



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 17-090

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

### **Appearances:**

Law Office of Anton G. Cohen, attorneys for petitioners, by Anton G. Cohen, Esq.

Howard Friedman, Special Assistant Corporation Counsel, attorneys for respondent, by Gail Eckstein, Esq.

## **DECISION**

### **I. Introduction**

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioners (the parents) appeal from a decision of an impartial hearing officer (IHO) which determined that the educational program respondent's (the district's) Committee on Special Education (CSE) had recommended for their daughter for the 2017-18 school year was appropriate and denied their request to place the student in a State-approved nonpublic school. The appeal must be sustained in part.

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

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

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

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

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

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

The student has received a diagnosis of autism, with an accompanying intellectual delay in addition to deficits with respect to her expressive, receptive, and pragmatic language skills, fine and gross motor skills, and sensory integration skills (Parent Ex. H at p. 6). She also has received a diagnosis of pica, and exhibits stereotypic behaviors and decreased attention (Tr. p. 31; Parent

Ex. H at p. 6).<sup>1</sup> The student received twice weekly home-based speech-language therapy and twice weekly home-based special instruction through the Early Intervention Program (Tr. p. 131; Parent Ex. H at p. 1). In August 2015, the Committee on Preschool Special Education (CPSE) found the student eligible for special education and related services and recommended that the student attend a 6:1+2 special class placement with related services consisting of speech-language therapy, occupational therapy (OT) and physical therapy (PT) in a center-based nonpublic preschool, the Hebrew Academy for Special Children (HASC) (Tr. pp. 131-33; Parent Ex. H at p. 1).<sup>2</sup> In December 2016, the parents privately obtained a comprehensive evaluation report from the McCarton Center (McCarton report) (Dist. Ex. H).

On March 20, 2017, the CSE convened to conduct the student's "Turning 5" conference and to develop the student's IEP for the 2017-18 school year, which would be implemented in September 2017 (Tr. p. 23; see also Tr. p. 27; Dist. Ex. 3 at pp. 10, 13). For the 2017-18 school year, the CSE deemed the student eligible for special education and related services as a student with autism, and recommended a 12-month school year program in a 6:1+1 special class placement in a specialized school in addition to the following related services: OT, PT, parent counseling and training and speech-language therapy (Dist. Ex. 3 at pp. 10-11, 13).<sup>3</sup> In addition, the March 2017 CSE recommended that the student receive individual health paraprofessional services on a full-time basis (id. at p. 10). In a prior written notice, dated April 6, 2017, the district summarized the contents of the March 2017 IEP (Dist. Ex. 5).

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

By due process complaint notice dated May 12, 2017, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2017-18 school year (see Dist. Ex. 1 at pp. 1-2, 4).

More specifically, and as relevant to this proceeding, the parents alleged that the March 2017 CSE failed to assess the student in all areas of her suspected disability (Dist. Ex. 1 at p. 2). They further alleged that the March 2017 CSE "relied on an outside comprehensive evaluation that was obtained and paid for" by the parents (id.). The parents also contended that the CSE "had the accurate information from the McCarton Center concerning the student's needs but failed to utilize this information to develop an appropriate IEP" (id. at pp. 3-4). Next, the parents alleged that the annual goals contained in the March 2017 IEP lacked meaningful criteria for measurement and were "not appropriate, sufficiently challenging and/or tailored to address [the student's] unique educational needs," because, among other things, the March 2017 IEP lacked annual goals designed to address the student's needs related to her pica diagnosis or OT (id. at p. 3). The parents

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<sup>1</sup> The hearing record generally describes pica as the ingestion of inedible or nonnutritive substances (see Tr. pp. 32, 82; Dist. Ex. 3 at p. 3).

<sup>2</sup> According to the hearing record, the student enrolled in the nonpublic school in February 2016 (Parent Ex. H at p. 1).

<sup>3</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]).

further argued that the March 2017 IEP's annual goals failed "to establish meaningful criteria toward mastery of the goals" (*id.*). Next, the parents asserted that the district failed to develop an IEP that was "reasonably calculated to confer educational benefit on the student" (*id.* at p. 2). Additionally, they alleged that the March 2017 IEP "fail[ed] to explain why the [CSE] believed its program recommendation with a staffing ratio of 6:1:1 would meet the student's individual needs," and they further maintained that a 6:1+1 special class placement would not meet the student's special education needs (*id.* at p.4).<sup>4</sup> Lastly, the parents alleged that the March 2017 CSE ignored the private evaluator's recommendation that the student continue to receive applied behavioral analysis (ABA) instruction, and that the IEP was "silent concerning the student's need for one to one [discrete trial] teaching" (*id.* at p. 3).

As relief, the parents requested that the student be referred to the district's "central school based support team" (CBST) for placement at AHRC – NYC Chapter Day Blue Feather Elementary (Blue Feather) a State-approved nonpublic school for the 2017-18 school year (Dist. Ex. 1 at p. 4).

### **B. Events Post-Dating the Due Process Complaint Notice**

On June 15, 2017, the CPSE convened to develop the student's IEP for summer 2017 (Parent Ex. B at p. 1). Finding that the student remained eligible for special education and related services as a preschool student with a disability, the June 2017 CPSE recommended a full-day 6:1+2 special class placement for the student with 1:1 health paraprofessional services, in addition to related services comprised of speech-language therapy, OT, PT and parent counseling and training (*id.*).

### **C. Impartial Hearing Officer Decision**

On June 30, 2017, an impartial hearing convened, which concluded on August 2, 2017, after two days of proceedings (Tr. pp. 1-165). On July 18, 2017, the IHO determined that the June 2017 IEP constituted the student's placement for purposes of pendency (Interim Order on Pendency at p. 2).

By decision dated September 7, 2017, the IHO determined that the district offered the student a FAPE for the 2017-18 school year and denied the parents' request for relief (IHO Decision at p. 13). More specifically, the IHO determined that the March 2017 IEP "mandated a continuation of the same related services that [the student] had been receiving previously at HASC," and that there was no evidence to suggest that these services were inadequate or that the student would not progress (*id.* at p. 12). The IHO found that the March 2017 IEP was reasonably calculated to provide the student with some meaningful benefit (*id.*).

