (and) alveolar sounds with minimal support (Dist. Ex. 1 at p. 8). The Rebecca School director opined that, with respect to the student's feeding issues, the IEP goal "talked about it a little bit" but that the goal was vague and broad (Tr. p. 195).<sup>12</sup> She stated that the IEP indicated that the student would explore 15 new foods, but not about how he would do that (Tr. p. 195).

Notwithstanding the Rebecca School director's critique of the annual goal, the evidence in the hearing record demonstrates that, the January 2015 IEP reflected the student's feeding needs consistent with the December 2014 Rebecca School progress report (see E.E. v. New York City Dep't of Educ., 2014 WL 4332092, at \*10 [S.D.N.Y. Aug. 21, 2014] [finding the student's feeding needs sufficiently addressed in the IEP]). Moreover, based upon the evidence in the hearing record, any failure to include information to detail a specific oral motor protocol in the January 2015 IEP did not rise to a denial of a FAPE.

## **2. Annual Goals**

The parent alleges that the IHO erred in finding that the annual goals in the January 2015 IEP were appropriate because the goals were vague, deficient, and inappropriate, the student had already accomplished several of the goals as of the time of the January 2015 CSE meeting, and certain goals were too difficult for the student. Further, the parent asserts that the IHO erred in failing to address the parent's claim that the IEP did not include annual goals to address the student's apraxia, feeding needs, or behavioral and sensory needs.

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]). Short-term instructional objectives or

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<sup>12</sup> The merits of such alleged deficiencies are discussed below.

benchmarks—described as "measurable intermediate steps between the student's present levels of performance and the measurable annual goal"—are required for students who participate in alternate assessment (see 8 NYCRR 200.4[d][2][iv]; see also 20 U.S.C. §1414[d][1][A][i][I][cc]; 34 CFR 300.320[a][2][ii]).

The hearing record shows that the academic goals developed by the January 2015 CSE generally addressed areas of academic weakness for the student. The district representative testified that the January 2015 CSE developed the student's academic goals during the CSE meeting (Tr. pp. 68-69). She explained a process in which the district special education teacher took notes while the Rebecca School teacher talked about the skills the student was working on (Tr. p. 68). Based on the Rebecca School teacher's verbal report, the district special education teacher created academic goals which she then reviewed and discussed with the other members of the CSE (Tr. pp. 68-69, 122). According to the district representative, the academic goals were aligned and "entwined" with the student's present levels of performance (id.). She explained that the CSE "took [the student] from where he was and then went to the next step forward" (Tr. p. 124; compare Dist. Ex. 3, with Dist. Ex. 1 at pp. 5-9). The hearing record offers no indication that either the parent or Rebecca School staff objected to the academic goals and short-term objectives at the time they were developed (Tr. p. 190; see Tr. p. 163).

As to the parent's assertion that the January 2015 IEP did not include annual goals to address the student's apraxia, feeding needs, or behavioral or sensory needs, the hearing record does not support his contention as detailed in the discussions of the student's sensory and feeding needs and the CSE's consideration of the student's interfering behaviors. Additionally, with respect to reading, a review of the CSE meeting minutes and the IEP shows that, at the time of the CSE meeting, the student was working on comprehension including answering "wh" questions, and that he learned new words through decoding and by sight (Dist. Exs. 1 at p. 2; 3 at p. 1).<sup>13</sup> The IEP further indicated that the student was working on identifying the feelings of characters in stories he read repeatedly, was working on a book within a first grade reading level, could decode consonant-vowel-consonant (CVC) words, and could retell and order events of an unfamiliar story using first, second, and last (Dist. Ex. 1 at p. 2). The student's January 2015 IEP included an annual goal that addressed the student's reading comprehension and decoding skills that was accompanied by seven short-term objectives that targeted the student's ability to: retell a story using beginning, middle, and end; retell a story using first, second, third, and last; answer "what/who," "where," and "when" questions when given texts in the first grade level range; decode unfamiliar CVC words; and identify sounds and syllable(s) in multisyllabic words (id. at p. 5).

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<sup>13</sup> The December 2014 Rebecca School progress report indicated that the student's individualized reading program was focused on increasing the student's comprehension when reading familiar stories, finding new texts that he was interested in, and increasing the student's fluency and verbal communication when reading out loud (Dist. Ex. 11 at pp 4-5).

With respect to math, the CSE meeting minutes and the IEP indicated that the student was able to rote count and demonstrate 1:1 correspondence up to 100 (Dist. Exs. 1 at p. 2; 3 at p. 2).<sup>14</sup> The minutes and the IEP also indicated that the student was working on double-digit addition (up to 30) and subtraction (up to 10) and identifying key words for addition and subtraction (id.). According to the meeting minutes and the IEP the student was able to combine coins to make a dollar and to tell time (id.). The math goal in the student's January 2015 IEP targeted the student's ability to solve double-digit addition and subtraction with regrouping and was accompanied by seven short-term objectives that targeted the student's ability to add double-digit numbers to 30 with regrouping and add double-digit numbers to 40 with regrouping; subtract numbers within 10; subtract double-digit numbers without regrouping; subtract double-digit numbers with regrouping; combine coins to a dollar independently; and identify key words indicating addition/subtraction in a given word problem (id. at pp. 5-6).

According to the CSE meeting minutes, when writing, the student had difficulty applying the "right" pressure on paper, his spacing was "OK" and he was able to write a couple of sentences on a topic (Dist. Ex. 3 at p. 2; see Dist. Ex. 1 at p. 2). The IEP further described that the student could write both upper and lowercase letters legibly and that he was working on using a combination of upper and lowercase letters in his writing and did not yet use appropriate capitalization and punctuation (Dist. Ex. 1 at p. 2). The January 2015 IEP included an annual goal for the student to improve his writing skills by demonstrating the ability to write three to five cohesive sentences on a preferred topic (id. at p. 6). In addition, the goal was accompanied by six short-term objectives that targeted the student's ability to: write a complete sentence; produce two sentences on a preferred topic given a sentence starter; produce three to five sentences on a preferred topic with fading adult support, read over his sentences and apply appropriate punctuation with adult support; read over his sentences and apply appropriate punctuation with fading adult support; and write sentences applying appropriate pressure on paper (id. at p. 6).

With regard to the student's related services goals, testimony by the district representative indicated that goals were adopted from the Rebecca School report (Tr. p. 68; see Dist. 11 at pp. 8-13). The district representative reported that there were speech, OT, PT, and counseling goals "embedded" in the Rebecca School progress report and that, prior to the CSE meeting, she highlighted the relevant goals and later reviewed them at the meeting (Tr. p. 69).<sup>15</sup> The minutes of the January 2015 CSE meeting show that OT goals were discussed by the committee and a sensory goal was "added" to the student's IEP (Dist. Ex. 3 at p. 2). The January CSE also discussed PT, speech-language therapy, and counseling goals for the student and "modified" his IEP by

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<sup>14</sup> The December 2014 Rebecca School report indicated that the student could rote count to 100, translate addition word problems into a number sentence (up to 20), and demonstrated an emerging ability to understand subtraction (quantities to 10) (Dist. Ex. 11 at p. 6). With respect to money, the Rebecca School report indicated that the student was receptively able to identify coins, given a field of choices, and was working on matching coins to their numerical value (id.). The progress report indicated that, going forward, the school would work with the student on making change (id.). With respect to time, the Rebecca School progress report indicated that the student was able to read time to the half-hour as it related to the classroom schedule and read digital time (id.).

<sup>15</sup> The Rebecca School program director testified that goals were part of the progress reports that were prepared twice a year by the school and were contained in a separate document called a "treatment plan" (Tr. p. 242). The hearing record does not include a copy of a "treatment plan" for the student and it is unclear whether or not the January 2015 CSE had such a document available to it; however, the Rebecca School progress report generally described the skills on which the student would be working to achieve going forward (see Dist. Ex. 11).

removing a speech-language goal addressing eye contact and adding a counseling goal that targeted the student's ability to identify feelings of self and others (id.). Furthermore, the minutes of the January 2015 CSE meeting indicated that, during the CSE meeting, the district members of the CSE solicited input regarding goal development from the parent and Rebecca School staff; however, they did not have any goals to add to the student's IEP (id.).

