The University of the State of New York

The State Education Department
State Review Officer
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No. 20-025

Application of a STUDENT WITH A DISABILITY, by his parents, for review of a determination of a hearing officer relating to the provision of educational services by the Board of Education of the New Hyde Park-Garden City Union Free School District

Appearances:
Thivierge & Rothberg, PC, attorneys for petitioners, by Christina D. Thivierge, Esq.

Lamb & Barnosky, LLP, attorneys for respondent, by Lauren Schnitzer, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioners (the parents) appeal from the decision of an impartial hearing officer (IHO) which denied their request to be reimbursed for costs of the student's tuition at The Gersh Academy (Gersh) for the 2019-20 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[a]). 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 in this case has continuously attended Gersh since December 2016 pursuant to either an agreement between the parties (2016-17 and 2018-19 school years) or as the result of a previous due process proceeding (2017-18 school year) (see Tr. pp. 405-12; Application of the Bd. of Educ., Appeal No. 18-118).[1] As the subject of a prior State-level administrative proceeding, the parties' familiarity with the facts and procedural history preceding this case—as well as the student's educational history—is presumed and will not be repeated herein unless relevant to the

[1] The Commissioner of Education has not approved Gersh as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

disposition of the issues presented in this appeal (see Application of the Bd. of Educ., Appeal No. 18-118). Briefly, however, during the 2018-19 school year ("[second] grade") at Gersh, the student attended an "ungraded" 6:1+1 classroom that utilized applied behavioral analysis (ABA) "to facilitate skill development" and received the following related services: five 30-minute sessions per week of individual speech-language therapy; three 30-minute sessions per week of individual occupational therapy (OT); two 30-minute sessions per week of individual physical therapy (PT); and the services of a full-time, individual paraprofessional (Parent Exs. M at p. 1; N at p. 1; O at p. 1; P at p. 1; Q at p. 1; R. at p. 1; S at p. 1; T at p. 2; X at p. 1).

On May 22, 2019, a CSE convened to conduct the student's annual review and to develop an IEP for the 2019-20 school year (third grade) (see Dist. Ex. 1 at pp. 1-2; see generally Dist. Ex. 2).[2] Finding that the student remained eligible to receive special education and related services as a student with autism, the May 2019 CSE recommended a 12-month school year program consisting of a 6:1+3 special class placement and the following related services: four 30-minute sessions per week of individual speech-language therapy (therapy room), one 30-minute session per week of individual speech-language therapy (special class), three 30-minute sessions per week of individual OT (therapy room), one 30-minute session per week of individual OT (special class), and two 30-minute sessions per week of individual PT (therapy room) (see Dist. Ex. 1 at pp. 1, 17).[3] In addition, the May 2019 CSE recommended home-based behavior intervention services (two hours per day), home-based parent counseling and training (two hours per week), and school-based parent counseling and training (five 60-minute sessions per year) for the 2019-20 school year (id. at pp. 18-19).[4] As supplementary aids and services, program modifications, and accommodations, the May 2019 CSE recommended checking for understanding; the use of a positive reinforcement plan ("token economy and [behavior intervention plan (BIP)]"); and the services of a full-time, individual aide as part of the 12-month school year program (id. at pp. 18-19).

According to the May 2019 IEP, the CSE recommended strategies to address the student's management needs, noting specifically that he required: an "intensive, small teacher-to-student ratio program in a highly structured and routinized environment"; "an ABA setting with the use of ABA strategies, including discrete trial instruction and a token economy to learn"; the use of "gestures, modeling and hand over hand manipulation to learn and complete tasks"; emphasizing and praising "any intention to communicate"; and the provision of sensory breaks "throughout the school day in order to maintain [an] appropriate state of readiness to learn and [to] decrease frustration" (Dist. Ex. 1 at pp. 11-12). The May 2019 CSE further denoted in the IEP that the student needed "strategies, including positive behavioral interventions, supports and other strategies to address behaviors that impede[d] the student's learning or that of others," and specifically noted that he needed a BIP to "target off task/escape, self-injurious, and physical

[2] Both parties recorded the May 2019 CSE meeting (see generally Parent Ex. AA; Dist. Ex. 16).

[3] 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]).

[4] The May 2019 IEP included recommendations for the home-based behavior intervention services and home-based parent counseling and training to continue during summer 2019 at the same frequencies and durations (see Dist. Ex. 1 at pp. 18-19).

aggression behaviors through proactive strategies and reinforcing replacement behaviors" (id. at p. 12). Similarly, the May 2019 CSE denoted that the student required a "particular device or service to address [his] communication needs" (id.).

Finally, the May 2019 CSE developed annual goals with corresponding short-term objectives targeting the student's needs in the areas of reading, mathematics, speech-language, social/emotional and behavioral, motor skills, and daily living skills (see Dist. Ex. 1 at pp. 13-17).

In a letter to the district director of special education services (director) dated June 17, 2019, the parents acknowledged receiving the student's IEP developed at the May 2019 CSE meeting, but noted that although the "placement at the [district elementary] [s]chool" had been "discussed at the CSE meeting," they had not been able to "visit before receiving the IEP laying out the details of the programming" recommended (Parent Ex. V). The parents expressed that they had "concerns with the IEP recommended for [the student]" but would remain "open minded and w[ould] gladly consider any programs and placements" recommended by the district (id.). The parents indicated that they would visit the district elementary school "as soon as possible" but further indicated that, at that time, they did "not have enough information to determine whether that program would be appropriate" for the student (id.).

In light of the foregoing, the parents notified the district of their intentions to continue the student's attendance at Gersh "(with transportation) as well as parent training at home" for the 2019-20 school year—"(including the summer of 2019)"—and to seek reimbursement or funding from the district for the costs of the student's tuition and expenses at Gersh for the 12-month school year program (Parent Ex. V).

According to the evidence in the hearing record, the student attended Gersh during summer 2019 (six weeks in July and August) and remained at Gersh for the 2019-20 school year (see Tr. pp. 912-18; see generally Parent Ex. T).[5] On or about July 21, 2019, the parents executed a "Parental Guarantee of Tuition" with Gersh for the student's attendance during the 2019-20 school year (12-month school year program) (Parent Ex. T at pp. 1, 3).

A. Due Process Complaint Notice

By due process complaint notice dated July 24, 2019, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2019-20 school year, including summer 2019 (see Parent Ex. A at p. 1).[6] Generally, the parents alleged that the district

[5] For summer 2017 and summer 2018, the parents enrolled the student in a "camp," as opposed to the student receiving the special education program and related services recommended for the July and August portions of the 12-month school year programs for the 2017-18 and 2018-19 school years (compare Tr. pp. 410, 468, 917-18, with Parent Ex. C at pp. 1, 18, and Parent Ex. D at pp. 1, 20-21). For the first time since beginning at Gersh in December 2016, the student attended a summer program at Gersh (see Tr. pp. 917-18). The student also attended a summer camp for students with disabilities during summer 2016 (Application of the Bd. of Educ., Appeal No. 18-118).

[6] Consistent with its statutory and regulatory obligations, the district has funded the student's attendance at Gersh as his pendency (stay-put) placement—as of the date of the parents' due process complaint notice, July 24, 2019—during these proceedings (see Tr. pp. 565-68, 895, 913-15; Parent Ex. A at p. 1).

failed to develop an "appropriate IEP or appropriate placement recommendation" for the student (id.). More specifically, the parents asserted that the district recommended its 6:1+3 special class placement notwithstanding that "[t]his program had previously been found inappropriate for [the student] by an [IHO] and an SRO" (id. at p. 4). According to the parents, the CSE continued to recommend the 6:1+3 special class placement even after the parents, Gersh staff attending the CSE meeting, and the parents' educational consultant and neuropsychologist expressed concerns that the "program would cause regression" for the student, thereby ignoring these concerns and failing to "meaningfully considering their concerns" about "transitioning [the student] into another new program after he had suffered regression after all his prior transfers to other programs" (id.). The parents emphasized that the student's "relationships with Gersh staff and supportive atmosphere had been central to his progress" (id.).

Next, the parents indicated that, at the CSE meeting, they "reiterated the concerns" about the 6:1+3 special class placement they "had seen the previous year," noting that the placement would be "substantially similar" to the placement offered to the student for the previous year (Parent Ex. A at p. 5). Nevertheless, the parents informed the district that they would be "willing to see the program, but that [they] felt it was inappropriate if it was still largely the same" (id.). The parents also alleged that, contrary to the director's opinion, the student lacked the "prerequisite skills to interact with mainstream peers or benefit from contact with them at this time," noting further that the student would experience regression "if required to interact with mainstream peers" (id.).