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<sup>4</sup> The parents also asserted claims that the CSE "may not" have been duly constituted; the management needs section of the IEP did not mention the student's pica diagnosis; the IEP did not indicate and that providers should have been aware that the student came from a bilingual home in which English was the primary language; the IEP "contain[ed] insufficient specific, measurable information regarding the student's functioning and needs" in speech and language, "occupational therapy" and "physical therapy"; and that the IEP contained only one goal in the area of daily living skills (Dist. Ex. 1 at pp. 2-3).

The IHO concluded that the district established that the student's individualized needs could be addressed through the IEP to be implemented at a district specialized school in a 6:1+1 special class placement in a district 75 school (a specialized school) (IHO Decision at p. 12). He found that the class was "comprised of other students with similar classifications of autism, similar ages, and similar needs" (*id.*). The IHO noted that TEACCH was a recognized methodology used with students with autism, and that the parents' witnesses acknowledged that they were familiar with TEACCH and that it was sometimes incorporated together with ABA, but that the witnesses could not state "whether or not such methodology would be effective to enable [the student] to make progress" (*id.*).<sup>5</sup> Regarding the parents' claims that pertained to educational methodology, the IHO held that the student's prior or current enrollment and progress in programs utilizing ABA was not determinative in this instance, "the effectiveness of ABA is not the issue in this proceeding," and that the recommendations from the McCarton report were "not determinative" (*id.* at p. 12). The IHO noted that it was understandable that the parents "would want to maximize the benefit for their child and that they had observed [the student] make progress using ABA methods," but that "it was not the [district's] burden to fund the maximizing of the child's potential" (*id.* at p. 13). Because he found that the district offered the student a FAPE, the IHO denied the parents' request to refer the student to the district's CBST for placement at Blue Feather (*id.* at p. 13).

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

The parents appeal and request reversal of the IHO decision. It appears though one of the primary claims pursued on appeal is that the parents maintain that the district failed to evaluate the student and that the CSE had no evaluative materials that suggest "could benefit from the use of some other methodology rather than ABA including 1: 1 discrete trial training." Next, the parents do not allege any specific error on the part of the IHO, but reference "multiple procedural claims" in their due process complaint, including but not limited to

"failure to develop appropriate goals for measuring progress in accordance with ABA's data-driven methodology that uses an intensive and rigorous collection of data; failure to develop appropriate goals to address the Student's PICA and sensory-seeking behavior; failure to conduct an FBA and develop a comprehensive BIP to address the Student's self-stimulatory and other interfering behavior"<sup>6</sup>

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<sup>5</sup> TEACCH is an acronym for Treatment and Education of Autistic and Communication related handicapped Children (see Application of a Student with a Disability, Appeal No. 14-142; Application of a Student with a Disability, Appeal No. 10-055; see generally Tr. p. 97).

<sup>6</sup> Although raised on appeal, the parents did not reference in their due process complaint notice anything with regard to a failure on the part of the district with respect to a functional behavioral assessment (FBA) and/or subsequently develop a behavior intervention plan (BIP), which in turn, supports a finding that the district failed to offer the student a FAPE for the 2017-18 school year (see Dist. Ex. 1). A party may not raise issues at the impartial hearing or for the first time on appeal 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 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][i][b]). Moreover, upon review of the hearing record, the district did not

The parents also allege that "[t]he IHO [d]ecision "is not supported by the record," and that determining that the district's recommended placement of the student in a 6:1+1 special class was appropriate because "[t]he fact that . . . [the] 6:1+1 class is specially designed for autistic children is irrelevant" as is "the fact that TEACCH is a recognized methodology used with other autistic children." The parents further allege that the March 2017 IEP was not reasonably calculated to address the student's needs, because it failed to recommend ABA methodology for the student and 1:1 discrete trial training. In addition, they allege that the IHO ignored the evidence that the student required 1:1 instruction and a program based on ABA principles in order to learn and progress.

The parents allege that since the IHO rendered his decision Blue Feather reached capacity and no longer has a seat available for the student. When questioned by the IHO, the parents explained that they sought Blue Feather because it was closer to the student's home and has programming through fifth grade whereas HASC's elementary program ends in the second grade. Accordingly, the parents now seek an order directing the district to maintain the student in the at HASC until the district provides an appropriate placement for the student.

In an answer, the district generally denies the parents' allegations, and requests that the IHO decision 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. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP" (Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]).

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subsequently agree to an expansion of the scope of the impartial hearing to include these issues and the parents did not attempt to amend the due process complaint notice to include this claim. Accordingly, this issue raised for the first time on appeal are outside the scope of the impartial hearing (see B.P. v. New York City Dep't of Educ., 841 F. Supp. 2d 605, 611 [E.D.N.Y. 2012] [explaining that "[t]he scope of the inquiry of the IHO, and therefore the SRO . . . , is limited to matters either raised in the . . . impartial hearing request or agreed to by [the opposing party]"]; M.R. v. S. Orangetown Cent. Sch. Dist., 2011 WL 6307563, at \*13 [S.D.N.Y. Dec. 16, 2011]). Even if the parents had properly raised the matter on appeal, a review of the evidence in the hearing record supports a finding that the March 2017 IEP otherwise addressed the student's alleged interfering behaviors.

The Supreme Court has indicated that "[t]he IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement" (Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. \_\_\_, 137 S. Ct. 988, 999 [2017]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ. of the Chappaqua Cent. Sch. Dist., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). "The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created" (Endrew F., 137 S. Ct. at 1001). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Endrew F., 137 S. Ct. at 1001 [holding that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"]; Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132).