The meeting minutes from the January 2015 CSE indicated that the student could perform many ADLs independently, but that he continued to work on tying his shoes and manipulating fasteners, including zippers, buttons and snaps (Dist. Ex. 3 at p. 2). The minutes also indicated that, with respect to writing, the student had difficulty applying the right amount of pressure on paper (id.). A review of the December 2014 Rebecca School progress report shows that the student's OT at the Rebecca School targeted his sensory regulation, motor planning, and visual spatial needs (Dist. Ex. 11 at pp. 8-9). The January 2015 IEP contains three OT goals, the first of which states that, given OT services, the student will improve his fine motor skills (Dist. Ex. 1 at p. 6). Corresponding short-term objectives targeted the student's ability to wheelbarrow walk for 10 to 20 feet with decreasing adult support to increase hand strength; hold writing utensils with a static tripod grasp; formulate letters with appropriate size with decreasing verbal and visual cues; formulate letters with appropriate pencil pressure so letters are dark enough so that readers can see them; tie his shoe laces; zipper up/down his jacket; and handle large buttons and snaps (id.). A second OT annual goal for the student targeted his visual-spatial skills and was accompanied by two corresponding short-term objectives that addressed the student's ability (1) to visually search the environment for desired items or activities and communicate using signs, gestures, and approximation with minimal to non-verbal support, and (2) to complete a six to eight-step scavenger hunt to locate specific items with minimal support (id.). Finally, as detailed above, the January 2015 IEP included a third OT goal that targeted the student's sensory processing ability (id. at p. 7).

With respect to PT, the December 2014 Rebecca School progress report indicated that the focus of the student's therapy was on muscle strength, postural control, balance, endurance, bilateral integration and coordination, and motor planning and sequencing skills (Dist. Ex. 11 at p. 9). The January 2015 IEP contained a goal designed to increase the student's muscle tone in order to increase his motor planning and body awareness (Dist. Ex. 1 at p. 7). The IEP also included short-term objectives aligned with the goal that targeted the student's ability to: engage in motor activities for 25 to 30 minutes; complete and correctly sequence an obstacle course with six steps and no more than two verbal and physical cues; to doff and don his shoes with minimal verbal assistance in preparation for and following a sensory activity; to hold 12 to 15 yoga poses with no verbal assistance while using a visual chart; to maintain his balance of dynamic standing and movement-based challenges 100 percent over five consecutive probes; to perform up to five push-ups during a session; and to perform up to 25 sit-ups during a session (id.).

According to the December 2014 Rebecca School progress report, the focus of the student's speech-language therapy at the time was on improving the student's pragmatic, receptive and expressive language, as well as his oral motor skills (Dist. Ex. 11 at p. 11). The January 2015 IEP contained three speech-language annual goals (Dist. Ex. 1 at pp. 3). The first annual goal targeted the student's pragmatic language skills and communication and was accompanied by three corresponding short-term objectives that addressed the student's ability: to spontaneously greet peers; to extend his ability to engage in two to three conversational turns with peers with fading

adult support; and to engage in one conversational turn with adults on a non-preferred topic (Dist. Ex. 1 at p. 7).<sup>16</sup> A second speech-language goal that addressed the student's need to improve his receptive and expressive language skills was aligned with four corresponding short-term objectives that required the student to: respond to multi-step commands in order to obtain an item or complete the task with minimal clinician support; sequence three to four story cards with minimal support; produce two to three word utterances with gestures to make requests; and produce the [l] sound in all positions with minimal support (*id.* at p. 8). Additionally, as described above, the January 2015 IEP included a third speech-language goal that addressed the student's need to improve his oral motor skills in support of promoting improved feeding and speech (*id.*).

Finally, the January 2015 IEP contained counseling annual goals designed to address the student's social/emotional (behavioral) needs (Dist. Ex. 1 at pp. 8-9). The January 2015 CSE meeting minutes indicated that the student pushed people when upset because he did not have the language skills to express his frustration (Dist. Ex. 3 at p. 2; *see* Dist. Ex. 1 at p. 3). The minutes further indicated that the student would tap a peer to initiate interaction and could engage in a preferred topic for a few minutes (*id.*). The first counseling goal addressed the student's need to increase his ability to cope (given group and individual counseling) with the unexpected changes in his environment through engagement and routine (Dist. Ex. 1 at p. 8). A corresponding short-term objective aligned to the goal expected the student would accept spontaneous and unexpected changes in his routine and schedule by exhibiting appropriate behaviors (without behavioral over-reactions) when given sensory support and visual and verbal cues (*id.*). A second counseling goal addressed the student's need to increase his ability to engage with others in his environment that was aligned with two short-term objectives, the first of which provided that, given adult support and prompting, the student would participate in activities chosen by a peer until task completion without behavioral over-reactions, and the second of which provided that, using music as a medium, the student would identify feelings and emotions in both himself and others given visual cues and adult scaffolding (*id.* at p. 9).

The parent asserts that the IEP goals were vague and deficient. In support of the parent's claim, the Rebecca School program director testified that the student's IEP goals were broad and not measurable and that the criterion was the same for every goal, which showed a lack of individualization and was impossible for the student to achieve (Tr. pp. 188-91). Similarly, an occupational therapist from the Rebecca School testified that the student's OT goals were vague and unmeasurable (Tr. pp. 275-77, 288, 291-92). The student's father testified that the mastery criteria of 80 percent ran "rampant throughout the IEP" and asserted that the student's counseling goals were generic and not tailored to the student (Tr. pp. 437-38).

A review of the 12 annual goals in the January 2015 IEP shows that each included criteria for measurement to determine if the goal had been achieved, the method of how the student's progress would be measured, and a schedule of when progress toward the goals would be measured (Dist. Ex. 1 at pp. 5-9). While some of the annual goals are explicit (e.g., given direct instruction along with verbal/visual prompts and using manipulatives, the student will demonstrate his ability to solve double-digit addition and subtraction problems with regrouping with 80 percent accuracy),

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<sup>16</sup> The January 2015 IEP reflects that the CSE continued the student's fulltime access to a voice output communication device (Tr. pp. 60-61; Dist. Exs. 1 at p. 10; 3 at p. 2).

others are more broad (e.g., in one year, given OT services, the student will improve his fine motor skills 80 percent of the time) (*id.* at pp. 5-6). All of the goals are supported by short-term objectives, only some of which include criteria for mastery and are measurable. (*id.* at pp. 5-9). Consistent with the testimony of the parent and Rebecca School program director, each annual goal contains a mastery criteria of "80% accuracy," "80% of the time," or "80% accuracy over 5 consecutive weeks given fading adult support" (*id.* at pp. 5-9). Although the criteria for mastery should be better matched to each skill being measured, the annual goals and short-term objectives in the January 2015 IEP were aligned with the student's identified needs. Accordingly, while review of the January 2015 IEP confirms the parent's assertion that some of the annual goals were broad and lack measurability, the evidence in the hearing record does not support a finding that defects in the form of the goals, as opposed to the content of the goals, results in a denial of FAPE (*Tarlowe*, 2008 WL 2736027, at \*9; *see also P.K. v. New York City Dep't of Educ.*, 819 F. Supp. 2d 90, 109 [E.D.N.Y. 2011] [noting 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]).

With respect to the parent's argument that the student had already achieved several of the goals, although the Rebecca School program director testified that the student had achieved some of the academic short-term objectives included in the January 2015 IEP prior to its development, she did not specify which objectives the student had mastered (Tr. pp. 188-90).<sup>17</sup> Review of the IEP shows that, while the present levels of performance indicate that the student was able to decode CVC words and retell and sequence the events of an unfamiliar story using first, second, and third, similar short-term objectives appear on the student's IEP (*compare* Dist. Ex. 1 at p. 2 *with* Dist. Ex. 1 at p. 5). Additionally, the Rebecca School occupational therapist testified that the student had mastered some of his OT short-term objectives as of July 2015; however, her testimony lacked certainty (Tr. pp. 276-79, 288, 291-92). Furthermore, she described an objective that required the student to wheelbarrow walk 10-20 feet as inappropriate and having been met, because the student could wheelbarrow walk 10 feet (Tr. p. 276, 291). It is not clear how the occupational therapist knew that the student had mastered the OT objectives as of July 2015, as she testified that she did not begin working with the student until September 2015 (Tr. pp. 292-93). The student's Rebecca School teacher for the 2015-16 school year clarified that a goal she had reported as mastered prior to the 2015-16 school year was actually mastered in November 2015 (Tr. pp. 403-05). Even assuming that the evidence supported a finding that the student had achieved some of the short-term objectives included in the January 2015 IEP, such level of achievement would "not render the goals in the IEP *per se* inappropriate" (*R.B. v. New York City Dep't of Educ.*, 2013 WL 5438605, at \*13 [S.D.N.Y. Sept. 27, 2013] [emphasis in the original], *aff'd*, 589 Fed. App'x 572 [2d Cir. Oct. 29, 2014]; *A.M. v. New York City Dep't of Educ.*, 964 F. Supp. 2d 270, 284 [S.D.N.Y. Aug. 9, 2013]; *see G.S. v. New York City Dep't of Educ.*, 2016 WL 5107039, at \*10-\*11 [S.D.N.Y. Sept. 19, 2016]; *C.L.K. v. Arlington Sch. Dist.*, 2013 WL 6818376, at \*13 [S.D.N.Y. Dec. 23, 2013]).