In addition to the abovementioned concerns, the parents asserted that the May 2019 IEP was "procedurally and substantively defective in at least the following ways": the program was not appropriate and "regressive" for the student because, given his intensive needs, he required placement in a "well-established ABA program, not [a] recently-started and evolving program which an [IHO] recently determined was run without an involved BCBA or properly trained staff;" the 6:1+3 program appeared to be the "same" district program that was "repeatedly determined to be inappropriate" to meet the student's needs; the district BCBA "supervising the program" was newly hired on a consultant basis, as opposed to as an employee of the district; the program remained in a "state of flux" because it was moving to a different district building; "staff were not properly trained when the parents and educational consultant last saw the program"; the present levels of performance in the May 2019 IEP failed to "fully and accurately report" the scores from the most recently obtained neuropsychological reevaluation and failed to report similar scores from the neuropsychological reevaluation conducted in 2018; the May 2019 IEP "would remove [the student] from his then-current program, despite serious concerns" expressed by the educational consultant, neuropsychologist, and Gersh staff; the district failed to consider the "opinions of experts familiar" with the student indicting that he "would regress if forced to transition to a new program"; and the May 2019 IEP failed to include any annual goals, objectives, or supports to assist the student transitioning into a new program (Parent Ex. A at pp. 5 [emphasis in original]).

Turning to the annual goals in the May 2019 IEP, the parents alleged that "[s]ome" of the annual goals were "inappropriate, unclear, and/or unspecific" (Parent Ex. A at p. 6). The parents also noted that while based upon the "reports and recommendations of Gersh staff," the district failed to "appropriately take into account the recommendations of Gersh staff that [the student] needed to be at Gersh or a similar intensive special education ABA program including 1:1 discrete trial instruction" (id.). Next, the parents asserted that the annual goals in mathematics and writing

were "insufficient" and failed to target areas of deficit, such as the student's "inability to rote count to [10]" and his need to "work on tracing vertical and horizontal lines" (id.). The parents also asserted that the annual goals failed to include an "appropriate schedule for reporting progress" and that the recommendation to report progress "with quarterly report cards" was "far too infrequently for them to monitor his incremental progress or lack thereof" (id.).

In addition to the concerns noted about the annual goals, the parents alleged that the May 2019 IEP failed to include any "behavioral [g]oals and [o]bjectives, strategies, supports, and/or interventions aimed at reducing [the student's] behaviors" (Parent Ex. A at p. 7). Moreover, the parents asserted that the district did not conduct a functional behavior assessment (FBA) or develop a behavior intervention plan (BIP) for the student to address his "interfering maladaptive behaviors" and self-injurious behaviors (id. at p. 6). The parents further asserted that although the district had "in the past inappropriately claimed it could use Gersh's BIP in its new program," the Gersh BIP had been "developed by ABA-trained professionals to work within Gersh's behavior modification system and be implemented by staff versed in intensive ABA therapies at Gersh" and could not, therefore, be "carried over to a different setting recommended" by the district (id. at pp. 6-7).

With respect to the May 2019 CSE process, the parents alleged that the district impermissibly engaged in predetermination of the 6:1+3 special class placement "well before the CSE meeting" and "without discussing the recommendation with the CSE team as a whole" (Parent Ex. A at p. 6). The parents also alleged that the CSE failed to discuss any other program and "failed to consider the full continuum of placements for [the student], including placement at Gersh" as requested by the parents and in light of the "significant progress" made by the student while attending Gersh (id.). In addition, the parents contended that the district failed to "treat [the student's] parents and professionals familiar with him as full and equal IEP Team Members," as evidenced by "[d]istrict CSE Team members interrupt[ng] [the educational consultant] and [the student's mother] when they raised serious concerns" about the recommended program (id. at p. 7). Relatedly, the parents alleged that the district failed to "meaningfully consider the opinions and recommendation of non-[d]istrict CSE Team Members" (id.).

As final points, the parents asserted that the May 2019 IEP lacked any "supports for school personnel on [the student's] behalf," and failed to include "BCBA services or behavioral intervention services in school" despite describing the program as having a BCBA "available as needed" (Parent Ex. A at p. 7). The parents also indicated that the aides in the recommended program "slated to work 1:1 with [the student] lack[ed] sufficient training to instruct [the student] and mange his behaviors" (id.). In addition, while the May 2019 IEP reflected that the student required a "particular device or service to address his communication needs," the IEP failed to "identify the device" (id.). Moreover, the parents noted that the district's recommended program "would not have appropriate peers in the proposed class" and the "ages of students in the proposed program exceed[ed] the 36 month limit"; the May 2019 IEP reflected the district's "policy, elevated over [the student's] individual educational needs"; and the May 2019 IEP was "insufficient to offer [the student] a FAPE" (id.).

In closing, the parents indicated that, in a letter to the district dated June 17, 2019, they expressed "their serious concerns" about moving the student to the "program already found to be inappropriate" for the student, but remained willing to consider the proposed program and

scheduled a visit of the program for July 26, 2019 (Parent Ex. A at p. 7). As relief for the alleged violations, the parents sought an order directing the district reimburse or directly fund the student's tuition, costs, and expenses for his attendance at Gersh, as well as parent training and counseling at home (id. at p. 8).

B. Events Post-Dating the Due Process Complaint Notice

On or about July 24, 2019, an IHO was appointed to the matter, and on August 27, 2019, the IHO held a prehearing conference (see IHO Decision at p. 2). Shortly thereafter, the parents prepared an amended due process complaint notice, dated September 3, 2019 (see Parent Ex. B at p. 1).[7] In addition to repeating, verbatim, all of the violations alleged and the relief requested in the original due process complaint notice, the amended due process complaint notice included new allegations arising from the parents' visit to the district's 6:1+3 special class placement on July 26, 2019 (compare Parent Ex. A at pp. 1-8, with Parent Ex. C at pp. 1-10). The amended due process complaint notice also included a new allegation that the district failed to recommend a program for the student that "provided toilet training" (compare Parent Ex. A at pp. 1-8, with Parent Ex. C at pp. 1-10).

With respect to visiting the district's program, the parents initially noted that they were accompanied by their educational consultant and that the director and the district's "part-time consultant BCBA" were also present for the visit (Parent Ex. C at p. 8). Based on their observations, the parents opined that the program "appeared similar to the program they previously rejected and which was deemed inappropriate" (id.). For example, the parents indicated that—"[a]s in previous years"—they saw a "student working while trapped in [a] wooden cubby by furniture" (id.). As they continued to observe this particular student, the parents noted that he was "engaging in self-injurious behaviors in the cubby" and even though he was "unable to respond appropriately" to the instruction being given, the district special education teacher gave the student "positive reinforcement anyway" (id.). According to the parents they learned at the visit that the district would be adding more cubbies to the classroom, which would further restrict the space for instruction and which raised concerns for the parents about the student's safety within the classroom, whom they described as "very energetic and requir[ing] movement to learn" (id. at pp. 8-9). Observing what the parents described as "[s]mall plastic filing cabinets" in the classroom raised additional safety concerns for the parents, noting the student could "easily open the drawers of the cabinets, which contained small objects (dangerous for students, like [this student], with pica) and scissors, dangerous for any impulsive young student" (id. at p. 9).

When the parents asked to "see sample data collected on students' programs," the director allegedly refused to provide access to that information and advised the parents to 'request it at the hearing'" (Parent Ex. C at p. 8). According to the parents, the staff "did not appear to be collecting data appropriately on students' academics or behaviors" and any further questions about the program were "rebuffed" by the director (id.). In addition to not collecting data, the parents alleged that the staff "were not providing ABA instruction," because they observed staff reinforcing

[7] The hearing record does not include any summary or transcript of the prehearing conference held on August 27, 2019 (see generally Tr. pp. 1-1099; Parent Exs. A-X; Z; AA; Dist. Exs. 1-16; IHO Ex. 1). The IHO and the parties are reminded that State regulation requires that a "transcript or a written summary of the prehearing conference shall be entered into the record by the [IHO]" (8 NYCRR 200.5[j][3][xi]).

students inconsistently, and because staff failed to "appropriately work on mastery and maintenance of skills, and did not redirect students engaging in maladaptive behaviors, including a student who licked his arm repetitively" (id. at p. 9). In addition, the parents observed one aide who "became increasingly verbally frustrated and used a harsh tone when the student . . . did not respond to her prompt" (id.). According to the parents, the BCBA "interceded in instruction being provided by classroom aides on [four to five] occasions during the one hour visit to correct inappropriate ABA techniques" (id.). The parents also alleged that the BCBA "did not work in the recommended classroom full time" or in that specific elementary school building, and instead, the BCBA "split her time between several schools" (id.). In addition, the parents noted concerns that "incorrect techniques were regularly used in the classroom, particularly as the classroom aides did not appear to be appropriately trained in the ABA methodology" (id.). As a result, the parents indicated that the student "would not receive the appropriate, individualized ABA instruction" nor would he receive the "level of BCBA oversight needed" (id.).

Next, the parents alleged that the student would not be appropriately grouped in the observed classroom (see Parent Ex. C at p. 9). The parents indicated that while some students engaged in "maladaptive behaviors," they were "quiet" and did not appear to require "movement to learn, unlike [this student]" (id.). The parents also indicated that the students appeared "larger" and "older" than the student, and exhibited "very little speech"—which "classroom staff did not appear to encourage" (id.). Also, the parents observed students working on "matching activities that did not require any verbal response," noting in comparison that the student in this case had "made meaningful progress in his ability and willingness to communicate verbally, and his speech skills would regress in a classroom with students who [were], upon information and belief, nonverbal or minimally verbal" (id.). Other concerns noted by the parents included observing augmentative communication devices in the classroom that were not being used; the program lacked a "sensory gym and could not provide consistent access to reinforcers that [were] highly motivating" to the student"; and the "standard token reinforcers used with the other students would present a safety concern given [the student's] pica" (id.).