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

provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).<sup>7</sup>

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

## **VI. Discussion**

### **A. Preliminary Matters**

#### **1. Compliance with Pleading Requirements**

Initially, it must be noted that the parents request for review fails to comply with the practice requirements before the Office of State Review. A request for review must set forth:

- (1) the specific relief sought in the underlying action or proceeding;
- (2) a clear and concise statement of the issues presented for review and the grounds for reversal or modification to be advanced, with each issue numbered and set forth separately, and identifying the precise rulings, failures to rule, or refusals to rule presented for review

(8 NYCRR 279.8 [c] [emphasis added]). The parent's request for review fails to clearly identify and enumerate the issues for review. Additionally, it largely fails to identify the errors of the IHO with specificity. For example although making numerous broad statements about the case and meandering from topic to topic, the parent cites only to one page of the IHO decision containing an alleged error by the IHO ["Petitioner is appealing the IHO's finding that the effectiveness of ABA is not the issue in this proceeding. (IHO Decision at 12)]. The request for review largely retells prior events which are already contained within the hearing record or the IHO's decision, and revisits alleged violations by the district, versus errors of the IHO. While referencing facts in the record is certainly permissible and necessary to a degree, counsel for the parent is cautioned that the failure to adhere to the requirements for pleadings, and requests for review in particular, by enumerating and citing to each of the alleged errors in the IHO's analysis may risk such pleadings being rejected without further consideration.<sup>8</sup>

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<sup>7</sup> The Supreme Court has stated that even if it is unreasonable to expect a student to attend a regular education setting and achieve on grade level, the educational program set forth in the student's IEP "must be appropriately ambitious in light of his [or her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives" (Endrew F., 137 S. Ct. at 1000).

<sup>8</sup> Typically parties that adhere to the regulations opt to create enumerated point headings for each alleged error of the IHO, reference the section of the IHO decision that discusses that issue by page number, and then cite to the most critical evidence in the hearing record that the party believes would support a different outcome than the one reached by the IHO.



## **2. Scope of Review**

As noted above, the parents reference "multiple procedural claims" that they allege were listed in their due process complaint notice, but they do not allege any error by the IHO with respect to such claims. While some of those topics may be discussed below as context for the ABA methodology issue raised by the parents, I will not attempt to decipher what the parents did or did not attempt to appeal and will treat unappealed matters final and binding on the parties and will not be reviewed on appeal, except to the extent that these issues may be related to the main issue on appeal that is, whether the IEP should have specified a particular methodology (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]).

### **B. CSE Process**

#### **1. Sufficiency of Evaluative Information**

Without further clarification, the parents appear to claim on appeal that the district "failed to evaluate the student . . ." However, the parents also appear to state that McCarton report was appropriate and sufficient to rely upon. As background for the methodological issue below, although the IHO did not make any findings related to the evaluative information utilized by the March 2017 CSE, the parents alleged in the Due Process Complaint Notice (DPCN) that the March 2017 CSE failed to assess the student in all areas of her suspected disability (Dist. Ex. 1 at p. 2), and further alleged that the March 2017 CSE "relied on an outside comprehensive evaluation that was obtained and paid for" by the parents (id.) 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 must conduct one 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]).

As noted above, on March 20, 2017, the CSE convened to conduct the student's "Turning 5" conference and to develop the student's IEP for the 2017-18 school year, which would be

implemented in September 2017 (Tr. p. 23; see also Tr. p. 27; Dist. Ex. 3 at pp. 10, 13). Evaluative information available at the time of the March 2017 CSE meeting included: December 2016 medical documentation submitted by the parent, the McCarton report obtained by the parents and shared with the CSE, January 2017 OT, PT, speech-language therapy, and parent training annual review progress reports, and a February 2017 classroom observation (Tr. pp. 28, 35; Parent Exs. D-H; Dist. Exs. 3 at pp. 1-3, 13; 5 at p. 2).<sup>9, 10</sup> In addition, the March 2017 CSE had input from the parent (Tr. p. 28; Dist. Ex. 4; see Dist. Ex. 3 at pp. 1-3).

The March 2017 IEP indicated that according to medical documentation dated December 2016 submitted by the parent, the student had received diagnoses of autism with an accompanying intellectual delay, pica, and receptive, expressive, and pragmatic language deficits (Dist. Ex. 3 at p. 1). According to the March 2017 IEP, the student required a 1:1 health paraprofessional to address her safety needs "to provide her with the supervision she needs in order to address her developmental needs and maladaptive behaviors associated with her [p]ica [d]iagnosis" (id.).

Consistent with the content included in the December 2016 McCarton report obtained by the parents, the March 2017 IEP reflected that administration of the Stanford-Binet Intelligence Scales, Fifth Edition revealed the student's individual test scores were all in the very low range, except for a low nonverbal visual spatial score (puzzle tasks) and an average verbal quantitative reasoning score (counting tasks) (Parent Ex. H at pp. 2-4, 9; Dist. Ex. 3 at p. 1). Regarding the student's cognitive skills, use of the cognitive scale of the Bayley Scales of Infant and Toddler Development-Third Edition estimated her cognitive skills clustered around the 27-month level (Parent Ex. H at pp. 3, 10; Dist. Ex. 3 at p. 1).<sup>11</sup>

Also consistent with the December 2016 McCarton report, the March 2017 IEP included information about the student's nonverbal skills (Parent Ex. H at p. 3; Dist. Ex. 3 at p. 1). The March 2017 IEP indicated the student demonstrated good matching skills, and matched colors and pictures (id.). The March 2017 IEP further indicated that the student matched several different objects in a field of three, but did not complete any object patterns (id.). According to the IEP, although the student clapped on request, she required a demonstration before performing other basic actions (Parent Ex. H at p. 4; Dist. Ex. 3 at p. 1). The IEP also indicated that the student did not demonstrate an understanding of the concepts, "bigger," "more," or "one;" however, she completed a six-piece pegboard and inset shape boards (id.). The March 2017 IEP revealed that the student consistently fit bisected shapes in an inset board (circle and square), but had difficulty

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<sup>9</sup> The December 2016 medical documentation submitted by the parent and the February 2017 classroom observation were not included in the hearing record. Additionally, the March 2017 IEP references a social history update, April 2016 "medical documentation," and a May 2016 PT evaluation report, none of which were included in the hearing record (Dist. Ex. 3 at p. 3).