The additional goals-related claims raised by the parent do not compel a different finding. The Rebecca School occupational therapist and special education teacher each opined that one of

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<sup>17</sup> The Rebecca School program director did not participate in the January 2015 CSE meeting at which the annual goals were developed (*see* Dist. Exs. 2; 3 at p. 1).

the IEP short-term objectives was difficult for the student (Tr. pp. 291-92, 390-91); however, even assuming this was true, their inclusion does not warrant a finding that the entire goal, let alone the entire IEP, is inappropriate to meet the student's needs, particularly given the management strategies set forth in the January 2015 that would be available to help the student succeed (see A.M., 964 F. Supp. 2d at 285).<sup>18</sup>

Based on all of the foregoing, the parent's challenges to the annual goals included in the January 2015 IEP do not support or contribute to a finding that the district failed to offer the student a FAPE.

### 3. Management Needs

Next, the parent claims that the IEP set forth stock management needs and did not describe the totality of the student's special needs. The parent asserts that the management strategies listed in the January 2015 IEP did not address the student's needs with respect to feeding, sensory needs, behaviors, transitions, social interactions, communicating with others, or navigating the school building.

State regulation defines management needs 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]). State guidance provides examples of environmental modifications (i.e., consistency in routine, limited visual or auditory distractions, adaptive furniture), human resources (i.e., assistance in locating classes, following schedules, and note taking), and material resources (i.e., instructional materials in alternative formats) ("Guide to Quality Individualized Education Program [IEP] Development and Implementation," at p. 20, Office of Special Educ. [Dec. 2010], available at [http://www.p12.nysed.gov/specialed/publications/iepguidance/IEP\\_guideDec2010.pdf](http://www.p12.nysed.gov/specialed/publications/iepguidance/IEP_guideDec2010.pdf)).<sup>19</sup> A student's management needs must be developed in accordance with the factors identified in the areas of academic achievement, functional performance, and learning characteristics, social development, and physical development, and reported in the student's IEP (see 8 NYCRR 200.1[ww][3][i][d], 200.4[d][2][i]; see also "Guide to Quality Individualized Education Program [IEP] Development and Implementation," at p. 20).

Although the parent did not recall "very much" discussion of the student's management needs during the CSE meeting (Tr. p. 440), the hearing record shows that the January 2015 CSE,

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<sup>18</sup> The student's Rebecca School teacher opined that a writing goal that required the student to produce three to five "cohesively connected sentences on a preferred topic" was too high for the student and that a more appropriate goal would be for the student to write a complete sentence (Tr. p. 391). However, the CSE meeting minutes indicate that, at the time of the January 2015 CSE meeting, the student was reportedly able to write "a couple of sentences on a topic" (Dist. Ex. 23 at p. 2). Likewise, the Rebecca School occupational therapist opined that a short-term objective related to completing a six-to-eight step scavenger hunt was "too high of a goal" for the student (Tr. p. 291). However, the December 2014 Rebecca School progress report, considered by the January 2015 CSE, indicated that the student had been "participating in a search and find activity while prone on a scooter board locating five objects hidden in a busy environment" (Dist. Ex. 11 at p. 9).

<sup>19</sup> Additional examples of management needs can be found in the general directions for the use of the State's model IEP form (see "General Directions to Use the State's Model IEP form," Office of Special Educ. Mem. [Revised Mar. 2010], available at <http://www.p12.nysed.gov/specialed/formsnotices/IEP/directions.htm>).



including the student's Rebecca School teacher, discussed and identified multiple environmental and human or material resources needed to address the student's management needs in school (Dist. Exs. 1 at p. 4; 3 at p. 2). The district representative testified that, during the CSE meeting, while the student's Rebecca School teacher described what she was doing with the student and what the student needed, she (the district representative) typed this information into a blank IEP (Tr. pp. 71-72; see Tr. pp. 68-69). She also indicated that the CSE gleaned information about the student's health management and other needs from the Rebecca School report (Tr. pp. 72-73; Dist. Ex. 1 at p. 11).

The parent does not particularize what environmental modifications or human or material resources he believes the IEP should have included but instead identifies areas of need that he alleges were not addressed in the management needs section of the IEP. The evidence in the hearing record does not support the parent's assertion that specific areas of the student's needs were left unaddressed in the IEP. The manner in which the January 2015 IEP addressed the student's feeding, sensory (including the student's needs related to transitions), and behavioral (including social and communication-related) needs are addressed in more detail above in the section discussion the student's sensory and feeding needs and below in the context of the student's need for an FBA or a BIP. As to navigating the school building, the October 2013 OT evaluation report noted that, although the student exhibited "dysfunctional" standing balance and moved "awkwardly and unsteadily," the student did not have or require any equipment or aides to help him maneuver through his environment (Dist. Ex. 6 at p. 1). Accordingly, the information before the January 2015 CSE did not indicate the student's needs for particular supports or strategies in this area of need.

The management supports and strategies included in the January 2015 IEP were consistent with the student's needs as described in the present levels and performance and included visual support, high affect engagement, sensory support, limited language, directions broken into small parts, written directions, visual and verbal prompts, modeling and scaffolding, manipulatives, and movements incorporated into the curriculum (Dist. Ex. 1 at p. 4). The IEP also noted that the student required modifications to all aspects of the general education curriculum including the depth, breath, and pacing of instructional materials (id.). Furthermore, embedded within the present levels of performance, the IEP reflected the student's need for sensory and visual supports, as well as movement incorporated into the math curriculum, word problems incorporated into games, support in identifying key words in math word problems, support to review his schedule to plan and organize his day, redirection, and advance warnings of changes in schedule (id. at p. 2). In addition, the IEP included the student's need for sensory and emotional support (a calm and soothing affect) during times of upset (i.e., when something spills during lunch or when he is unable to engage in a preferred activity or a preferred item is unavailable, whereupon he may cry or push objects or people), and in trying to understand his and others' emotions other than feeling happy (id. at p. 3). Furthermore, the IEP indicated the student's physical need for a sensory diet (intense vestibular and proprioceptive input three times per day) with additional sensory supports as needed, and oral motor support (id. at pp. 3-4).

The parent testified that the management needs included in the January 2015 IEP were a "starting" point (Tr. p. 442).<sup>20</sup> Indeed, the IEP described the student's needs accurately and sufficiently to enable the student to benefit from instruction and omission of any particular environmental modification or human or material resource does not support a finding that the district failed to offer the student a FAPE in this instance.

#### **4. Special Factors—Interfering Behaviors**

The parent asserts that the district denied the student a FAPE by failing to conduct an FBA and develop a BIP for the 2015-16 school year notwithstanding that the student exhibited interfering behaviors such as daily outbursts, physical aggression, and potentially injurious behavior. Additionally, the parent claims that the district failed to provide a 1:1 paraprofessional, which the student required to address his behaviors.

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., 361 Fed. App'x 156, 160 [2d Cir. Oct. 16, 2009]; A.C., 553 F.3d at 172). State procedures for considering the special factor of a student's behavior that impedes his or her learning or that of others may also require that the CSE consider developing a BIP for a student that is based upon an FBA (8 NYCRR 200.4[d][3][i], 200.22[a], [b]). State regulation defines an FBA as the process of determining why a student engages in behaviors that impede learning and how the student's behavior relates to the environment" and includes, but is not limited to,

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

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

Although State regulations call for the procedure of using an FBA when developing a BIP, the Second Circuit has indicated that, when required, "[t]he failure to conduct an adequate FBA is

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<sup>20</sup> With specific respect to the student's management needs, the parent testified about the student's need to feel safe and comfortable and the benefit of anticipating the student's needs and having "a backup plan" in the event the student became upset (Tr. pp. 439-40). This description generally aligns with information about the student's sensory-related needs before the CSE, as discussed above.

a serious procedural violation because it may prevent the CSE from obtaining necessary information about the student's behaviors, leading to their being addressed in the IEP inadequately or not at all" (R.E., 694 F.3d at 190; see L.O., 822 F.3d at 113). 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.).