In the amended due process complaint notice, the parents indicated that the director "confirmed that the students in the class [were] restrained when classroom staff believe[d] it [was] necessary to do so" (Parent Ex. C at p. 9). The parents indicated that restraint was an "aversive and inappropriate intervention" to use with the student, and would "not teach him appropriate replacement behaviors or appropriate skills" (id.). The parents also noted that the director informed them that a student "would be restrained for engaging in self-injurious behaviors" (id.).

Next, the parents described their concerns with regard to the "physical environment" of the observed classroom and the student's ability to "navigate" the district elementary school's program (see Parent Ex. C at pp. 9-10). For example, the parents indicated that the classroom's location on the second floor required the student to "transition up and down stairs and through hallways with general education students," which contrasted with the student's "severe social deficits" and his need for a "self-contained program" (id.). The parents noted that the classroom was "extremely small and confining" and would become more so with the addition of the newly constructed "cubbies" (id. at pp. 9-10). In addition, the parents were told that the classroom's "'chill' area [used] for dysregulated students to de-escalate" would be replaced by the cubbies, and the parents were not provided with any explanation regarding "where students would de-escalate" (id. at p. 10).

As a final point, the parents indicated that, according to the director, the district's program did "not work on toilet training," which added to the parents' opinion that the program was not appropriate for the student (Parent Ex. C at p. 10).

C. Impartial Hearing Officer Decision

On September 25, 2019, the parties resumed the impartial hearing, which concluded on November 26, 2019 after six days of proceedings (see Tr. pp. 1-1099). On December 23, 2019, the parties submitted post-hearing briefs to the IHO (see IHO Decision at p. 3). In a decision dated January 2, 2020, the IHO concluded that the district offered the student a FAPE for the 2019-20 school year and denied the parents' request to be reimbursed for the costs of the student's tuition and expenses at Gersh (id. at p. 17).

Before turning to the merits of the case for the 2019-20 school year, the IHO recited the procedural history of the case—including the student's educational history—related to the preceding school years: 2016-17, 2017-18, and 2018-19 (see IHO Decision at pp. 1-6). As part of this recitation for the 2017-18 school year, the IHO specifically noted that, contrary to the parents' stated position with respect to the conclusions drawn by an SRO, the "SRO did not find that the CSE's recommendation to place the [s]tudent in the [d]istrict's 6:1:3 program for the 10-month 2017-2018 school year was inappropriate for the [s]tudent's needs, that the program itself would not provide the student with a FAPE or that the program would not provide the [s]tudent with an appropriate ABA program provided by trained and competent staff" (id. at pp. 5-6, 11).[8]

Turning to the 2019-20 school year at issue, the IHO initially noted that the "main issue" of the case was the parents' desire for the student to remain at Gersh at district expense (IHO Decision at p. 7). While noting that the parents described several procedural and substantive reasons in the due process complaint notices to find the May 2019 IEP "defective," the IHO indicated that "[n]one of the reasons that the [p]arents put forth would lead [her] to rule that the IEP was defective, as those reasons were either[] irrelevant, misleading, untrue, unsupported by the record or antithetical to the IDEA" (id.).

The IHO then briefly described the witnesses presented for each party, along with succinct highlights of their testimony (see IHO Decision at pp. 8-11). With respect to the parents' educational consultant, the IHO focused on testimony she provided when asked about the May 2019 CSE meeting, which the IHO characterized as "describ[ing] a contentious dismissive meeting" (id. at p. 9). The IHO quoted the educational consultant's testimony, and specifically found that the "audio recording of the CSE meeting impugned [the educational consultant's] testimony to such a degree that it caused her to lose all credibility in this case" and added that "[o]ther testimony lessened her credibility as well" (id. at pp. 9-10).

Next, the IHO set forth her "Findings of Fact With Explanations" (IHO Decision at pp. 11-14). After noting that the May 2019 CSE recommended the "6:1:3 Intensive Needs Special Education Class which employ[ed] [ABA] beginning in July 2019," the IHO restated that, contrary to the parents' position, an SRO "never found the district's program to be inappropriate" and

[8] The IHO included the language directly from the prior SRO decision on this point (see IHO Decision at p. 6; Application of the Bd. of Educ., Appeal No. 18-118 n.31).

pointed to language in the previous SRO decision indicating that the hearing record in that case was "'replete with evidence that the district had the capacity to provide ABA to the student in the 6:1+3 special class'" (id. at p. 11). Finding the "totality of testimony" by the district special education teacher of the 6:1+3 special class, the director, and the district BCBA "very convincing," the IHO concluded that the district sustained its burden to establish that it offered the student a FAPE (id.).

As additional findings of fact, the IHO explained why she found it "misleading to say that the [s]tudent was forced to change schools several times in his young life"; that all parties agreed that the student made progress at Gersh; that the parents' "experts"—i.e., the educational consultant and the neuropsychologist who had evaluated the student on three separate occasions—only knew the student while he attended Gersh; and that the director—who fulfilled the role of the CSE chairperson at the May 2019 CSE meeting—ran a "very collegial and cooperative" meeting in "textbook" fashion, discussing the present levels of performance, annual goals, and recommendations, and making "sure to ask the parents, repeatedly, if they agreed with what was going on or wanted to add anything" and allowing "[e]veryone" with the opportunity "to be heard" (IHO Decision at pp. 11-12).[9]

The IHO also explained in the findings of fact that the "number of hours that a BCBA spen[t] supervising" either the district's 6:1+3 special class or the 6:1+1 classroom at Gersh was a "non-issue" (IHO Decision at p. 13). The IHO reached a similar conclusion with regard to whether the BCBA was an "employee of the school or work[ed] on a contract basis through an agency" (id.). In addition, the IHO noted that there were no federal or State requirements that BCBAs "supervise" or must "otherwise [be] involved in regular or special education classes" (id.). While the IHO acknowledged that a great deal of attention was paid in this case comparing the BCBA at Gersh with the BCBA at the district, the IHO found this, too, was a "non-issue" (id.). The IHO also acknowledged that the parents, in their closing brief, claimed that the district failed to include BCBA services in the student's IEP (id.). However, the IHO noted that "[n]o one at [at the CSE meeting] made any mention of including BCBA services on the IEP (probably because it [was] an integral component of both programs)," and as such, the "IEP [was] not deficient in this regard" (id.).

Finally, the IHO addressed findings of facts related to concerns raised about the student's access to nondisabled peers (i.e., the least restrictive environment (LRE)) (see IHO Decision at pp. 13-14). The IHO indicated that "every student ha[d] a right to be included as a student within his own school district and meet typically developing peers" (id. at p. 13). The IHO also indicated that "[k]eeping" disabled students "out of public schools and out of sight of their typically developing peers [was] antithetical to the IDEA concepts of [FAPE] and [LRE]" (id.). In this case, the IHO explained that the district did not expect the student to "immediately jump into the fray with the [r]egular [e]ducation [s]tudents" (id.). With respect to the location of the 6:1+3 special class placement on the second floor of the district elementary school building, the IHO indicated that it shared the hallway with only one other classroom, to wit, another self-contained special class, as well as the "office for the program's speech pathologist and the multipurpose sensory

[9] The IHO also noted that she listened to both the district's recording and the parents' recording of the May 2019 CSE meeting entered into evidence and found that "there [were] no surprises" because they were "both the same" (IHO Decision at p. 12).

room" (id.). In addition, the IHO noted that the students in the 6:1+3 special class would enter and exit the school building at different times "than the rest of the school so as to avoid passing general education students in the hallway at the same time" (id. at pp. 13-14).

Finally, the IHO explained that the "reverse mainstreaming available for students" in the district's 6:1+3 special class placement took place when the students were "ready" (IHO Decision at p. 14). At that time, the student would have the opportunity to "interact with typical peers with the support of the classroom staff and [a] [d]istrict social worker" and within the "comfort" of the student's own classroom (id.). The IHO also found that the hearing record lacked any evidence that the "student would regress if he were to leave Gersh and transfer" to the district's program (id.). Similarly, the IHO found no evidence of regression in the hearing record with respect to the summers the student spent at camp when he returned to Gersh, or "whether special steps were taken to help [the student] transition" from the camps he attended during those summers back to Gersh (id.).

Having completed the findings of fact, the IHO turned next to the "Conclusions of Law" (IHO Decision at pp. 14-16). In concluding that the district offered the student a FAPE in the LRE, the IHO indicated that "[n]one of the issues that the [p]arents have raised (aside from the fact that the [d]istrict did not recommend Gersh as the placement) were raised at the CSE meeting" (id. at pp. 14-15). Similarly, the IHO indicated that "[n]one of the supposed IEP deficiencies that the parents cited in their [d]ue [p]rocess [c]omplaint [n]otice[s] [were] valid" (id. at p.15). With respect to the May 2019 CSE meeting, the IHO concluded that the parents and "their consultants were full participants" at the meeting, with "ample opportunities to raise any concerns during that meeting" (id.). More specifically, the IHO found that the district "properly developed an IEP, through the IDEA's procedures, which [was] reasonably calculated to enable the student to receive educational benefits" (id.).