<sup>10</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>11</sup> The December 2016 McCarton report and the March 2017 IEP indicated the Bayley-III normative scores only extended to age 3 1/2 years, but a developmental age could be estimated for an older child based on the items successfully completed (Parent Ex. H at p. 3; Dist. Ex. 3 at p. 1).

fitting the triangle piece (id.). In addition, the IEP noted that while the student followed the request to find a hidden object, she did not replicate single block taps, and instead towered the blocks (id.). Consistent with the December 2016 McCarton report, the March 2017 IEP also described the student's verbal skills, and noted her receptive knowledge of colors and shapes (id.). According to the March 2017 IEP, the student identified eyebrow, and reportedly identified other body parts, although her responses were limited and her cooperation was variable (id.). The March 2017 CSE reported that on both the receptive and expressive vocabulary tasks, the student's responses were in the very low range; however, the IEP revealed that the student counted with one-to-one correspondence, and identified some printed numerals (id.). Additionally, the March 2017 IEP reflected that the student did not follow actions that included positional words, and although the student imitated a two-word phrase on request, she did not imitate longer sentences (id.).

Consistent with the December 2016 McCarton report, the March 2017 IEP included results of the Vineland Adaptive Behavior Scales-Third Edition (Vineland-3) (Parent Ex. H at p. 5; Dist. Ex. 3 at p. 1). The March 2017 IEP noted that the student's overall adaptive behavior skills were in the low range in the areas of communication, daily living, socialization, and motor skills (id.). With respect to communication, the March 2017 IEP indicated the student's functional language was limited, and noted that it included mostly nouns and rote-based labels (id.). According to the IEP, the student identified some objects, pictures, and body parts, in addition to alphabet letters and numbers from at least 1-10 (id.). Regarding the daily living skills domain, the March 2017 IEP reported that the student ate with utensils, and although she needed prompts, the student could put on clothes (id.). In addition, the IEP noted that although the student was toilet trained during the day, she was not consistent at night (id.). The March 2017 IEP also contained information regarding the socialization domain, and reflected that although the student showed interest in other children, her interactions were limited (id.). The March 2017 IEP further noted that generally the student easily transitioned from one setting to another (id.). Finally, regarding the motor domain, the March 2017 IEP stated that the student navigated steps with an alternating step pattern, and described her writing grasp as "weak and inconsistent" (id.). In addition, the IEP noted that the student could transfer an object between hands (id.).

The March 2017 IEP reflected the McCarton report results from an administration of the Childhood Autism Rating Scale, Second Edition, Standard Version that showed overall, the student had significant language deficits, low reciprocal social interaction skills, limited play skills, and exhibited self-stimulatory behaviors (Parent Ex. H at pp. 2, 6; Dist. Ex. 3 at p. 1). The IEP further noted that with regard to her attention, the student showed selective attention to materials, and needed physical and verbal prompts (Parent Ex. H at p. 3; Dist. Ex. 3 at p. 1). The March 2017 IEP noted the student's attention was best when she readily understood the task expectation (id.). Regarding the student's behavior, the March 2017 IEP indicated the student required "high degrees of structure, one to one instruction and hand over hand demonstration in order to attempt many tasks" (Parent Ex. H at p. 3; Dist. Ex. 3 at pp. 1-2). The March 2017 IEP further revealed that the student was observed to have many repetitive behaviors, many of which were described as "sensory seeking," that compromised the student's attention span and level of engagement (Parent Ex. H at p. 3; Dist. Ex. 3 at p. 2).

With respect to the student's speech-language functioning, the March 2017 IEP revealed that the student was making steady progress toward her speech-language goals, and willingly transitioned to therapy (Dist. Ex. 3 at p. 2; see Parent Ex. D at p. 2). According to the IEP, the

student responded to greetings by familiar people by repeating "hi" (Dist. Ex. 3 at p. 2; see Parent Ex. D at p. 2). The March 2017 IEP described the student's eye contact as "inconsistent," and further revealed that she was easily distracted by auditory stimuli (Dist. Ex. 3 at p. 2; see Parent Ex. D at p. 1). Although the March 2017 IEP characterized the student as "highly self-directed," it further noted that the student's playfulness during therapy sessions and willingness to participate in adult-directed activities were becoming more consistent (Dist. Ex. 3 at p. 2; see Parent Ex. D at p. 1). Nevertheless, the March 2017 IEP indicated that self-directedness and noncompliance adversely affected the student's ability to consistently demonstrate her skills, and that the student could follow one-step verbal directions with hand over hand assistance (Dist. Ex. 3 at p. 2). The CSE further reported that the student's vocabulary continued to emerge, and that when provided with maximal prompts, the student produced one-word utterances for a variety of pragmatic functions (again, gimme) (id.). In addition, the March 2017 IEP revealed that the student could imitate vocal sounds, spontaneously count, and sing familiar songs (id.).

The March 2017 IEP further reported improvement with respect to the student's self-help skills within the classroom (Dist. Ex. 3 at p. 2). Additionally, the March 2017 IEP reflected that the student could say some of her ABCs and some shapes, and that with support, the student could count up to ten (id.). The IEP further noted that the student spontaneously said about ten words, readily imitated most words and could match two colors (id.). In addition, the March 2017 IEP revealed that the student could eat independently and with minimal spillage (id.). Moreover, the IEP reflected that while the student was timed trained to use the toilet, she needed to improve self-advocacy regarding personal toileting needs (id.). According to the IEP, the student required maximum assistance and prompting throughout the day (id.). Although the March 2017 IEP characterized the student as a sweet and active girl who willingly transitioned to different settings of faces with which she was familiar, the March 2017 IEP noted that the student exhibited non-compliant behaviors (id.). The March 2017 IEP included teacher reports that the student tried to escape the classroom by attempting to open the door, that the student refused teacher directive, pushed objects away, and got out of her seat (id.). According to the March 2017 IEP, the student required much supervision to attend to tasks, modeling and praise for positive behavior, and that the student learned best with modeling, imitation, and consistent feedback (id.).

With respect to the student's social functioning, the March 2017 IEP included a section describing the student's social development that incorporated a summary of various evaluative results related to communication, adaptive skills, and ability to transition from one activity to another (Parent Ex. H at pp. 2-6; Dist. Ex. 3 at pp. 2-3). To determine the student's social needs, that the March 2017 CSE relied upon the student's pediatrician, and the December 2016 McCarton report which incorporated some of the standardized diagnostic tools discussed previously (id.). The IEP noted per the December 2016 McCarton report, the student was easily distracted, and her attention to materials was generally brief (Parent Ex. H at p. 3; Dist. Ex. 3 at p. 3).