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

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

(8 NYCRR 200.22[b][1]). If the CSE determines that a BIP is necessary for a student the BIP shall identify: (i) the baseline measure of the problem behavior, including the frequency, duration, intensity and/or latency of the targeted behaviors . . . ; (ii) the intervention strategies to be used to alter antecedent events to prevent the occurrence of the behavior, teach individual alternative and adaptive behaviors to the student, and provide consequences for the targeted inappropriate behavior(s) and alternative acceptable behavior(s); and (iii) a schedule to measure the effectiveness of the interventions, including the frequency, duration and intensity of the targeted behaviors at scheduled intervals (8 NYCRR 200.22[b][4]).<sup>21</sup>

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

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<sup>21</sup> The Official Analysis of Comments to the federal regulations explains that the decision regarding whether a student requires interventions such as a BIP rests with the CSE and is made on an individual basis (Consideration of Special Factors, 71 Fed. Reg. 46683 [August 14, 2006]). However, neither the IDEA nor its implementing regulations require that the elements of a student's BIP be set forth in the student's IEP. State guidance indicates that New York State regulations merely "require that a student's need for a BIP be documented in the student's IEP" ("Student Needs Related to Special Factors," Office of Special Educ. [April 2011], available at <http://www.p12.nysed.gov/specialed/formsnotices/IEP/training/QA-411.pdf>). 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, "[t]he implementation of a student's [BIP] shall include regular progress monitoring of the frequency, duration and intensity of the behavioral interventions at scheduled intervals, as specified in the [BIP] and on the student's IEP. The results of the progress monitoring shall be documented and reported to the student's parents and to the CSE or CPSE and shall be considered in any determination to revise a student's [BIP] or IEP" (8 NYCRR 200.22[b][5]).

Here, the district did not conduct an FBA or develop a BIP for the student and the January 2015 CSE did not otherwise recommend that the student required the same (see Dist. Ex. 1 at p. 4). According to the January 2015 CSE meeting minutes, the CSE discussed the student's social functioning, noting that the student would "push people when he's upset [and] typically cry" (Dist. Ex. 3 at p. 2). The meeting minutes indicated that the student exhibited pushing and crying behaviors because he did not have the language to convey his frustrations (id.). The district representative acknowledged at the impartial hearing that the student exhibited behaviors that "interfere[d] with his functioning" (Tr. pp. 107-08).

The parent and the Rebecca School program director testified that, although the student would not require a BIP at the Rebecca School, a BIP would be necessary given the CSE's recommendations because the student would get frustrated and lash out while transitioning to a public school (Tr. pp. 187, 234-35, 434-35).<sup>22</sup> However, as the district representative recognized, had the CSE conducted an FBA, it "would only [have] reflect[ed] what was happening at that time" while the student was attending the Rebecca School, rather than reflecting the behaviors that the Rebecca School staff expected the student would exhibit as a result of the transition (Tr. p. 111). This observation highlights a tension that exists between the environment-focused nature of an FBA and its relationship to when an FBA should be conducted. That is, FBA/BIP disputes between districts and parents that end in due process and litigation are frequently premised upon fact patterns involving an anticipated change in placement at the time the CSE is convened and develops a student's IEP. In cases involving such anticipatory changes in placement, the express language in State regulations does not indicate whether the FBA should be conducted in the most recent placement that the student actually attended or in the future placement anticipated by the CSE. Instead, State guidance suggests that the decision of timing and the environment in which an FBA should be conducted is a matter under State policy that has been left to the CSE to decide ("Guide to Quality Individualized Education Program [IEP] Development and Implementation," at p. 25, Office of Special Educ. [Dec. 2010] [noting the student's need for a BIP must be documented in the IEP, and, prior to the development of the BIP, an FBA either "has [been] or will be conducted"], available at <http://www.p12.nysed.gov/specialed/publications/iepguidance/IEPguideDec2010.pdf>). When the facts of the particular case support the outcome, one can reason that, given the environment-focused nature of the assessment—e.g., an FBA is defined as the process of determining why a student engages in behaviors that impede learning and how the student's behavior relates to the environment (8 NYCRR 200.1[r])—there is at least some merit to the proposition that an FBA, in some circumstances, would yield the educationally necessary information when conducted in the environment in which the resultant BIP would be

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<sup>22</sup> The Rebecca School program director testified that the Rebecca School viewed "behavior as a communication," which was understood and addressed in such a way that a BIP would "not necessarily [be] effective" (Tr. p. 225; see Tr. p. 234).

implemented.<sup>23</sup> On the other hand, in its opinion in R.E., the Second Circuit Court of Appeals unambiguously stated that "the entire purpose of an FBA is to ensure that the IEP's drafters have sufficient information about the student's behaviors to craft a plan that will appropriately address those behaviors" (694 F.3d at 190 [emphasis added]; see L.O., 822 F.3d at 111), evincing a view that an FBA must, in order to be procedurally compliant, always be drafted prior to or at the time of the development of the IEP, which must, by definition be completed before a student is placed.<sup>24</sup> In any event, this observation is largely academic in the present case since the January 2015 CSE did not recommend that an FBA be conducted or a BIP developed either leading up to or subsequent to the January 2015 CSE meeting.

According to the testimony of the district representative, the January 2015 CSE determined that the student did not require an FBA because the parent did not want an FBA to be conducted (Tr. p. 113). While the district may have acceded to the parent's preference that the student not undergo an FBA, this would not relieve the district of its obligation to ensure that the student's entire special education program and related services aligned with the student's needs (Blackmon v. Springfield R-XII Sch. Dist., 198 F.3d 648, 657-58 [8th Cir. 1999] [noting that although the district's obligation "to permit parental participation in the development of a child's educational plan should not be trivialized . . . , the IDEA does not require school districts simply to accede to parents' demands"]; cf. Loretta P. v. Bd. of Educ., 2007 WL 1012511, at \*6 [W.D.N.Y. Mar. 30, 2007] [observing that no party claimed "that the [d]istrict's acquiescence to the parents' request for home instruction was compatible with the IDEA or [the student's] right to an IEP which satisfied the [d]istrict's obligation to provide a [FAPE]"]).

However, even considering the CSE's determination that the student did not require an FBA or a BIP as a serious procedural violation, in this instance, it would not rise to the level of a denial of a FAPE or otherwise contribute to such a finding because the January 2015 CSE had

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<sup>23</sup> Once, in a summary order only, the Second Circuit explicitly addressed the timing for conducting an FBA in light of parallel IDEA and State regulatory standards then in effect, holding that it does not follow that in every circumstance an FBA must be conducted and a BIP developed at the same time as the IEP (see Cabouli v. Chappaqua Cent. Sch. Dist., 202 Fed. App'x 519, 522 [2d Cir. Oct. 27, 2006] [noting that it may be appropriate in some circumstances 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]). However, that decision was issued prior to and could not have addressed the timing factor in light of the State's subsequent promulgation of program standards in 8 NYCRR 200.22 and the addition of explicit definitions for the terms FBA and BIP to 8 NYCRR 200.1. Although FBAs and BIPs have become frequently litigated issues in New York in the special education context, none of the case law of which I am aware in New York has discussed in any significant detail either the timing factor or the environmental factor of the FBA, although a handful of cases have recognized and mentioned that such factors exist with respect to FBAs and BIPs (see, e.g., J.C.S. v. Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, at \*13 [S.D.N.Y. Aug. 5, 2013]; B.K., 12 F. Supp. 3d at 365; M.M., 583 F. Supp. 2d at 510).

<sup>24</sup> In R.E. and L.O., the Court indicates that, if a student has interfering behaviors, a BIP must be developed, citing 8 NYCRR 200.22; however, the text of the regulation actually indicates that the CSE "shall consider the development of a [BIP]" (8 NYCRR § 200.22[b]), which language is less absolute. This may have allowed districts additional flexibility in determining how to address students' needs (i.e. changing placements to those with different class wide behavioral strategies and approaches, especially when changes in restrictiveness were not a factor).

sufficient evaluative information regarding the student's behaviors and the January 2015 IEP adequately identified and described the student's behavioral needs (R.E., 694 F.3d at 190).

The January 2015 IEP accurately reflected the information from the December 2014 Rebecca School progress report (summarized above with respect to the student's sensory needs), identifying the student's behaviors of crying and acting out, including the behaviors of pushing objects or people (compare Dist. Ex. 1 at p. 3, with Dist. Ex. 11 at p. 2). The January 2015 IEP indicated that, according to the student's then-current Rebecca School teacher, the student became upset daily for about 5 to 15 minutes and typically cried (Dist. Ex. 1 at p. 3). Additionally, the IEP noted that, according to the student's teacher, aggressive behaviors could occur weekly (id.). The IEP also set forth possible triggers for the student's behaviors, including the student's sensory-related sensitivities—described in more detail above—such as becoming dysregulated when others were loud or not following directions or if there were changes to the routine (compare Dist. Ex. 1 at p. 3, with Dist. Ex. 11 at p. 2). The January 2015 IEP also indicated that the instances where the student acted-out were an attempt to communicate and that he needed support to help him communicate (Dist. Ex. 1 at p. 3). The district representative acknowledged at the impartial hearing that the January 2015 CSE did not have data about the frequency and duration of the student's behaviors (Tr. pp. 133-14)—e.g., the sort of information included in an FBA.<sup>25</sup> However, in this case, the January 2015 CSE had adequate information to form a hypothesis as to the general conditions that caused the student's behaviors sufficient to mitigate any violation arising from the district's failure to conduct an FBA or develop or recommend a BIP for the student (see L.O., 822 F.3d at 112-13 [noting that hypotheses about the causes of a student's program behaviors are a "minimum requirement" of State regulations]).