Next, the IHO concluded that the district was not obligated to "consider placement and was actually precluded from considering placement at the Gersh Academy, regardless of the desires of the parents and the opinions of their consultants and the Gersh team" as Gersh was not approved by the Commissioner (IHO Decision at p. 15). With respect to the continuum of services, the IHO found that the district was "required to consider . . . [a] [r]egular [e]ducation [c]lass with and without support, [r]esource [r]oom, and various in-district [s]elf [c]ontained class configurations" (id.). According to the IHO, the hearing record failed to contain any "evidence or testimony . . . that anyone thought that any placement other than a 6:1:3 or 6:1:1 should be considered" and therefore, the "IEP [was] not deficient in this regard" (id.).

Turning specifically to the district's 6:1+3 intensive needs special class, the IHO found it was an "ABA program taught by a certified special education teacher with experience in ABA therapy, including discrete trial therapy, who receive[d] in-classroom support" from the district's BCBA (IHO Decision at p. 15). In addition, the IHO found that the BCBA provided "hands-on training" to the "teacher, related service providers and classroom aides" and that they were "fully qualified to provide the services required by the [s]tudent's IEP" (id.). Moreover, the IHO noted that the district's program need not be better than the Gersh program or "more established (whatever that mean[t])" (id.). Similarly, the IHO noted that the district's program did not have to be in "operation for a certain length of time or in a specific building" (id.). Rather, the district's program "only need[ed] to be up and running and able to meet the student's needs when the IEP

commence[d]" and offer the student a FAPE (id. at pp. 15-16). And in this case, the IHO determined that the district's program offered the student a FAPE in the LRE and dismissed the parents' claims (id. at pp. 16-17).

IV. Appeal for State-Level Review

The parents appeal, arguing overall that the IHO erred in finding that the district offered the student a FAPE for the 2019-20 school year. Initially, however, the parents contend that the IHO failed to issue a decision that conformed to appropriate, standard legal practice and that failed to fully and accurately analyze the law or the evidence in the hearing record. In addition, the parents assert that the IHO's decision lacked a reasonable basis or analysis upon which to draw the conclusion that the district offered the student a FAPE. The parents also assert that the IHO's decision was conclusory and failed to include appropriate citation to the hearing record or the law, misstated the hearing record, improperly relied on retrospective testimony, failed to reconcile conflicting testimony and evidence, and failed to address "several significant issues." As a result, the parents contend that the SRO has "discretion to undertake an initial determination of the merits based on the [hearing] record when, as here, the IHO issue[d] a conclusory decision that [was] not 'reasoned and supported by the [hearing] record.'" (Req. for Rev. ¶ 16).

With respect to the argument that the IHO erred in finding that the district offered the student a FAPE, the parents argue that the IHO excused the district's failure to recommend "appropriate ABA programming and BCBA supervision for [the student] in his IEP." In further support of this argument, the parents contend that the student required an ABA program with BCBA supervision, which was "essential to ensuring ABA [was] being properly provided"; the district BCBA was not a full-time employee of the district; and the student's IEP failed to include BCBA supports or supervision for the student or school personnel on his behalf. In addition, the parents argue that the IHO failed to "reconcile contradictory information regarding BCBA services and "glossed over" testimony misrepresenting the hours worked by the BCBA in the district.

The parents also argue on this point that the IHO appeared to rely on the rationale that the absence of federal or State requirements for a BCBA to supervise classrooms could not result in failure to offer the student a FAPE if an IEP, therefore, omitted a recommendation for BCBA services. The parents contend that given the student's unique needs—as well as the agreement of the "professionals familiar" with the student—the district was required to recommend an ABA program with BCBA supervision in order to receive a FAPE. Finally, the parents argue that the IHO erred in finding that they could not challenge "anything that was not brought up explicitly" at the May 2019 CSE meeting. In support of this argument, the parents note that while they "did not raise [the student's] need for BCBA services at the CSE meeting," they also did not receive the IEP until after the meeting and "could not have known at the time of the CSE meeting that BCBA services would not be recommended explicitly on the IEP."

Next, the parents contend that the IHO erred in finding that the district's program could offer appropriate ABA programming. Here, the parents assert that the program "lacked systematic ABA interventions and consistency of services." As examples, the parents note that the "staff could not appropriately perform simple ABA interventions, did not consistently collect data on student responses, and were unable to keep students engaged." In addition, the parents argue that the classroom staff were not aware of "proper ABA therapy and behavior interventions, and

ignored students' dangerous behaviors." The parents also argue that the district BCBA testified that she would "modify BIPs and ABA interventions to fit the skills (or lack thereof) of classroom staff" rather than based upon the student's needs.

Next, the parents argue that the IHO failed to consider the district's failure to conduct an FBA and develop a BIP for the student, which constitutes a serious procedural violation. Absent an appropriate FBA and BIP, the parents allege that the student would regress behaviorally and educationally. In addition, the parents contend that the district failed to "consider relevant evaluative information" when developing the student's IEP, and the IHO improperly relied upon district staff testimony who were not familiar with the student rather than discussing or citing to the April 2019 neuropsychological reevaluation of the student (i.e., the "most recent evaluation").[10] The parents also contend that the district failed to develop annual goals that could be implemented in the district's program, impermissibly engaged in predetermination of the student's placement in the 6:1+3 special class, and failed to meaningfully consider other options or the parents' concerns. The parents further contend that the director inaccurately claimed that the district's 6:1+3 special class placement was the student's LRE and the IHO improperly relied upon her testimony without accurately analyzing the law or the hearing record.

The parents argue that the IHO erred in failing to analyze whether the student was appropriately grouped with similar peers in the 6:1+3 special class. The parents assert that the student would be the only one with an individual aide and only one of two verbal students in the classroom. The parents also assert that the district failed to obtain an age variance to address the 39-month age range at the start of the school year. In addition, the parents argue that the student required peers who were "all beginning to work on social interaction skills and early academic skills," and thus, the student would not receive a FAPE "in this class."

Finally, the parents allege that the cumulative effect of the district's failures resulted in a failure to offer the student a FAPE for the 2019-20 school year. The parents thereafter alleged that Gersh was an appropriate unilateral placement and equitable considerations weighed in favor of their requested relief. On appeal, the parents seek to reverse the IHO's finding that the district offered the student a FAPE, that Gersh was appropriate, that equitable considerations weighed in their favor, and to order the district to reimburse the parents for the costs of the student's tuition and expenses at Gersh.

In an answer, the district responds to the parents' allegations and generally argues to uphold the IHO's decision in its entirety.

[10] Initially, the parents' allegation in the request for review could be construed as challenging the sufficiency of the evaluative information relied upon by the CSE to develop the May 2019 IEP (see Req. for Rev. ¶43); however, the parents did not raise any issues in either the original or amended due process complaint notices about the evaluative information relied upon by the CSE or during the impartial hearing itself (see generally Parent Exs. A-B). In the memorandum of law, the parents clarify this allegation as related to whether the CSE failed to consider evaluative information concerning the student's regression if he were transitioned to a "new, non-ABA program" within the district (Parent Mem. of Law at pp. 22-23).

V. Applicable Standards

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

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

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). "The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created" (Endrew F., 137 S. Ct. at 1001). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations

omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Endrew F., 137 S. Ct. at 1001 [holding that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"]; Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the 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]).[11]

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. Sufficiency of IHO Decision

The parents seek to set aside the IHO's decision because the decision allegedly lacked citations to the hearing record and the applicable law, misstated the hearing record, included errors

[11] 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).

of law and fact, improperly relied on retrospective testimony, failed to reconcile conflicting testimony and evidence, and failed to "address several significant issues."[12]

In further support of these general allegations, the parents point out in the memorandum of law that the IHO's "legal citations" were "irrelevant; the IHO prematurely concluded on page 11 of the decision that the district failed to offer the student a FAPE without first conducting any legal analysis; the IHO's decision was only 16 pages long—despite a 6-day impartial hearing with 1099 pages of transcript and 43 total exhibits—and was drafted "with unusually-large 1.5 inch page margins and citations to only 8 exhibits"; the IHO appeared to have "hastily copied" the "Jurisdiction section" of the decision from "another document, without . . . taking the time to remove stray numbers and an awkward, irrelevant sentence"; the IHO's decision included typographical errors, including the failure to "correct missing spaces"; the IHO misstated that the district "'provided' home services" to the student during the 2016-17 school year and cited to testimonial evidence that did not support this proposition;[13] the IHO "mischaracterized the prior SRO decision"; the IHO failed to "reconcile conflicting evidence and testimony" related to "ABA