The March 2017 IEP also referenced "medical documentation submitted by the parent and dated April 2016," that indicated the student's diagnoses of autism and pica (Dist. Ex. 3 at p. 3). The March 2017 IEP further noted that according to the student's teacher's rationale for a 1:1 paraprofessional, the student required a 1:1 health para to monitor her behaviors associated with her pica diagnosis (id.). Additionally, the March 2017 CSE reported that the student required consistent 1:1 monitoring to ensure her safety inside the classroom, on the playground, and during various therapies (id.). The IEP noted that throughout the day, the student frequently put non-

edibles into her mouth and swallowed them (id.). The March 2017 IEP reflected reports and provided examples of the student's inability to complete projects as she constantly put objects into her mouth (id.). The student required hand over hand assistance when using sensory objects to prevent her from placing objects into her mouth(id.). The March 2017 IEP further indicated that multiple incidents reflecting the student's pica were recorded and logged (id.).

Regarding the student's motor delays, the March 2017 IEP referenced the Vineland-3 results included in the December 2016 McCarton report, indicating the student's gross motor skills fell within the low range and her fine motor skills fell within the moderately low range (Parent Ex. H at p. 5; Dist. Ex. 3 at p. 3; see Parent Exs. F at pp. 2-3; G at pp. 2-3). The IEP also included information from a May 2016 physical therapy evaluation report, which indicated that the student presented with "decreased bilateral core and lower extremity muscle strength and control, delayed balance skills, gait and running deviations, delayed jumping skills, and delayed reciprocal ball playing skills..." (Dist. Ex. 3 at p. 3). Next, with respect to OT, the March 2017 IEP indicated the student demonstrated significant delays in fine motor skills, visual motor integration, and sensory processing (Dist. Ex. 3 at p. 3; see Parent Ex. H at p. 5). The IEP indicated the student presented with a high arousal level, difficulties with self-regulation, and poor attention to task and motor planning skills, although the IEP also noted improvement with respect to her arousal, attention, and eye contact (Dist. Ex. 3 at p. 3). According to the March 2017 IEP, limited safety awareness combined with the tendency to be easily distracted by visual and auditory stimuli, weakness in her lower extremity and core musculature, as well as delays in her balance skills, created for a true safety concern for the student within the school environment (id.).

While the parents assert that the district failed to sufficiently evaluate the student, they do not specifically identify what evaluative information the March 2017 CSE lacked, nor do they challenge the accuracy or the thoroughness of the March 2017 IEP present levels of performance. Rather, as discussed above, the hearing record shows that the CSE had a comprehensive range of evaluative information available during the March 2017 CSE meeting and adequately identified all areas of need for the student based upon those materials; in addition, the evaluative information considered by the March 2017 CSE was completed within three years of the CSE meeting and the hearing record does not reflect that any of the participants requested updated evaluations (Tr. pp. 54-55; Parent Ex. H; Dist. Ex. 3; see 34 CFR 300.303[a], [b][2]; 8 NYCRR 200.4[b][4]). Further, the school psychologist testified that the March 2017 CSE reviewed and used the parent-provided McCarton report at the time of the March 2017 CSE meeting, and did not recall any discussion regarding reevaluating the student during the March 2017 CSE meeting (see Tr. pp. 36-37).

## **C. June 2017 IEP**

### **1. Annual Goals**

The IHO did not address goals as part of his decision, but the parents alleged in the DPCN that the annual goals contained in the March 2017 IEP lacked meaningful criteria for measurement and "were not appropriate, sufficiently challenging and/or tailored to address [the student's] unique educational needs," failed to include annual goals designed to address the student's needs related to her pica diagnosis and also failed "to establish meaningful criteria toward mastery of the goals" (Dist. Ex. 1 at 3). I will discuss the student's goals, but I will not interpret what the parent might or might not have chosen to appeal.

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][III]; 34 CFR 300.320[a][2][i]; 8 NYCRR 200.4[d][2][iii]). Each annual goal shall include the evaluative criteria, evaluation procedures and schedules to be used to measure progress toward meeting the annual goal during the period beginning with placement and ending with the next scheduled review by the committee (8 NYCRR 200.4[d][2][iii][b]; see 20 U.S.C. § 1414[d][1][A][i][III]; 34 CFR 300.320[a][3]).

The hearing record demonstrates that the March 2017 CSE developed approximately 16 annual goals based on the student's identified needs as reflected in the present levels of performance in the March 2017 IEP (see Dist. Ex. 3 at pp. 1-9). In addition, the March 2017 CSE included approximately 59 short-term objectives and/or benchmarks aligned to the annual goals, all related to the student's global deficits in the areas of cognitive/academic, self-help, social/emotional, gross motor, fine motor, sensory, visual motor, and receptive, expressive, and pragmatic language skills (id.).<sup>12</sup>

In accordance with her academic needs, the March 2017 IEP contained annual goals aligned with short-term objectives that targeted the student's needs related to general knowledge and cognitive skills (i.e., counting with one-to-one correspondence, labeling shapes and colors on request, and arranging objects into sets of categories), comprehension skills (understand concepts such as open/close, front/back, behind/in front of, differentiate concepts such as many/one, little/big, empty/full, identify time of day associated with an activity such as morning, afternoon, night-time by pointing to a picture, identify gender and pronouns by pointing), communication skills (i.e., respond to one-step directives, use of one word to request object, point to teacher, respond to yes/no questions), and independent matching skills (three pairs of cards, six pairs of cards, nine pairs of cards) (Dist. Ex. 3 at pp. 5, 9). To address the student's social/emotional needs, the March 2017 CSE developed an annual goal related to the student's ability to play a simple game with a peer by taking turns, aligned with short term objectives/benchmarks whereby the student would play a game with a peer with the help of a teacher or therapist for one, two, and then three minutes (id. at p. 6). Another annual goal addressed self-help skills that included corresponding short-term objectives targeting the student's ability to eat with a spoon and fork independently, wash/dry hands independently, and assist in dressing tasks (id. at pp. 5-6). In addition, the March 2017 IEP included annual goals with corresponding short-term objectives that targeted the student's gross motor needs (i.e., descending one flight of stairs with one handrail in an alternating pattern with close supervision, improve single limb balance skills to allow student to kick a moving playground ball independently, improve jumping skills so that student will jump forward 20 inches, jump off a 16-inch height, and jump over a two-inch high rope) (id. at pp. 6-7). The March 2017 IEP also contained annual goals designed to improve the student's expressive, receptive, and pragmatic language skills (id. at pp. 7-8). More specifically, the short-term