The supports, services, and goals included in January 2015 IEP to address the student's sensory needs are detailed above (Dist. Ex. 1 at pp. 3-4, 7, 9-10). Additionally, to address the student's communication needs, the CSE recommended both individual and small group speech-language therapy and included annual goals, also summarized further above, to improve the student's pragmatic language skills and communication and his receptive and expressive language skills (Dist. Ex. 1 at pp. 7-8, 10). Additionally, the January 2015 CSE recommended the use of an assistive technology device for communication (id. at p. 10). To address the student's social/emotional needs, the CSE recommended both individual and small group counseling services and annual goals relating to coping strategies (id. at pp. 8-9).

To the extent that the parent argues that the January 2015 CSE should have recommended a 1:1 crisis management paraprofessional, various courts have found that recommendation for a 1:1 paraprofessional in a student's IEP helped to mitigate a district's failure to recommend a BIP for the student (see, e.g., M.W., 725 F.3d at 141; R.E., 694 F.3d at 193; T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 419 [2d Cir. 2009]). However, such authority does not go so far as to imply that a 1:1 paraprofessional should substitute for a BIP or that, if a district does not develop a BIP for a student with behavioral needs, it must alternatively provide for a 1:1 paraprofessional in all instances (see "Guidelines for Determining a Student with a Disability's Need for a One-to-One Aide," at p. 1, Office of Special Educ. Mem. [Jan. 2012], available at

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<sup>25</sup> The district representative testified that she requested information from the student's teacher at the time but that the staff at the Rebecca School did not collect that sort of data (Tr. pp. 112-13).

<http://www.p12.nysed.gov/specialed/publications/1-1aide-jan2012.pdf>; see "Teaching Assistants and Teacher Aides Compared," Office of Teaching Initiatives [Aug. 31, 2009] [noting that "[o]ne-to-one aides may not be used . . . as a substitute for an appropriately developed and implemented [BIP]"], available at <http://www.highered.nysed.gov/tcert/career/tavsta.html>). The district representative testified that 1:1 paraprofessionals were often recommended for students with "very significant behaviors" but that the student's behaviors did not warrant that level of "individual adult support" (Tr. pp. 73-74). In this instance, the IEP adequately addressed the student's behavioral needs with the 6:1+1 special class placement, related services, assistive technology, and supports for the student's management needs.

Considering the supports set forth above to assist the student in communicating his frustrations instead of acting out physically, to support the student's ability to calm himself and organize himself with sensory supports, and to provide the student with coping strategies, the January 2015 IEP adequately addressed the student's behaviors. Thus, the January 2015 CSE's failure to recommend an FBA or a BIP does not in this instance rise to the level of a denial of a FAPE because the January 2015 IEP otherwise identified and addressed the student's problem behaviors with appropriate supports and strategies (see E.H. v. New York City Dep't of Educ., 611 Fed. App'x 728, 730-31 [2d Cir. May 8, 2015]; T.M., 752 F.3d at 169 [holding that so long as an IEP sufficiently identifies the student's behavioral impairments, and includes strategies for managing them, failure to develop a BIP will not rise to the level of a denial of a FAPE]; F.L., 553 Fed. App'x at 6-7; M.W., 725 F.3d at 140-41; R.E., 694 F.3d at 190; A.C., 553 F.3d at 172-73).

## **5. 6:1+1 Educational Placement**

The parent asserts that the district recommended a 6:1+1 educational placement without properly discerning the student's ability to be placed in that type of environment and the student's special education needs warranted a greater amount of individualized teacher support throughout the school day. A review of the hearing record supports the district's 6:1+1 special class recommendation for the student.

In this case, the January 2015 CSE recommended a 6:1+1 special class placement— together with annual goals, related services, and strategies to address the student's management needs—for the 2015-16 school year (see Dist. Ex. 1 at pp. 4-13). State regulations provide that a 6:1+1 special class placement is designed for students the "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]).

As noted above, at the time the student's January 2015 IEP was developed, the student was attending the Rebecca School, where the classroom student-to-staff ratio was two-to-one (Tr. p. 170; see Dist. Ex. 11 at p. 1). The Rebecca School program director explained that each classroom included a head teacher and a given number of teaching assistants, determined by the number of students in the classroom (Tr. p. 170). According to the program director, the two-to-one ratio allowed for one-to-one, two-to-one, or small group instruction depending on the students' goals (Tr. pp. 170-71). She reported that academics were taught one-to-one (Tr. p. 171).

The Rebecca School progress report, relied on by the January 2015 CSE, indicated that the student was independent during most activities of daily living (Dist. Ex. 11 at p. 7). In addition,

the report indicated that the student participated in group activities for art, music, reading, social studies, and OT (id. at pp. 1, 5, 7, 8-9). With respect to needed adult support, the December 2014 Rebecca School progress report indicated that staff primarily provided the student with verbal assurance/prompting and sensory support (see generally id.). In times of dysregulation, when the student required "maximum adult and sensory support," Rebecca School staff spoke to the student using "calm and soothing language," validated his feelings, and provided him with squeezes/deep pressure (id. at pp. 2, 4). The Rebecca School report showed that the student required adult verbal support to stay engaged in an activity with a peer and to process frustration when upset and return to the interaction (id. at p. 2). However, the progress report also noted that more recently the student had accepted peer support when upset or frustrated and that classroom staff supported the student by helping him ask a peer for hand squeezes when upset (id. at p. 4).

The district representative testified that she was familiar with 6:1+1 special classes in a general sense, based on classroom observations (Tr. p. 51). She described a 6:1+1 as a small class, that tended to be language-based (id.). She explained that 6:1+1 special classes were designed for students with intensive management needs, "thus the very small ratio" (Tr. pp. 51-52). The district representative commented that generally students placed in 6:1+1 special classes had a significant degree of impairment (Tr. p. 52). She confirmed that, in a 6:1+1 special class, a student would receive direct teacher assistance for a particular task (Tr. p. 52). She noted that the teacher was obligated to follow the IEP as it was written and would provide instruction in whatever area the IEP dictated (id.). According to the district representative, the CSE determined that a 6:1+1 special class was an appropriate placement for the student because he presented with significant, global impairments (Tr. p. 53). The district representative reported that the student had very limited language and required a high amount of support throughout the day in order to make progress (id.). She further stated that there were "significant issues in terms of academic acquisitions, as well as social/emotional functioning" (id.). Lastly, the district representative noted that the student's need for sensory supports throughout the day required an intensive staff to student ratio, like a 6:1+1 (id.).

Regarding the student's educational placement, the district representative reported that prior to recommending a 6:1+1 special class in a specialized school, the CSE ruled out all 10-month programs (community school based programs) because the student needed more support than those classes would provide and because the likelihood of regression was great, given the student's level of functioning (Tr. p. 53; see Dist. Ex. 1 at p. 14). The district representative further indicated that, within the 12-month programs, the CSE considered special classes with ratios of 12:1+1 and 8:1+1, but determined that, given the intensity of the student's needs, these ratios would not provide him with sufficient support (Tr. p. 53-54; Dist. Ex. 1 at p. 14). The CSE determined that the student required a smaller student-to-teacher ratio to address his intensive management needs (Dist. Ex. 1 at p. 14). The district representative testified that, when discussing the student's health management needs, the need for a 1:1 paraprofessional did not come up, because one was not warranted (Tr. p. 73). She stated that generally students need to have very significant interfering behaviors that require 1:1 support and the student's behaviors did not warrant individual adult support (Tr. p. 74). Additionally, as noted above, the district representative confirmed that the CSE did not discuss deferring the student's placement recommendation to the CBST or placement in a New York State approved school (Tr. p. 89).



The district representative testified that she was aware of the ratio of the student's Rebecca School class at the time of the CSE meeting, stating that the student was in a class with five other students, a head teacher and two assistant teachers (Tr. p. 115; Dist. Ex. 11 at p. 1). She explained that the CSE did not consider recommending a program with two teachers because, with the exception of ICT classes, no State public school or State-approved school used two teachers; rather classes were staffed by one teacher and paraprofessionals (Tr. p. 116). She acknowledged that some private schools used two teachers (id.).