[12] With regard to the parents' contention that the IHO failed to "address several significant issues," State regulation requires that a request for review "shall clearly specify the reasons for challenging the [IHO's] decision, identify the findings conclusions, and orders to which exceptions are taken, or the failure or refusal to make a finding" (8 NYCRR 279.4[a]; see 8 NYCRR 270.8[c][1]-[4]). Conclusory, blanket statements—such as this one for example, which does not identify the specific issues the IHO allegedly failed to address (see, e.g., Req. for Rev. ¶¶15, 18)—does not conform to the practice regulations, and thus, pursuant to State regulation, "any issue not identified in a party's request for review, answer, or answer with cross-appeal shall be deemed abandoned and will not be addressed by a[n SRO]" (8 NYCRR 279.8[c][4]). Assuming for the sake of argument that while the parents may have intended such conclusory statements only as support for their argument to set aside the IHO's decision, neither the parents nor their attorney took the time to clarify those points, but instead, spilled much ink drawing attention to the IHO's alleged lack of care in drafting the decision (see Req. for Rev. ¶¶ 14-23). Upon further review, the parents do go on to identify specific issues in other sections of the request for review that the IHO allegedly failed to address, notably that the IHO failed to "consider the [d]istrict's failure to conduct an [FBA] or develop a BIP" for the student prior to the start of the 2019-20 school year, the IHO failed to determine whether the student would be appropriately grouped with similar peers in the 6:1+3 special class, and the IHO failed to determine whether the May 2019 CSE failed to consider other program options (compare Req. for Rev. ¶¶15, 18, with Req. for Rev. ¶¶ 38, 40, 46); as such, these issues will be addressed herein. However, other statements in the request for review are less clear. For instance, the parents contend that the district failed to develop appropriate annual goals that could be implemented in its program (but without any citations to the hearing record—the same allegation the parents level as a basis to set aside the IHO's decision), and similarly, that the district predetermined the 6:1+3 special class placement, which deprived them of the opportunity to participate in the decision-making process (citing to two pages of testimony offered by the parents' witness whom the IHO ultimately found not credible) (see Req. for Rev. ¶¶ 44-45; Tr. pp. 1049-51; IHO Decision at pp. 9-10). Certainly, these two allegations inform the SRO of what the district failed to do, but do not—as required by State regulation—inform the SRO of how the IHO erred or what issues the IHO failed to address (compare Req. for Rev. ¶¶ 44-45, with 8 NYCRR 279.4[a]). Erring on the side of caution, these two allegations will also be addressed herein; the parents and their attorney, however, are strongly cautioned that such lack of care and noncompliance with State regulations in the future will forfeit any review of similarly pleaded issues.

[13] Given that the instant matter relates to the 2019-20 school year and even assuming for the sake of argument that the IHO misstated the proposition that the district provided home-based services to the student during the 2016-17 school year (and cited to testimony that did not support this finding), the parents fail to indicate what effect, if any, this misstep may have had on the outcome of the impartial hearing or in the IHO's decision regarding the 2019-20 school year.

and BCBA services"; the IHO made "credibility assessments without addressing or reconciling conflicting testimony";[14] and the IHO improperly relied upon, and requested, retrospective evidence concerning ABA and BCBA services (Parent Mem. of Law at pp. 8-11).

State regulations provide in relevant part that the "decision of the [IHO] shall set forth the reasons and the factual basis for the determination" and "shall reference the hearing record to support the findings of fact" (8 NYCRR 200.5[j][5][v]). State regulations further require that an IHO "possess knowledge of, and the ability to conduct hearings in accordance with appropriate legal practice and to render and write decisions in accordance with appropriate standard legal practice" (8 NYCRR 200.1[x][4][v]). While not defined by regulation, citations to the hearing record and to applicable law and application of that law to the facts of the case are generally considered to be the norm in "appropriate standard legal practice" and should be included in any IHO decision. In drafting an appropriate decision, an IHO should cite to relevant facts in the hearing record with specificity and provide a reasoned analysis of those facts that references applicable law in support of the conclusions drawn.

Contrary to the parents' contention, while State regulations call for IHOs to draft decisions in conformity with "appropriate standard legal practice," the regulations do not require IHOs to include citations to every exhibit, a minimum number of transcript pages, or that a decision must be a certain page length in order to meet this mandate (see 8 NYCRR 200.1[x][4][v]). Here, the IHO's decision—consistent with State regulation—included citations to the evidence in the hearing record in support of her findings of fact, as well as citations to applicable law (see generally IHO Decision). In addition, many of the parents' assertions described above pertain to typographical errors (i.e., not removing or revising sentences, stray numbers, missing spaces), and perhaps less than perfect formatting of the IHO's decision (i.e., copying hastily, large margins)—that, while not uncommon even within the parents' request for review—do not constitute a basis upon which to set aside the IHO's decision, especially where, as here, these errors are not so prevalent as to

[14] In the decision, the IHO found that parents' educational consultant's testimony describing the May 2019 CSE meeting was so "impugned" by contradictory evidence in the audio recordings that "it caused her to lose all credibility in this case" (IHO Decision at pp. 9-10). 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 [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. of Hicksville Union Free Sch. Dist. v. Schaefer, 84 A.D.3d 795, 796 [2d Dep't 2011]; Application of a Student with a Disability, Appeal No. 12-076). In this instance, the IHO found that the educational consulted lacked credibility based on discrepancies between her testimony and the audio recordings in evidence in the hearing record. Upon listening to the same audio recordings, the evidence in the hearing record supports the IHO's credibility determination, and absent evidence compelling a contrary conclusion, the IHO's finding will not be disturbed. To be clear, the IHO's assessment of the educational consultant's credibility did not require "addressing or reconciling conflicting testimony," as pressed by the parents (Parent Mem. of Law at pp. 8-11). In this instance, the educational consultant did not merely evade answering questions or exhibit behaviors that called her credibility into question, but instead, she affirmatively misrepresented the tone, collegiality, and overall collaborative environment of the May 2019 CSE meeting, which a reasonable person—upon listening to the audio recordings compared to the educational consultant's testimony—would similarly and easily discern (see K.R. v . New York City Dep't of Educ., 107 F.3d 295, 308-09 [S.D.N.Y. 2015] [describing IHO's observations of the witness's demeanor in assessing credibility, which included "the cadence and volume of [the witness's] speech, hesitations and pauses, and tone of voice"]).

undermine the IHO's findings of fact and conclusions of law or interfere with a party's due process rights.

Next, the parents argue to set aside the IHO's decision because the IHO mischaracterized the prior SRO decision with respect to the administrative proceedings related to the 2017-18 school year. Contrary to the parents' repeated assertion, the SRO's conclusion in Application of the Bd. of Educ., Appeal No. 18-118, that the district failed to offer the student a FAPE for the 2017-18 school year was not based upon any substantive or procedural inadequacies with the recommended 6:1+3 special class placement and program or the 2017-18 IEP itself; rather, the SRO found that the district failed to offer the student a FAPE because the district could not implement the recommended placement and program during summer 2017 (see Application of the Bd. of Educ., Appeal No. 18-118 [emphasis added]). The IHO correctly interpreted the SRO's decision in this regard, and therefore, the parents' argument is dismissed.

To the extent that the parents also argue that the IHO failed to reconcile conflicting testimony, made improper credibility assessments, and improperly relied upon—and in fact, requested the production of—retrospective evidence, these arguments are more properly made with regard to particular issues and would not, alone, suffice to set aside the IHO's decision without further development of these particular assertions. The parents' contentions will be addressed if, and where, relevant.

Overall, a review of the IHO's decision demonstrates that although the IHO cited to portions of the hearing record that supported her determinations and concluded that the district offered the student a FAPE for the 2019-20 school year, the IHO could have added additional detail and further developed the reasoning and factual basis for her conclusions as contemplated by the regulations at issue (see generally IHO Decision). However, that fact does not lead to a reversal of her decision in this case. Notwithstanding the foregoing, an SRO is tasked with conducting an impartial review of the issues presented on appeal and rendering a decision based on an independent review of the entire hearing record (34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]; see M.W. v. New York City Dep't of Educ., 869 F. Supp. 2d 320, 329-30 [E.D.N.Y. 2012]). Accordingly, the parties have the opportunity for an independent review and are not prejudiced by any lack of specific detail in the IHO's decision.

B. May 2019 CSE Process—Parent Participation/Predetermination

Generally, the parents argue that the May 2019 CSE impermissibly engaged in predetermination of the 6:1+3 special class placement and failed to "meaningfully consider any other options" or the parents' concerns, which "significantly impeded" the parents' opportunity to participate in the decision-making process. In response, the district contends that the 6:1+3 special class placement—as an "ABA program . . . , with BCBA support"—was the student's LRE and thus, the May 2019 CSE was "prohibited from considering a more-restrictive private school setting," such as Gersh. Upon review, the evidence in the hearing record does not support the parents' contentions.