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<sup>12</sup> The March 2017 CSE recommended the student participate in the New York State alternate assessment because she was unable to take part in the regular assessment due to her cognitive, academic, social, and physical delays (Dist. Ex. 3 at p. 14). Regulatory requirements indicate that for a student recommended for the alternate assessment, such as the student in the instant case, annual goals must include short-term objectives or benchmarks (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]).

objectives aligned with the annual goal related to the student's expressive language needs targeted the student's ability to demonstrate the imitation of vocal sounds/target sounds produced by therapist, imitation of words/phrases produced by therapist, use of jargon and/or single words to comment or request an object, and the use one to two-word utterances for a variety of pragmatic functions (*id.* at p. 7). Short-term objectives aligned with the student's receptive and pragmatic annual goals targeted the student's ability to follow simple directions; comprehend pronouns, spatial concepts, and simple "WH" questions; establish and maintain eye contact; and respond to greetings/her name (*id.* at pp. 7-8). Lastly, the March 2017 IEP included annual goals that targeted the student's attentive behaviors for increased participation during academic activities, fine motor needs (hand strength and coordination to independently manipulate tools in the classroom setting), visual motor skills for improved independence with art activities, and independence in following the morning routine with corresponding short-term objectives that targeted the student's needs in smaller increments of measurable skill performance (*id.* at pp. 8-9).

Additionally, consistent with State regulations, a review of the annual goals reveals that each of the annual goals included evaluative criteria (i.e., 80 percent accuracy, for four minutes over a one-month period, three out of four trials over two consecutive sessions), an evaluation schedule (i.e., measuring progress one time per month), and a method for evaluating the student's progress (i.e., teacher or provider observations, teacher, provider or classroom data checklist, teacher made materials, and class activities) (Dist. Ex. 3 at pp. 5-9). Under the circumstances, the evidence in the hearing record fails to support the parents' contention that the March 2017 CSE failed to develop "goals targeting an intensive and rigorous collection of data to map the [s]tudent's individual progress in all areas of functioning," given that the measurability method reflected in the IEP, as described above, complied with the relevant State regulations and the parents fail to identify any specific deficiencies in either the annual goals or the short-term objectives developed by the March 2017 CSE.

With respect to the student's sensory needs, the IEP recommended providing the student with a sensory diet, tickling and other sensory tactile input, as well as hands-on and frequent movement activities in the classroom (Dist. Ex. 3 at pp. 3-4). Furthermore, the March 2017 IEP included an OT annual goal targeting the student's demonstration of attentive behaviors for increased participation during academic activities, with three corresponding short-term objectives that incorporated "sensory input" or the use of "sensory tools" with the student (*id.* at p. 8). The IDEA does not require that a district create a specific number of goals for each deficit, and failure to create an annual goal related to a particular area of need does not necessarily rise to the level of a denial of FAPE; rather, a determination must be made as to whether the IEP, as a whole, contained sufficient goals to address the student's areas of need (*J.L. v. New York City Dep't of Educ.*, 2013 WL 625064, at \*13 [S.D.N.Y. Feb. 20, 2013]; see *C.M. v. New York City Dep't of Educ.*, 2017 WL 607579, at \*20-\*21 [S.D.N.Y. Feb. 14, 2017]). In view of the foregoing, a review of the March 2017 IEP shows that the goals recommended by the CSE adequately addressed the student's sensory needs.

Turning next to the pica diagnosis, a review of the March 2017 IEP reveals it did not include specific goals to address the student's pica diagnosis (*see* Tr. pp. 41-42; *see also* Dist. Ex.

3 at pp. 5-9).<sup>13</sup> However, the March 2017 IEP indicated multiple times that the student had been diagnosed with pica (Dist. Ex. 3 at pp. 1, 3, 10) and provided for full-time 1:1 health paraprofessional services to ensure her safety throughout the school day, and to address developmental and behavioral needs associated with her pica diagnosis (*id.*).<sup>14</sup>

## 2. 6:1+1 Special Class Placement

The parents did not specifically challenge the 6:1+1 special class ratio in their appeal but stated "[t]he fact that . . . [the] 6:1+1 class is specially designed for autistic children is irrelevant" as is "the fact that TEACCH is a recognized methodology used with other autistic children." This is not surprising as the ratio is far closer to student's placement at HASC than the proposed placement at Blue Feather. However, the parents assert that the March 2017 IEP was not reasonably calculated to confer educational benefits on the student because it failed to recommend ABA methodology and any 1:1 discrete trial training, and that the IHO "failed to address the highly significant evidence demonstrating that the Student required 1:1 discrete trial teaching and an ABA-based program in order to learn and progress."

The March 2017 CSE recommended that the student be placed in a 6:1+1 special class. 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]). In this case, to address the student's identified needs, the March 2017 CSE recommended a 12-month 6:1+1 special class placement together with 1:1 full-time health paraprofessional services to monitor safety concerns, and related services comprised of three 30-minute sessions per week of individual OT, two 30-minute sessions per week of individual PT, and three 30-minute sessions per week of individual speech-language therapy, in addition to four 30-minute sessions per year of parent counseling and training (Tr. pp. 29-30; Dist. Ex. 3 at pp. 3, 10). The March 2017 IEP also included the following management needs: maximum prompting with immediate feedback, refocusing prompts/cues and reminders to regulate attention and pace, auditory and visual material broken down/simplified, visual schedule, hands on activities, movement activities, verbal and visual redirection, frequent transitions, sensory diet, and tickling and other sensory diet input (Dist. Ex. 3 at p. 3). The March 2017 IEP further reflected that the student benefitted from frequent transitions, positive praise,

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<sup>13</sup> At the time of the March 2017 CSE meeting HASC did not have a goal in place to address the student's needs related to her pica diagnosis, rather, HASC used 1:1 aide services to "prevent" the student from ingesting inedible substances (Tr. pp. 107-08).