Although parent disagreed with the 6:1+1 special class recommendation, it appears that much of his disagreement related to finding an appropriate assigned school rather than the actual 6:1+1 ratio. The parent reported if he could "find a site that gave [the student] the supports and . . . love and his things that he needed," there would be "no problem" (Tr. p. 429). The parent noted that he had seen over 23 schools and hadn't found one that had most of the supports and things that could keep the student safe and help him progress toward being an adult (Tr. pp. 429-30). The parent also explained that, "whenever you find a school there is a transition" and transitions were "the bane of these children's existence" and the "thing that that's hardest," particularly for his child (Tr. p. 430). The parent noted that, while the district staff legitimately felt that 6:1+1 "works," he did not and, moreover, he had seen the positive results of the student's participation in his then-current program (see Tr. pp. 430-31).

The parent testified that he disagreed with the 6:1+1 special class recommendation because the student needed "additional favorite adult supports" (Tr. p. 470). He noted that the qualifications for district paraprofessionals was not as stringent as the Rebecca School in terms of education, growth, and in some cases experience (id.). The parent opined that the student needed "more adult supports than can be offered by one teacher and one minimally qualified or one maximally qualified para, as well as they may be" (Tr. p. 471). However, at the impartial hearing, the parent testified, "I don't find tremendous fault with the IEP," and he was unable to indicate what would be different academically between the recommended 6:1+1 special class and the student's Rebecca School program (Tr. pp. 478-79). The parent further indicated his main complaint with the January 2015 IEP was "placement" (Tr. p. 479). He noted, "[i]f they could find a placement that could enact the IEP as written, I'm good" (id.).

In summary, there was "no unequivocal" testimony at the impartial hearing that the student could not progress outside of a two-to-one setting, such as that provided at the Rebecca School, and, even considering evidence that the student exhibited success in the ratio offered at the Rebecca School, that would "in no way disprove[] his potential for success in a 6:1:1 setting" (Z.C. v. New York City Dep't of Educ., 2016 WL 7410783, at \*7, \*8 [S.D.N.Y. Nov. 28, 2016]). The parent clearly preferred the two-to-one student-to-staff ratio provided by the Rebecca School. However, the student's level of independence with respect to ADLs, ability to participate in group activities, and response to verbal prompts and sensory input suggests that the district's recommended placement, which would have provided the student with a three-to-one student-to-staff ratio, along with 13 individual related services sessions per week, and 5 group related services sessions per week was designed to confer meaningful educational benefits upon the student (Dist. Ex. 1 at pp. 9-10). Moreover, notwithstanding the parent's preference, districts are not required to replicate the identical setting used in private schools (see, e.g., Z.D. v. Niskayuna Cent. Sch. Dist., 2009 WL 1748794, at \*6 [N.D.N.Y. June 19, 2009]; Watson v. Kingston City Sch. Dist., 325 F.Supp.2d 141, 145 [N.D.N.Y. 2004]). Based on the foregoing, the January 2015 CSE's decision to recommend a

6:1+1 special class placement—together with annual goals, related services, and strategies to address the student's management needs—was reasonably calculated to enable the student to receive educational benefits and offered the student a FAPE for the 2015-16 school year. While I can sympathize with the parent in this case, who may desire a more ideal program for his son that would offer even greater educational benefits through the auspices of special education, it does not follow that the district has failed in meeting the more modest standard offering the student an appropriate program, because 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). The IDEA 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, 873 F.2d at 567 [citations omitted]).

## 6. DIR Methodology

The parent claims that the district failed to provide evidence as to the methodology it intended to employ and that the student benefitted from DIR methodology.<sup>26</sup> Further the parent alleges that the student would not have been able to attain the annuals goals included in the January 2015 IEP without the use of DIR methodology.

By way of background, DIR is the methodology used by the Rebecca School to instruct all students (Tr. p. 354). According to the hearing record, the methodology is based on identifying strengths and limitations in the "six basic developmental levels" mastered by typically-developing children, as well as a student's "individual sensory profile," and is focused on "broaden[ing] and deepen[ing] the relationships" between children and causing learning to be motivating (Tr. pp. 166-67; see Tr. pp. 105, 249, 354). The Rebecca School teacher testified that "Floortime" was used to "facilitate interactions between students," whereby staff would "follow the student's lead," observe his or her interests, and "meet [the student] where [he or she was] developmentally, and then try to move [that student] up" the "developmental ladder" (Tr. pp. 310, 356). The teacher also described "circles of communication," as communication initiations and responses, the latter of which would represent "closing a circle" (Tr. p. 311). According to a 2009 journal article entitled "Evidence Base for the DIR/Floortime Approach," the model is an evidence-based intervention that is "widely accepted and respected" (Parent Ex. I at pp. 2, 10).<sup>27</sup>

As noted above, 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

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<sup>26</sup> It may be that the parent intended to direct this allegation at the district's failure to present evidence regarding the methodology employed at the assigned public school site. However, since the January 2015 IEP did not mandate a particular methodology for the student, such a challenge would, in any event, be a "substantive attack[]" on [the] IEP . . . couched as [a] challenge[] to the adequacy" of the assigned public school site (M.O. v. New York City Dep't of Educ., 793 F.3d 236, 245 [2d Cir 2015]). Therefore, the parent's claim relating to methodology shall be examined in the context of the recommendations included in the January 2015 IEP.

<sup>27</sup> According to "Findings and Conclusions: National Standards Project, Phase 2" published in 2015 by the National Autism Center of the May Institute, which reviewed scientific literature published between 2007 and February 2012, DIR/Floortime was an intervention "falling into the [u]nestablished level of evidence"; however, the report also characterized "Developmental Relationship-based Treatment" as "falling into the [e]merging level of evidence" (Dist. Ex. 16 at pp. 1, 4, 12, 73-74). The Rebecca School program director testified that DIR/Floortime and Developmental Relationship-based Treatment were the same approach (Tr. pp. 200-01).

is necessary (Rowley, 458 U.S. at 204; R.B., 589 Fed. App'x at 575-76; A.S., 573 Fed. App'x at 66; K.L., 530 Fed. App'x at 86; R.E., 694 F.3d at 192-94; M.H., 685 F.3d at 257). As long as any methodologies referenced in a student's IEP are "appropriate to the [student's] needs," the omission of a particular methodology is not necessarily a procedural violation (R.B., 589 Fed. App'x at 576 [upholding an IEP when there was no evidence that the student "could not make progress with another methodology"], citing 34 CFR 300.39[a][3] and R.E., 694 F.3d at 192-94). However, where the use of a specific methodology is required for a student to receive an educational benefit, the student's IEP should 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 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"]).

Here, the January 2015 CSE was aware that the Rebecca School used the DIR methodology (Tr. pp. 104-05; Dist. Ex. 11 at p. 1) and the January 2015 IEP included information provided by the parent that the student had benefited from the DIR methodology (Dist. Ex. 1 at p. 3).<sup>28</sup> In his petition, the parent notes that the district "has been on notice for several years that [the student] is in a school that utilizes the DIR approach in every aspect of his education and that [the student] has benefited from this approach" (Pet. ¶ 25). However, simply because the student's private school employed a specific methodology, it does not follow that all students at that school must continue their instruction in that methodology to receive educational benefit. An instructional methodology that so polluted a student's potential educational experiences so as to prevent the future use of other appropriate educational methodologies would be highly questionable practice in pedagogical terms. Consistent with this general observation, the district representative stated that her "perspective [wa]s larger than a specific methodology," meaning that she had witnessed students transfer to schools with different methodologies "and yet they adapt" (Tr. p. 106).

Further, a review of the hearing record demonstrates that there was nothing available to the CSE at the time of the January 2015 CSE meeting that indicated that the "DIR/Floortime" methodology was necessary in order for the student to receive educational benefit. For example, there is no evidence in the hearing record that there was information before the CSE indicating that the student could not receive educational benefit from other methodologies (see R.B., 589 Fed. App'x at 575-76). Moreover, the hearing record does not indicate that the parent or the Rebecca School staff requested that the student be limited to a specific methodology.

Therefore, the January 2015 CSE's failure to recommend a particular methodology for the student is not a procedural violation (see R.B., 589 Fed. App'x at 576; P.S. v. New York City Dep't

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<sup>28</sup> According to the student's Rebecca School teacher for the 2015-16 school year, the DIR approach was "perfect for [the student]" in that he was "motivated by relationships" and the Rebecca School staff knew "his individual differences and support[ed] him and m[et] him where he [wa]s developmentally" (Tr. p. 309). The Rebecca School teacher who testified did not attend the January 2015 CSE meeting and there is no indication that the CSE was made aware of how "perfect" the DIR approach was for the student. However, even assuming the CSE was aware that the student was particularly suited to receive instruction under this methodology, the IDEA guarantees "an appropriate education, not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker, 873 F.2d at 567 [citations omitted]).

of Educ., 2014 WL 3673603, at \*12 [S.D.N.Y. July 24, 2014] [failure to consider a specific methodology did not result in a denial of FAPE]).