The IDEA sets forth procedural safeguards that include providing parents an opportunity "to participate in meetings with respect to the identification, evaluation, and educational placement of the child" (20 U.S.C. § 1415[b][1]). Federal and State regulations governing parental

participation require that school districts take steps to ensure that parents are present at their child's IEP meetings or are afforded the opportunity to participate (34 CFR 300.322; 8 NYCRR 200.5[d]). Although school districts must provide an opportunity for parents to participate in the development of their child's IEP, mere parental disagreement with a school district's proposed IEP and placement recommendation does not amount to a denial of meaningful participation (see T.F. v. New York City Dep't of Educ., 2015 WL 5610769, at *5 [S.D.N.Y. Sept. 23, 2015]; A.P., 2015 WL 4597545 at *8, *10; E.F. v. New York City Dep't of Educ., 2013 WL 4495676 at *17 [E.D.N.Y. Aug. 19, 2013] [stating that "as long as the parents are listened to," the right to participate in the development of the IEP is not impeded, "even if the [district] ultimately decides not to follow the parents' suggestions"]; P.K. v. Bedford Cent. Sch. Dist., 569 F. Supp. 2d 371, 383 [S.D.N.Y. 2008] [noting that "[a] professional disagreement is not an IDEA violation"]; Sch. for Language & Commc'n Dev. v. New York State Dep't of Educ., 2006 WL 2792754, at *7 [E.D.N.Y. Sept. 26, 2006] [finding that "[m]eaningful participation does not require deferral to parent choice"]). When determining whether a district complied with the IDEA's procedural requirements, the inquiry focuses on whether the parents "had an adequate opportunity to participate in the development" of their child's IEP (Cerra, 427 F.3d at 192). Moreover, "the IDEA only requires that the parents have an opportunity to participate in the drafting process'" (D.D-S., 2011 WL 3919040, at *11 [E.D.N.Y. Sept. 2, 2011], quoting A.E. v. Westport Bd. of Educ., 463 F. Supp. 2d 208, 216 [D. Conn. 2006]; see T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 420 [2d Cir. 2009] [noting that the IDEA gives parents the right to participate in the development of their child's IEP, not a veto power over those aspects of the IEP with which they do not agree]).

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

While the IHO did not directly address the issue of predetermination or parent participation in the decision, the IHO did find that, based upon listening to both the parents' and the district's audio recordings of the May 2019 CSE meeting "three times," the "CSE chairperson, . . . , held a very collegial and cooperative, one might say textbook, CSE meeting" (IHO Decision at p. 12; see

Parent Ex. AA; Dist. Ex. 16; see also Dist. Ex. 1 at pp. 1-4).[15] Here, the evidence in the hearing record demonstrates that, consistent with the IHO's findings, the May 2019 CSE reviewed the present levels of performance, the annual goals, and then the ultimate recommendations, and moreover, that "[e]veryone had the chance to be heard" (compare IHO Decision at pp. 12, 14-15, with Dist. Ex. 1 at pp. 2-4; see generally Parent Ex. AA; Dist. Ex. 16).[16]

When the CSE convened in May 2019, the director began the meeting by discussing the observation of the student conducted by district staff (the director, the district special education teacher of the 6:1+3 special class, and the district speech-language therapist) at Gersh in March 2019 (see Dist. Ex. 1 at pp. 2, 5; Parent Ex. X at p. 1).[17] Next, the student's then-current special education teacher and related services' providers at Gersh reportedly individually about the student's progress and present levels of performance in their respective areas and as reflected in the Gersh progress reports available at that time (see Dist. Ex. 1 at pp. 2-3, 5; Parent Ex. AA; Dist. Ex. 16; see generally Parent Exs. M-P; S). After the Gersh special education teacher and the speech-language therapist individually completed their reports, the director asked the parents if they had any questions and they responded "no" (see Parent Ex. AA; Dist. Ex. 16). The parents'

[15] After listening to both audio recordings of the May 2019 CSE meeting, the evidence supports the IHO's finding that both recordings were the "same" (IHO Decision at p. 12; see generally Parent Ex. AA; Dist. Ex. 16). In addition, when listening to and comparing the audio recordings with the comments documented within the meeting information section of the May 2019 IEP, the evidence also supports a finding that the May 2019 IEP accurately captured and reflected the content of those audio recordings and what transpired at the CSE meeting (compare Parent Ex. AA, and Dist. Ex. 16, with Dist. Ex. 1 at pp. 1-4).

[16] At the impartial hearing, the student's father testified that they were "not offered an opportunity to opine anything" during the CSE meeting (Tr. pp. 901-02). He further testified that their educational consultant who also attended the May 2019 CSE meeting "basically spoke for [them], but personally [they] didn't" (Tr. p. 902). This testimony, however, is directly contradicted by the evidence in the hearing record, which reflects that the director asked the parents during the CSE meeting if they had any questions or concerns and actively sought their input, and that the parents did, at times, respond directly to the director's inquiries (see Tr. pp. 133, 423; Dist. Ex. 1 at pp. 2-4; Parent Ex. AA; Dist. Ex. 16). Neither the parents nor their educational consultant voiced any objections or disagreements with the information presented about the student's progress and needs (i.e., present levels of performance), the annual goals, the management needs, or special education recommendations (i.e., related services) at the CSE meeting, with the exception of the ultimate recommendation for the in-district 6:1+3 special class placement and program (see Dist. Ex. 1 at pp. 2-4; Parent Ex. AA; Dist. Ex. 16).

[17] The May 2019 CSE consisted of the following individuals: the district director, psychologist, special education teacher of the 6:1+3 special class, a speech-language therapist, a social worker, the parents, and the parents' educational consultant—all of whom attended at the district location (see Dist. Ex. 1 at p. 2; Parent Ex. AA; Dist. Ex. 16). The May 2019 CSE also consisted of the following individuals from Gersh: the student's then-current special education teacher, physical therapist, speech-language therapist, occupational therapist, and the Gersh principal—all of whom attended via telephone from the Gersh location (see Dist. Ex. 1 at p. 2; Parent Ex. AA; Dist. Ex. 16). The neuropsychologist who conducted an updated evaluation of the student in April 2019 also attended the May 2019 CSE meeting via telephone (see Dist. Ex. 1 at p. 2; Parent Ex. AA; Dist. Ex. 16; see also Parent Ex. F at p. 1).

educational consultant also discussed her classroom observation of the student at Gersh, which she conducted in April 2019 (see Dist. Ex. 1 at p. 2; Parent Ex. AA; Dist. Ex. 16).[18]

Next, the Gersh special education teacher reviewed the updated BIP prepared in April 2019 with the CSE (see Dist. Ex. 1 at pp. 3, 5; see generally Parent Ex. R). After hearing that report, the parents "noted that the [student's] self-injurious behaviors ha[d] decreased" significantly (Dist. Ex. 1 at p. 3; Parent Ex. AA; Dist. Ex. 16). Thereafter, the neuropsychologist attending the May 2019 CSE meeting reviewed at length (approximately 18 minutes) the results of the student's reevaluation she conducted in April 2019 (see Dist. Ex. 1 at pp. 3, 5; Parent Ex. F at p. 1; see generally Parent Ex. AA; Dist. Ex. 16). At the conclusion of her report, the neuropsychologist indicated that her overall diagnostic impression of the student "remain[ed] the same as previous [evaluations] which include[d] a diagnosis of autism spectrum disorder, level 3 requiring very substantial supports and intellectual disability, unspecified" (mainly as a function of being unable to complete formal testing of the student's cognitive functioning) (Dist. Ex. 1 at p. 3; see generally Parent Ex. AA; Dist. Ex. 16). The neuropsychologist also "recommended continuation of school at Gersh" because the student was "making progress" (Dist. Ex. 1 at p. 3; see Parent Ex. F at p. 11).

The May 2019 CSE then entered a lengthy (approximately 35-minute) discussion of the student's annual goals in the IEP for the 2019-20 school year "based on his progress on his current goals" (Dist. Ex. 1 at pp. 3, 13-17; see generally Parent Exs. M-P; S; AA; Dist. Ex. 16). The evidence in the hearing record reveals that, prior to the CSE meeting, the district special education teacher of the 6:1:+3 special class placement drafted annual goals gleaned from information obtained at the district's March 2019 classroom observation of the student at Gersh, which wrapped up with a meeting between district staff, the Gersh speech-language therapist, and the Gersh special education classroom teacher (see Dist. Ex. 1 at pp. 3, 13-17; see also Tr. pp. 131-32; see generally Parent Exs. M-P; S; AA; Dist. Ex. 16).

During the meeting, the CSE reviewed each of the drafted annual goals in the IEP and modified the annual goals when necessary based on input from Gersh staff (see Tr. p. 132; Dist. Ex. 1 at pp. 3, 13-17; see generally Parent Ex. AA; Dist. Ex. 16). Throughout this process, the parents did not express any disagreement, objections or concerns about the annual goals ultimately created (see Dist. Ex. 1 at p. 3; see generally Parent Ex. AA; Dist. Ex. 16).

Finally, the May 2019 CSE turned its attention to the student's placement recommendation for the 2019-20 school year, and the director began that discussion noting the district's obligation to meet the student's needs in the LRE (see Dist. Ex. 1 at pp. 3-4; Parent Ex. AA; Dist. Ex. 16; see also Tr. p. 430).[19] According to the comments in the meeting information, the May 2019 CSE determined that, based upon the "progress noted this year, including more verbal output and

[18] The hearing record does not include any document reflecting the educational consultant's classroom observation of the student at Gersh (see Dist. Ex. 1 at p. 5; see generally Tr. pp. 1-1099; Parent Exs. A-W; Z; AA; Dist. Exs. 1-16; IHO Ex. 1).