<sup>14</sup> Regarding the parents' allegations that the student engages in pica and other dangerous behaviors such as running away from staff, leaving the classroom, and climbing, although the March 2017 IEP did not contain any annual goals designed to reduce the student's eloping and climbing behaviors, a review of the IEP shows that it otherwise addressed these needs (Tr. pp. 58-59; *see also* Tr. pp. 139-40; *see* Dist. Ex. 3 at pp. 5-9, 10). For instance, the March 2017 CSE recommended full-time 1:1 paraprofessional services for the student designed to address her safety needs (*id.* at p. 10). According to the school psychologist, a health paraprofessional's role was to monitor the student and make sure she was safe (Tr. p. 31). Additionally, the March 2017 IEP noted that the student had attempted to leave the classroom and roam the hallways and recommended that the student receive "maximal monitoring and prompts" and "[c]onsistent 1:1 monitoring" to ensure the student's safety "inside the classroom, on the playground, and during various [therapy sessions]" (Tr. pp. 55, 59; Dist. Ex. 3 at pp. 3, 14).



movement activities, and visual schedules (id. at p. 4).

In recommending the 6:1+1 special class placement, the March 2017 CSE noted that the student had global delays in retaining and generalizing information, and that the student's global delays, behaviors, and communication deficit warranted a highly structured classroom setting and precluded participation in the general education setting (Dist. Ex. 3 at p. 4). In addition, at the time of the CSE meeting, the student was enrolled in a classroom with six students, which the March 2017 CSE opined "[wa]s working for her" (see Tr. pp. 61-62).<sup>15</sup> According to the school psychologist, the March 2017 CSE recommended a 6:1+1 special class placement for the student based the findings of the December 2016 McCarton report, which showed "that [the student] required a more restrictive setting, and [that] she need[ed] a lot more services to help her, which warrants a smaller classroom" (Tr. p. 30). The school psychologist further testified that the March 2017 CSE recommended full-time individual paraprofessional services to support the student's medical needs, namely, her diagnosis of pica (Tr. pp. 30-31; Dist. Ex. 3 at p. 10). Although the parents assert that that it was irrelevant that the recommended 6:1+1 special class placement was specifically designed for students with autism, the school psychologist opined that a 6:1+1 special class placement met all of the student's individual needs in the LRE, because it was a "smaller classroom ... specifically for nonverbal" students with autism, in accordance with the March 2017 IEP (Tr. pp. 32-33; Dist. Ex. 3 at p. 3).

In addition, the March 2017 CSE determined that the student's significant cognitive and expressive and receptive language deficits precluded her participation in a community school, and that she required a specialized program with more direct intervention and teaching to address her needs (Dist. Ex. 3 at p. 2). The March 2017 IEP indicated that the student would benefit from small group attention in the classroom that she needed to complete tasks and promote self-help skills, and that the student required consistent and ongoing support in helping her to develop daily living and academic skills (id.). The hearing record further reveals that the March 2017 CSE considered and rejected a high student to teacher ratio, in light of the student's teacher's concerns that the student would not receive the amount of individualized attention she needed (Dist. Exs. 3 at p. 14; 5 at p. 2). Additionally, the March 2017 IEP indicated that the student needed maximal monitoring and prompts, due to her needs and diagnosis, and a 12:1+1 special class in a community or specialized school, or an 8:1+1 special class in a specialized school would not address her needs (Dist. Ex. 3 at p. 14).<sup>16</sup>

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<sup>15</sup> A student's progress under a prior IEP is to varying degrees a relevant area of inquiry for purposes of determining whether a subsequent IEP is appropriate, particularly if the parents express concern with respect to the student's rate of progress under the prior IEP (see H.C. v. Katonah-Lewisboro Union Free Sch. Dist., 528 Fed. App'x 64, 66 [2d Cir. Jun. 24, 2013]; Adrienne D. v. Lakeland Cent. Sch. Dist., 686 F. Supp. 2d 361, 368 [S.D.N.Y. 2010]; M.C. v. Rye Neck Union Free Sch. Dist., 2008 WL 4449338, at \*14-\*16 [S.D.N.Y. Sept. 29, 2008]; see also "Guide to Quality Individualized Education Program (IEP) Development and Implementation," Office of Special Educ., at p. 18 [Dec. 2010]). Furthermore, "if a student had failed to make any progress under an IEP in one year," at least one court has been "hard pressed" to understand how a subsequent IEP could be appropriate if it was simply a copy of the IEP which failed to produce any gains in a prior year (Carlisle Area Sch. v. Scott P., 62 F.3d 520, 534 [3d Cir. 1995] [noting, however, that the two IEPs at issue in the case were not identical as the parents contended]).

<sup>16</sup> Moreover, the evidence in the hearing record supports a finding that the March 2017 CSE considered the

### 3. Methodology and the Student's IEP

Regarding the parents' claims with respect to methodology, the parent alleges that although the March 2017 CSE recommended 1:1 health paraprofessional services, and that the delivery of related services would take place in a 1:1 setting, the IEP did not include 1:1 discrete trial training or any other form of ABA methodology. 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 F. App'x 572, 575-76 [2d Cir. 2014]; A.S. v. New York City Dep't of Educ., 573 F. App'x 63, 66 [2d Cir. 2014]; K.L. v. New York City Dep't of Educ., 530 F. App'x 81, 86 [2d Cir. 2013]; R.E., 694 F.3d at 192-94; M.H., 685 F.3d at 257). As long as any methodologies referenced in a student's IEP are "appropriate to the [student's] needs," the omission of a particular methodology is not necessarily a procedural violation (R.B., 589 Fed. App'x at 576 [upholding an IEP when there was no evidence that the student "could not make progress with another methodology"], citing 34 CFR 300.39[a][3] and R.E., 694 F.3d at 192-94).