Turning to the parent's assertion about the annual goals and the DIR methodology, it appears that the argument has shifted on appeal. In his due process complaint notice, the parent claimed that the annual goals appeared to be goals developed by the staff at the Rebecca School and that, because they were written with the intention that they would be implemented with the staffing ratio and methodology used at the Rebecca School, they could not be implemented in the placement recommended in the IEP (Parent Ex. B at p. 3). The IHO found that the annual goals were not methodology-specific (IHO Decision at pp. 10-11). On appeal, the parent does not challenge the IHO's determination in this respect but instead appears to argue that, regardless of the methodology the CSE had in mind when drafting the goals, the goals would be too difficult for the student to achieve without the DIR methodology. This argument has been sufficiently examined above with respect to the appropriateness of the annual goals and the student's need for DIR methodology in the IEP and is without merit. That is, while the parent and the Rebecca School staff have "considerable confidence in a single teaching methodology," this does not explain why the annual goals in the January 2015 IEP, "which are methodologically-neutral," can only be achieved using DIR methodology. (T.C. v. New York City Dep't of Educ., 2016 WL 1261137, at \*14 [S.D.N.Y. Mar. 30, 2016]).

However, the parent's original claim is briefly addressed. In the present case, unlike in some instances where the district repeated DIR-related terms in formulating a student's annual goals (see Application of the Dep't of Education, Appeal No. 16-057), the academic and related services annual goals and short-term objectives included in the January 2015 IEP do not include any such terms and, therefore, as the IHO found, cannot be said to have implicitly adopted any particular methodology (Dist. Ex. 1 at pp. 5-9).<sup>29</sup> Consistent with this, the district representative testified that the annual goals were related to skill deficits, not a specific methodology, and provided an example that the student's math goals related to adding and subtracting numbers and not to a methodology (Tr. pp 70, 103; Dist. Ex. 1 at pp. 5-6). She further explained that she was aware the student received instruction through DIR at the Rebecca School, but did not consider the methodology of instruction in drafting the student's annual goals because the student's deficits were not linked to the method of instruction but were consistent regardless of the methodology employed (Tr. pp. 102-06).

In summary, while there are indicators in the hearing record that the student received some benefit from instruction using DIR methodology, the hearing record does not support a finding that the student required this methodology to benefit from instruction (Tr. pp. 203-04, 309-11, 354-55, 460; see generally Dist. Ex. 11).

### **C. Assigned Public School Site**

The parent asserts that the IHO erred in dismissing his claims with respect to the assigned public school as speculative. On appeal, the parent claims that, based on his visit to the assigned

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<sup>29</sup> As noted above, the district representative indicated that related services goals were adopted from the Rebecca School report but that the academic goals were developed at the CSE meeting (Tr. pp. 68-69; see Dist. 11 at pp. 8-13).

school, the school lacked in-class sensory equipment that the student required and that the school could not ensure that the student would receive all of the related services mandated on the student's IEP. The parent contends that the district presented no evidence to prove that the assigned school could provide all of the student's related services or could meet the student's sensory and feeding needs. In addition, the parent asserts that the district failed to produce evidence regarding the functional grouping of the other students in the proposed class or the qualifications of the school's teachers and service providers.

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., 611 Fed. App'x at 731; R.B. v. New York City Dep't of Educ., 603 Fed. App'x 36, 39 [2d Cir. Mar. 19, 2015] ["declining to entertain the parents' speculation that the 'bricks-and-mortar' institution to which their son was assigned would have been unable to implement his IEP"], quoting T.Y., 584 F.3d at 419; R.B., 589 Fed. App'x at 576).

However, while a district's assignment of a student to a particular public school site is an administrative decision, it must be made in conformance with the CSE's educational placement recommendation, and the district is not permitted to deviate from the provisions set forth in the IEP (M.O. v. New York City Dep't of Educ., 793 F.3d 236, 244 [2d Cir. 2015]; R.E., 694 F.3d at 191-92; T.Y. 584 F.3d at 419-20; see C.F., 746 F.3d at 79 [holding that while parents are entitled to participate in the decision-making process with regard to the type of educational placement their child will attend, the IDEA does not confer rights on parents with regard to the selection of a school site]).<sup>30</sup> The Second Circuit has held that claims regarding an assigned school's ability to implement an IEP may not be speculative when they consist of "prospective challenges to [the assigned school's] capacity to provide the services mandated by the IEP" (M.O., 793 F.3d at 245; see Y.F. v. New York City Dep't of Educ., 2016 WL 4470948, at \*2 [2d Cir. Aug. 24, 2016]; J.C. v. New York City Dep't of Educ., 643 Fed. App'x 31, 33 [2d Cir. 2016]; B.P. v. New York City Dep't of Educ., 634 Fed. App'x 845, 847-49 [2d Cir. 2015]). Such challenges must be "tethered" to actual mandates in the student's IEP (see Y.F. v. New York City Dep't of Educ., 2016 WL 4470948, at \*2 [2d Cir. Aug. 24, 2016]). Additionally, in M.O., the Court indicated that such challenges would be appropriate as long as they were evaluated prospectively as of the time the parent made the placement decision and based on more than "mere speculation" that the school would not adequately adhere to the IEP despite its ability to do so (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 (J.D. v. New York City Dep't of Educ., 2015 WL 7288647, at \*16 [S.D.N.Y. Nov. 17, 2015], quoting K.C. v. New York City Dep't of Educ., 2015 WL 1808602, at \*12 [S.D.N.Y. Apr. 9, 2015]; see also Z.C., 2016 WL 7410783, at \*9; L.B. v. New York City Dept. of Educ., 2016 WL 5404654, at \*25 [S.D.N.Y. Sept. 27, 2016]; G.S., 2016 WL 5107039, at \*15; M.T. v. New York City Dep't of Educ., 2016 WL 1267794, at \*14 [S.D.N.Y. Mar. 29, 2016]) based on something more than the parent's speculative "personal belief" that the

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<sup>30</sup> The district is required to implement the IEP and parents are well within their rights to compel a non-compliant district to adhere to the terms of the written plan (20 U.S.C. §§ 1401[9][D]; 1414[d][2]; 34 CFR 300.17[d]; 300.323; 8 NYCRR 200.4[e]).

assigned public school site was not appropriate (K.F. v. New York City Dep't of Educ., 2016 WL 3981370, at \*13 [S.D.N.Y. Mar. 31, 2016]; Q.W.H. v. New York City Dep't of Educ., 2016 WL 916422, at \*9 [S.D.N.Y. Mar. 7, 2016]; N.K. v. New York City Dep't of Educ., 2016 WL 590234, at \*7 [S.D.N.Y. Feb. 11, 2016]).

As an initial matter, on appeal, the parent raises challenges to the assigned public school site that were not included in his due process complaint notice. A party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in the 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.P., 634 Fed. App'x at 849-50; N.K. v. New York City Dep't of Educ., 961 F. Supp. 2d 577, 584-86 [S.D.N.Y. 2013]). Here, the parent's due process complaint notice included no allegation regarding the assigned public school site's ability to deliver all of the related services mandated on the January 2015 IEP or regarding the qualifications of the school's teachers and service providers (Parent Ex. B at p. 6).<sup>31</sup> It has been observed that, absent a non-speculative claim that an assigned public school site would not or could not comply with the IEP, a district has no affirmative obligation to present evidence that the assigned school could comply with the IEP (M.O., 793 F.3d at 246; Y.F., 2016 WL 4470948, at \*3; Q.W.H., 2016 WL 916422, at \*12). Here, speculative or not, prior to the parent's testimony at the impartial hearing, there was no communication to the district that the parent had concerns about these particular issues (see Tr. pp. 448-51). Thus, it is no wonder that, as the parent asserts, the district "presented no evidence regarding the qualifications or existence of the special education teacher, or the related service providers . . ." <sup>32</sup> and that the district's "witness did not even refute the parent's assertions that during the school tour, the parent was told that the school could not guarantee the availability of

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<sup>31</sup> Additionally, the due process complaint notice did not directly allege that the assigned public school site would be incapable of addressing the student's feeding needs; however, because the district solicited testimony on direct examination on the issue and the district's attorney indicated his understanding that "supervision and monitoring of the student due to his food intake issues" was an issue raised in the due process complaint notice (Tr. pp. 138-39, 143; see Dist. Ex. B at p. 4), the parent's concern on this point shall be examined (M.H., 685 F.3d at 250-51 [finding that issues not included in a due process complaint notice may be ruled on by an administrative hearing officer when the district "opens the door" to such issues with the purpose of defeating a claim that was raised in the due process complaint notice]; see B.M. v. New York City Dep't of Educ., 569 Fed. App'x 57, 59 [2d Cir. June 18, 2014] [noting that foundational questions, as opposed to direct examination pursued "in support of an affirmative, substantive argument," would not open the door to issues outside of the due process complaint notice]; J.C.S., 2013 WL 3975942, at \*9).