[19] In making the May 2019 CSE's recommendation, the director indicated that, comparatively, the district's 6:1+3 special class program was equivalent to what Gersh offered the student—and the parents' educational consultant disagreed with that comparison (see Parent Ex. AA; Dist. Ex. 16).

imitation and interest in peers," the district's 6:1+3 special class program "c[ould] meet [the student's] needs" (Dist. Ex. 1 at p. 3; see Parent Ex. AA; Dist. Ex. 16). The director further described the program, noting that it was "based on ABA principals using discrete trial instruction in a very small learning ratio"; that the student would also have a "1:1 aide to meet his needs appropriately"; the "district ABA program [was] an intense program utilizing the district BCBA who consult[ed] with and train[ed] the program staff and work[ed] on program for students"; the BCBA was an integral part of the program; the district's program provided the student with the opportunity to "have typical peer models through the day and allow[ed] for mainstreaming as appropriate for [the student]" with the support of a district social worker and the BCBA; and the program utilized "[r]everse mainstreaming . . . where typical peer buddies push[ed] into the classroom with the district social worker to engage the students in the special class setting in various play activities" (Dist. Ex. 1 at p. 4; see Parent Ex. AA; Dist. Ex. 16). The director also noted that Gersh could not offer the student an opportunity to engage with nondisabled (i.e., "typical") peers (Dist. Ex. 1 at p. 4; see Parent Ex. AA; Dist. Ex. 16).

The parents' educational consultant immediately expressed disagreement with the CSE's recommendation and she asked Gersh staff about the student's current ability to interact with his peers (see Parent Ex. AA; Dist. Ex. 16). The Gersh principal responded that she understood the benefit of having access to nondisabled peers, but the benefit only existed when a student was developmentally ready for that interaction (see Parent Ex. AA; Dist. Ex. 16).[20] And in this case, this student would not benefit from having access to nondisabled peers because he was not ready, and furthermore, opined that the student would regress if exposed to nondisabled peers and strongly disagreed that the student would benefit from interaction with nondisabled peers (see Parent Ex. AA; Dist. Ex. 16).[21] The parents' educational consultant agreed with the Gersh principal's opinion (see Parent Ex. AA; Dist. Ex. 16). The May 2019 CSE continued to engage in discussions about the student's ability to interact with nondisabled peers (see Parent Ex. AA; Dist. Ex. 16).

The director explained, however, that the 6:1+3 special class placement recommendation was not solely based upon the opportunity to have access to nondisabled peers, but the recommendation also arose because it was an intensive ABA program and matched what Gersh offered the student (see Parent Ex. AA; Dist. Ex. 16). She also noted that access to nondisabled peers in the district's program was a bonus for the student (see Parent Ex. AA; Dist. Ex. 16).

Next, the neuropsychologist was asked her opinion as part of the placement discussion (see Parent Ex. AA; Dist. Ex. 16). She opined that, given the student's remarkable progress at Gersh, it would be regressive to move the student to the district's program and she did not understand why the CSE would want to move him from Gersh where he made such great progress (see Parent Ex. AA; Dist. Ex. 16). She further expressed concern about regression as a result of switching the

[20] At the time of the impartial hearing, the Gersh principal's title changed to "executive director," but retained the same job responsibilities and duties (Tr. pp. 505-07).

[21] The Gersh principal further stated that Gersh did have higher functioning peers for the student, who showed no interest in those higher functioning peers (see Parent Ex. AA; Dist. Ex. 16).

student to a different program and making such a dramatic shift from Gersh's program to the district's program and into a completely different environment (see Parent Ex. AA; Dist. Ex. 16).

Both parents commented about removing the student from Gersh in order to place him in the district's program as a basis for disagreeing with the May 2019 CSE's 6:1+3 special class placement recommendation (see Parent Ex. AA; Dist. Ex. 16). The student's mother opined that regardless of where the district's program was located—because the special class program was moving from one district school building to another district school building—would be horrible for the student, charactering the district's program as still in a state of flux in light of the anticipated change in location (see Parent Ex. AA; Dist. Ex. 16).[22] The student's mother indicated that moving the student to the district's program would result in the student engaging in more self-injurious behaviors and would, overall, not meet his needs (see Parent Ex. AA; Dist. Ex. 16). The student's father expressed similar reasons for disagreeing with the CSE's recommendation, focusing primarily on not interfering with the progress the student had made at Gersh and that it would be silly to move him from that program (see Parent Ex. AA; Dist. Ex. 16). The student's father also stated at the May 2019 CSE meeting that they respectfully disagreed with the CSE's recommendation, and the student would stay at Gersh because the CSE had no substantial reason for removing the student from a program where he had made substantial progress (see Parent Ex. AA; Dist. Ex. 16).

The May 2019 CSE meeting continued, and the director then described the special education program and related service recommendations for summer 2019 (see Dist. Ex. 1 at p. 4; see also Parent Ex. AA; Dist. Ex. 16). Ultimately, the student's father expressed disagreement with the recommendations for 2019-20 school year (see Dist. Ex. 1 at p. 4; see also Parent Ex. AA; Dist. Ex. 16). Prior to concluding the meeting, the parents agreed that they would visit the district's program and the director provided them with a copy of a class profile of the anticipated student cohort within the district's 6:1+3 special class placement for the 2019-20 school year (see Dist. Exs. 1 at p. 4; 14 at p. 1; see also Parent Ex. AA; Dist. Ex. 16). The student's mother also indicated that the student would be attending Gersh for summer 2019 (see Dist. Ex. 1 at p. 4; see also Parent Ex. AA; Dist. Ex. 16).

In light of the foregoing, the evidence in the hearing record does not support a conclusion that the May 2019 CSE impermissibly engaged in predetermination of the student's placement recommendation even if, as the parents contend, the May 2019 CSE did not discuss or consider other placement options for the student or relatedly, that the alleged failure to discuss or consider other placement options significantly impeded the parents' opportunity to participate in the decision-making process. Generally, once the CSE determined that the 6:1+3 special class placement was appropriate for the student, the district was not obligated to consider a more restrictive placement—such as a nonpublic school or Gersh—as desired by the parents (see, e.g., B.K. v. New York City Dep't of Educ., 12 F.Supp.3d 343, 359 [E.D.N.Y. 2014] [indicating that "once the CSE determined that a 6:1:1 placement was appropriate for [the student], it was under no obligation to consider more restrictive programs"]; E.F., 2013 WL 4495676, at *15 [explaining that "under the law, once [the district] determined . . . the least restrictive environment in which

[22] The director disagreed with the characterization expressed by the student's mother about the program still being in a state of flux (see Parent Ex. AA; Dist. Ex. 16).

[the student] could be educated, it was not obligated to consider a more restrictive environment"; A.D. v. New York City Dep't of Educ., 2013 WL 1155570, at *8 [S.D.N.Y. Mar. 19, 2013] [finding that "[o]nce the CSE determined that [the public school setting] would be appropriate for the [s]tudent, it had identified the least restrictive environment that could meet the [s]tudent's needs and did not need to inquire into more restrictive options"]; T.G. v. New York City Dep't of Educ., 973 F. Supp. 2d 320, 341-42 [S.D.N.Y. 2010]).[23] The hearing record contains ample evidence that the parents individually expressed their reasons for disagreeing with the recommended 6:1+3 special class placement, and that several other CSE members also engaged in the placement discussion (see Parent Ex. AA; Dist. Ex. 16). Here, the evidence supports findings that the May 2019 CSE remained open-minded as to the contents of the student's IEP, and while not agreeing with the ultimate recommendation, the parents had the opportunity to participate in the decision-making process and in drafting the contents of the IEP. Consequently, the parents' arguments must be dismissed.

C. May 2019 IEP

1. Annual Goals

The parents assert that the annual goals in the May 2019 IEP were not appropriate because they could not be implemented in the district's 6:1+3 intensive needs program. In support of this argument, the parents contend that the annual goals in the May 2019 were "copied" from a Gersh progress report and were therefore "designed to be implemented in Gersh's intensive 1:1 ABA

[23] To be clear, the parents did not assert at the May 2019 CSE meeting or now on appeal that the student required a less restrictive setting than the district's 6:1+3 special class placement (see generally Parent Exs. A-B; AA; Dist. Ex. 16; Req. for Rev.; Parent Mem. of Law). In addition, the hearing record does not include any evidence that the parents—or any other CSE members—asked the CSE to consider any other placement options, including Gersh (see generally Tr. pp. 1-1099; Parent Exs. A-W; Z; AA; Dist. Exs. 1-16; IHO Ex. 1). In particular, the audio recordings of the May 2019 CSE meeting reveal that the parents did not ask the CSE to consider Gersh as a placement option, but instead, only stated that the student would remain at Gersh for the 2019-20 school year (see Parent Ex. AA; Dist. Ex. 16). I can infer from the parents' statements that the potential of negative affects upon the student's progress due to removing the student from Gersh that they at least implicitly would have preferred that the CSE recommend Gersh. In contrast, however, the district's prior written notice, dated May 24, 2019, indicated that the parents requested that the CSE recommend Gersh for the 2019-20 school year and that the CSE rejected this option based upon its obligation to recommend a placement in the LRE, that the district's program would appropriately meet the student's needs, and that Gersh was not a State-approved nonpublic school (compare Dist. Ex. 2 at pp. 1-2, with Parent Ex. AA, and Dist. Ex. 16). The lack of State approval made it sufficiently clear that the district was not authorized under State law to contract with Gersh.

program."[24] The district denies these allegations, arguing that the evidence in the hearing record reflects that the May 2019 CSE developed the annual goals during a collaborative, 30-minute discussion. In addition, the district asserted that the annual goals—"which include the use of 1:1 discrete trial instruction"—can be implemented within the recommended program. Upon review, the evidence in the hearing record does not support the parents' contentions.