However, where the use of a specific methodology is required for a student to receive an educational benefit, the student's IEP should so indicate (see, e.g., R.E., 694 F.3d at 194 [finding an IEP substantively inadequate where there was "clear consensus" that a student required a particular methodology, but where the "plan proposed in [the student's] IEP" offered "no guarantee" of the use of this methodology]).<sup>17</sup> If the evaluative materials before the CSE recommend a particular methodology, there no other evaluative materials before the CSE that suggest otherwise, and the school district does not conduct any evaluations "to call into question the opinions and recommendations contained in the evaluative materials," then, according to the Second Circuit, there is a "clear consensus" that requires that the methodology be placed on the IEP notwithstanding the testimonial opinion of a school district's CSE member (i.e. school psychologist) to rely on a broader approach by leaving the methodological question to the discretion of the teacher implanting the IEP (A.M. v. New York City Dep't of Educ., 845 F.3d 523, 544-45 [2d Cir. 2017]). The fact that some reports or evaluative materials do not mention a specific teaching methodology does not negate the "clear consensus" (R.E., 694 F.3d

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parents' concerns that a "specialized program would not be sufficient to address [the student's] needs," and that the student needed a sensory gym, ABA instruction, and a high degree of safety precautions in order to maximize the student's growth (Dist. Ex. 3 at p. 14). According to the March 2017 IEP, the school psychologist explained to the parent how a specialized program was "geared to work with children on the spectrum and therefore [could] address [the student's] needs," and that a classroom with more students would not provide the student with the direct attention she needed (id.). As previously discussed, the March 2017 IEP provided the student with sensory strategies, and 1:1 adult supervision to monitor her safety (id., at pp. 3, 10). The parents' request for use of ABA instruction is addressed below.

<sup>17</sup> It may be that the parents 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 March 2017 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 parents' claim relating to methodology shall be examined in the context of the recommendations included in the March 2017 IEP.

at 194).

In this case, recommendations included in the McCarton report indicated the student "should be enrolled in a full day special education ABA program where she can receive 1:1 academic instruction to meet her learning and language needs. The teaching methodology should be based on the principles of [ABA] therapy" (Parent Ex. H at p. 7). The opinion in the McCarton report is stated as follows: "[The student] requires a full-time, comprehensive educational program that uses Applied Behavioral Analysis (ABA) therapy techniques. Specifically, she requires one-to-one teaching, reinforcement, visual aides, modeling and a high degree of practice in order to learn (*id.* at p. 6 [emphasis added]).

The school psychologist testified that at the March 2017 CSE meeting the parent expressed her disagreement about how ABA could successfully be used in the classroom, and indicated that she wanted "[f]ull-time ABA therapy" for the student (Tr. p. 60). The school psychologist further testified that the March 2017 CSE mentioned to the parent that although the district's classroom staff were not "ABA specialists," they did implement "strategies that are consistent and similar to what ABA provides" (*id.*). Additionally, the school psychologist testified that at the time of the meeting, the CSE "discussed what a 6:1:1 classroom could offer," and she provided the parent with a printout that described a 6:1+1 special class in a specialized school, and noted its use of ABA philosophies<sup>18</sup> and also "the TEACCH system" (Tr. pp. 29, 37-38, 46, 60-61).<sup>19</sup> However, the parents are entitled to rely on the written IEP, and to the extent that this evidence was elicited by the district's representative at the impartial hearing for the purpose of suggesting that ABA would have been used with the student to some extent, it would be impermissible to rehabilitate the IEP after the fact through testimony (R.E., 694 F.3d at 185).

Two elements in the evidence call into question the necessity of placing full time ABA on the student's IEP. First, while the McCarton report contains information that suggests why ABA and 1:1 discrete trial would be beneficial approaches to use with the student, the report does not provide a rationale that explains why a special education teacher or provider's flexibility should be so limited as to rely on ABA exclusively or otherwise provide any information regarding the problems with attempting other methodological approaches for this student. However, similar concerns about tying the hands of the teachers that were to implement the IEP were discussed by the district court but ultimately rejected by Second Circuit in the A.M. case (A.M., 845 F.3d at 533). Where, as here, the school psychologist testified that she was unable to complete an assessment of the student and the CSE elected to rely on the McCarton report (Tr. p. 36), and therefore there is little to rely on from the district to address the issue. In its answer, the district notes that the McCarton report evaluators were not cross examined, however, that only points out the flaw in its defense—it was up to the district to subpoena those individuals from McCarton if it wanted to rely on the report while challenging portions of its recommendations.

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<sup>18</sup> During the impartial hearing, the parent expressed her concern with the ABA "philosophy" terminology, stating her view that "there's no such thing as ABA philosophy. It's either ABA or it's not ABA" (Tr. p.143).

<sup>19</sup> I note that the head teacher at HASC testified that the student's instruction was provided using the "principles" of ABA, but that the student did not receive 1:1 discrete trial instruction all day long (Tr. pp. 91-93, 98, 106-07).

Next, the head teacher from HASC, which the student attended at the time of the March 2017 CSE meeting, testified that she was a licensed BCBA and supervisor of the ABA program at the HASC (Tr. pp. 91-93, 98). When asked if ABA was the only appropriate methodology for the student she responded "I don't know," and further testified HASC also used aspects of other approaches, including TEACCH (Tr. pp. 115-17). This is concerning, but it does not negate her views that ABA was effective with the student. The fact that testimony at the impartial hearing suggests reasons why the evaluative information before the CSE could have been subject to scrutiny does not alter the fact that the CSE chose not to scrutinize it with an evaluation of its own at the time the IEP was formulated.

Overall the issue of methodology on the student's IEP closely aligns with the clear "consensus" facts set forth in the A.M. case, namely that the IEP formulated for the student failed to provide ABA and 1:1 discrete trial services consistent with the consensus and was not reasonably calculated to enable the child to receive educational benefits (A.M. 845 F.3d 523, 543).

## **VII. Conclusion**

In summary, a review of the evidence in the hearing record supports a finding that the district failed to offer the student a FAPE for the 2017-18 school year by failing to specify the McCarton report's methodological recommendations on the student's IEP.

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

### **THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.**

**IT IS ORDERED** that the IHO's decision, dated September 7, 2017, is modified, by reversing those portions which found that district offered the student a FAPE for the 2017-18 school year

**IT IS FURTHER ORDERED** that, within 15 days of the date of this decision, the district shall revise the student's IEP to specify the ABA and 1:1 discrete trial methodologies as recommended in the McCarton report.

**Dated:** Albany, New York  
December 22, 2017

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**JUSTYN P. BATES**  
**STATE REVIEW OFFICER**