<sup>32</sup> Moreover, the parent does not assert that the district would not have complied with State regulations regarding the qualifications of staff. Rather, the parent merely asserts that the district did not establish to his satisfaction that the staff working with his child would have been adequately qualified. As noted by several district courts, claims regarding qualifications of staff are inherently speculative when a student never attends the assigned public school, as there is no guarantee that a student will receive services from a specific teacher or provider (J.D., 2015 WL 7288647, at \*16; 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; B.K., 12 F. Supp. 3d at 371-72; M.S. v. New York City Dep't of Educ., 2 F. Supp. 3d 311, 331-32 [E.D.N.Y. 2013]).

on-site related service providers" (Pet. ¶¶ 25, 26 n.17).<sup>33</sup> Based on the foregoing, these assertions were not raised as issues to be addressed at the impartial hearing and will not be further examined.

Turning to the merits, it is undisputed that the parent rejected the January 2015 IEP and instead chose to enroll the student in a nonpublic school of his choosing (Parent Exs. A; E). The parent entered into an enrollment contract with the Rebecca School on May 29, 2015 and informed the district of this decision by letter dated June 16, 2015 (Parent Exs. A; E). Also on June 16, 2015, the parent toured the assigned public school site (Tr. pp. 133-34). The parent's letter to the district rejecting the January 2015 IEP did not reference the assigned school or the parent's observations during the tour (see Parent Ex. A). Nonetheless, even assuming that the parent's observations of the assigned public school site constituted information upon which the parent relied in making the placement decision (see Z.C., 2016 WL 7410783, at \*10 [noting that challenges to assigned schools must be evaluated prospectively, "based on facts 'uncovered by a parent prior to' [his or her] rejection of the placement"], quoting M.T. v. New York City Dep't of Educ., 165 F. Supp. 3d 106, 120 [S.D.N.Y. 2016]), the claims regarding the assigned public school site's alleged inability to meet the student's sensory and feeding needs or to group the student with similar peers are impermissible, as they appear to be based solely on the parent's speculative "personal belief" that the assigned public school site was not appropriate (see M.O., 793 F.3d at 245; J.M. v. New York City Dep't of Educ., 171 F. Supp. 3d 236, 251 [S.D.N.Y. 2016]; Q.W.H., 2016 WL 916422, at \*9).

Specifically, to the extent the parent claims that the assigned school lacked the sensory equipment the student required, there is no evidence that the assigned school could not implement the student's IEP. The district intake coordinator from the assigned public school site testified that the school's "sensory room" was "the OT room," which possessed "a lot of sensory equipment" such as a ball pit, mats, a trampoline, a swing, a compression roller, some bean bags, bolsters, and a one-hand exercising machine, and that, in addition, the PT room came equipped with a wedge for positioning, a bike for standing, a riding machine, a gymnastics ball, a balance beam, and "one Wii machine" (Tr. pp. 136-37, 147). The parent testified that the school had some sensory equipment, "but not everything that [he] was looking for" (Tr. pp. 447-48). As detailed above, the January 2015 IEP noted that the student required sensory support, vestibular and proprioceptive input, brushing, joint compression, and an oral motor protocol, and included an annual goal with short-term objectives that targeted the student's sensory processing ability (Dist. Ex. 1 at pp. 3-4, 7). The IEP did not mandate that the student be provided particular types of sensory equipment

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<sup>33</sup> The parent testified that he was told the school would try to fulfil the student's related services mandates for OT and PT, and that the school would have contracted with outside providers to provide speech-language therapy if the school could not provide the level of services mandated on the student's IEP (Tr. pp. 448-51). Even if this issue was properly raised, the allegation would be insufficient to state a non-speculative claim that the school was factually incapable of implementing the IEP (G.S., 2016 WL 5107039, at \*15). The parent also testified that the school was "doing more of a push-in model at that time" and he preferred for the student to receive his speech-language therapy services on a pull-out basis (Tr. pp. 449-50). As the IEP called for the student's related services to be provided in a separate location at the provider's discretion (Dist. Ex. 1 at p. 10), an allegation that the school would only provide related services on a push-in basis might have presented the type of claim to which the district would have been required to respond with evidence at the impartial hearing. However, in addition to not being raised for resolution at the impartial hearing, the parent's statement also falls short of alleging that he was told the school could not provide the student's speech-language therapy services in a separate location (Tr. pp. 449-50).

(see generally Dist. Ex. 1). Although the parent's preference is understandable, such a subjective desire for specific sensory equipment not mandated by the student's IEP is not a basis for finding that the assigned school would have been incapable of implementing the student's IEP (B.P., 634 Fed. App'x at 848; E.P. v. New York City Dep't of Educ., 2015 WL 4882523, at \*7 [E.D.N.Y. Aug. 14, 2015]; B.K., 12 F. Supp. 3d at 372; N.K., 961 F. Supp. 2d at 592).

Turning to the assigned public school site's ability to meet the student's needs related to feeding, the parent testified that the cafeteria in the assigned school was loud and crowded and that he "couldn't conceive of [the student] eating comfortably and safely in that environment" (Tr. pp. 444-45). The parent reported that, during his tour of the assigned school, the district intake coordinator indicated that a paraprofessional would sit at the student's table but that "to the best of [intake coordinator's] knowledge," there was not staff trained in "SOS or feeding therapy" but that, generally, "ongoing education" of staff occurred (Tr. p. 447).<sup>34</sup> The district intake coordinator at the assigned public school site testified that paraprofessionals from the 6:1+1 special classes accompanied students to the cafeteria where each class had its own table assignment (Tr. pp. 139, 148). In addition to the paraprofessionals, he testified that "two licensed persons" would be present in the cafeteria, such as "two teachers," who would be "trained in CPR" (Tr. p. 139). He also noted that, if a particular student needed "extra help in chewing . . . , the speech teacher [would be] available to provide those services" during the lunch hour (Tr. pp. 139-40). As described above, with respect to the student's feeding needs, the January 2015 IEP indicated that the student benefited from "oral motor support" (Dist. Ex. 1 at p. 3) and included a speech-language goal with short-term objectives that addressed the student's need to improve his oral motor skills in support of promoting improved feeding and speech skills (*id.* at p. 8). The IEP did not mandate that the student's cafeteria be a particular size or that the student receive a particular type of feeding therapy (see generally Dist. Ex. 1; see also J.M., 171 F. Supp. 3d at 253 [finding that, "notwithstanding the bells and the noisy lunchroom," an assigned school was able to provide a student with the "quiet environment" required by her IEP and claims to the contrary were impermissibly speculative]).<sup>35</sup> Accordingly, the parent's claim on this point is also impermissibly speculative.

Lastly, the parent contends that the district did not present evidence regarding the functional grouping of the students in the class the student would have attended if he had enrolled in the assigned school. This claim is also inherently speculative, as there is no guarantee as to the composition of the class the student would have attended (see J.C., 643 Fed. App'x at 33 [noting that "grouping evidence is not the kind of non-speculative retrospective evidence that is permissible"]; M.S. v. New York City Dep't of Educ., 2 F. Supp. 3d 311, 332 n.10 [E.D.N.Y. 2013]). Consistent with this, the parent testified that, when he visited the assigned school, he was told that the school could not identify the exact class the student would have been placed in as the composition of the classes was changing (Tr. p. 445).

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<sup>34</sup> "SOS" is not defined in the hearing record but is understood to stand for "Sequential Oral Sensory," an approach to feeding.

<sup>35</sup> In general, parental concerns regarding school or class size, when not contrary to a requirement in a student's IEP, have been deemed not to constitute permissible challenges to the ability of an assigned school to implement the student's IEP (M.O., 793 F.3d at 234; see L.B., 2016 WL 5404654, at \*24 [finding that beliefs as to how a particular class model, peer group, or school size would impact a student's development are impermissibly speculative]).



Based on the foregoing, the parent has not presented any non-speculative claims related to the school's ability to implement the student's IEP, and, accordingly, the parent's claims regarding the assigned public school site will not support a determination that the district denied the student a FAPE.

## **VII. Conclusion**

In summary, a review of the evidence in the hearing record supports a finding that the district offered the student a FAPE for the 2015-16 school year. Therefore, the necessary inquiry is at an end and there is no need to reach the issues of whether the Rebecca School was an appropriate unilateral placement or whether equitable considerations support the parent's claim (see M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 66 [2d Cir. 2000]).

**THE APPEAL IS DISMISSED.**

**Dated:** Albany, New York  
January 4, 2017

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**SARAH L. HARRINGTON**  
**STATE REVIEW OFFICER**