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 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 20 U.S.C. §1414[d][1][A][i][I][cc]; 34 CFR 300.320[a][2][ii]).[25]

Additionally, a determination of the appropriateness of a particular set of annual goals for a student turns, not upon their suitability within a particular classroom setting or student-to-teacher ratio, but rather on whether the annual goals and short-term objectives are consistent with and relate to the identified needs and abilities of the student (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]). To hold otherwise would suggest that CSEs or CPSEs should preselect an educational setting on the continuum of alternative placements and/or

[24] To be clear, although the parents raised additional allegations pertaining to the annual goals in their due process complaint notices that were also not addressed by the IHO in the decision—including that the May 2019 IEP failed to include any annual goals to assist the student transitioning into a new program; that "[s]ome" of the annual goals were "inappropriate, unclear, and/or unspecific"; that the annual goals in mathematics and writing were "insufficient" and failed to target areas of deficit, such as the student's "inability to rote count to [10]" and his need to "work on tracing vertical and horizontal lines"; and that the annual goals failed to include an "appropriate schedule for reporting progress"—the parents do not now continue to press those same issues on appeal (compare Parent Ex. A at pp. 5-7, and Parent Ex. C at pp. 6-7, with Req. for Rev. ¶ 44, and Parent Mem. of Law at p. 4). Consequently, these issues are deemed abandoned and will not be addressed (see 8 NYCRR 279.8[c][4]).

[25] State guidance describes short-term instructional objectives as the "intermediate knowledge and skills that must be learned in order for the student to reach the annual goal" ("Guide to Quality [IEP] Development and Implementation," at pp. 37-38, Office of Special Educ. [Dec. 2010], available at http://www.p12.nysed.gov/specialed/publications/iepguidance/IEPguideDec2010.pdf). According to the same State guidance, short-term instructional objectives break down the skills or steps necessary for a student to accomplish an annual goal into discrete components (see id.). Benchmarks are described as "major milestones that the student will demonstrate that will lead to the annual goal;" benchmarks "usually designate a target time period for a behavior to occur" and generally establish "expected performance levels that allow for regular checks of progress that coincide with the reporting periods for informing parents" of progress toward the annual goals (id.). "Short-term instructional objectives and benchmarks should be general indicators of progress, not detailed instructional plans, that provide the basis to determine how well the student is progressing toward his or her annual goal and which serve as the basis for reporting to parents" (id.).

related services and then draft annual goals specific to that setting; however, that is, idiomatically speaking, placing the cart before the horse (see generally, "Guide to Quality Individualized Education Program [IEP] Development and Implementation," at pp. 38-39, Office of Special Educ. [Dec. 2010], available at http://www.p12.nysed.gov/specialed/publications/iepguidance/IEPguideDec2010.pdf [stating, among other things that "[t]he recommended special education programs and services in a student's IEP identify what the school will provide for the student so that the student is able to achieve the annual goals and to participate and progress in the general education curriculum (or for preschool students, age-appropriate activities) in the [LRE]" [emphasis added]).

In this case, the evidence in the hearing record demonstrates that the May 2019 CSE discussed, reviewed, and revised the annual goals in the student's IEP with the input of all CSE members, including the student's then-current Gersh providers, the parents, the parents' educational consultant, together with information obtained from the evaluative information available to the CSE, which included Gersh progress reports, a classroom observation report(s), an updated FBA and BIP, and an updated neuropsychological evaluation (see Dist. Ex. 1 at pp. 2-3, 5, 13-17; see generally Parent Exs. F; M-S; X; AA; Dist. Ex. 16). The audio recordings of the May 2019 CSE meeting evidence collaboration between all members of the CSE in reviewing and revising the annual goals for the student until all of those members were satisfied with the language of the annual goals, as well as the specific skills targeted by the annual goals (see Parent Ex. AA; Dist. Ex. 16; see also Dist. Ex. 1 at pp. 13-17). The audio recordings also make evident that the May 2019 CSE reviewed and revised each of the annual goals drafted prior to the CSE meeting against the annual goals contained in various Gersh progress reports, and that—as asserted by the parents—some of the annual goals in the IEP were revised to either copy or include language as part of the annual goal based upon at least one Gersh progress report (see Parent Ex. AA; Dist. Ex. 16; see also Dist. Ex. 1 at pp. 13-17; Parent Ex. N at pp. 2-4).[26]

Here, the May 2019 IEP includes approximately 19 annual goals with approximately 38 corresponding short-term objectives targeting the student's identified needs in the areas of reading, mathematics, speech-language, social/emotional and behavioral, motor skills, and daily living skills (see Dist. Ex. 1 at pp. 13-17). A careful review of the annual goals reveals that, consistent with regulation, each annual goal includes an evaluative criteria (i.e., "8 out of 10 trials on 5 consecutive occasions"), an evaluation schedule (i.e., "[e]very 2 weeks," "daily"), and a procedure to evaluate the annual goals (i.e., "[r]ecorded observations," "[w]ork samples") (id.). With the exception of perhaps one annual goal, the annual goals in the May 2019 IEP that could reasonably be identified as being copied from the Gersh progress report (reading, mathematics, study skills, daily living skills, and writing) specifically require the use of discrete trial teaching to implement

[26] On appeal, the parents only point to one Gersh progress report—Parent Exhibit N—as the source for the annual goals allegedly copied into the IEP (see Parent Mem. of Law at p. 4; see generally Parent Ex. N). Parent Exhibit N included annual goals targeting skills in the areas of reading, mathematics, study skills, daily living skills, and writing (see generally Parent Ex. N). The May 2019 CSE also had several Gersh progress reports for his related services of speech-language therapy, OT, and PT, which also included annual goals; the annual goals in the Gersh progress reports for related services did not, however, include language requiring the use of discrete trial teaching and the parents do not appear to allege on appeal that the district copied annual goals from these reports into the IEP (compare Parent Ex. N, with Parent Ex. M and Parent Ex. O, and Parent Ex. P).

the annual goal and/or the short-term objectives (compare Dist. Ex. 1 at pp. 13-17, with Parent Ex. N at pp. 2-4).[27]

At the time of the May 2019 CSE meeting, the student attended a 6:1+1 classroom at Gersh with the assistance of an individual paraprofessional, and he received 1:1 discrete trial instruction in the classroom (see Parent Ex. N at p. 1; X at p. 1).[28] Given that the May 2019 CSE recommended a 6:1+3 special class placement, an individual aide, and 1:1 discrete trial instruction as a strategy to address the student's management needs, it is unclear how the annual goals within the IEP—directing the use of 1:1 discrete trial instruction to implement the annual goals—could not be implemented in the district's program. Therefore, the parents' contentions to the contrary are unpersuasive and must be dismissed.

2. Consideration of Special Factors—Interfering Behaviors

As an issue unaddressed by the IHO, the parents argue that the May 2019 CSE's failure to conduct an FBA or to develop a BIP resulted in the district's failure to offer the student a FAPE for the 2019-20 school year. In support of this contention, the parents argue that the FBA and BIP in place for the student at Gersh could not cure these failures and the "behavioral strategies" used at Gersh could not be implemented in the district's program, which lacked the necessary trained staff and "oversight/supervision by a BCBA." The district denies these allegations, arguing that the May 2019 CSE reviewed and discussed Gersh's updated FBA and BIP. In addition, the district asserts that it was not required to conduct another FBA or develop another BIP if the student remained attending Gersh. Upon review, the evidence in the hearing record does not support the parents' contentions.

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

[27] There is no authority cited for the proposition that a CSE cannot incorporate annual goals into a student's IEP that were developed by the student's nonpublic school teachers and/or providers (see C.L.K. v. Arlington Sch. Dist., 2013 WL 6818376, at *13 [S.D.N.Y. Dec. 23, 2013]; A.M. v. New York City Dep't of Educ., 964 F. Supp. 2d 270, 284 [S.D.N.Y. 2013] [noting that the parent cited "no authority for the proposition that drawing goals from a teacher's progress report is a violation of the statute or regulations"]). Overall, the evidence in the hearing record supports a finding that the annual goals and short-term objectives in the IEP targeted and appropriately addressed the student's identified areas of need (see, e.g., D.A.B. v. New York City Dep't of Educ., 973 F. Supp. 2d 344, 359-60 [S.D.N.Y. 2013]).

[28] The March 2019 classroom observation reflects that the student attended a 6:1+2 special class at Gersh at that time (see Parent Ex. X at p. 1).

Florida Union Free Sch. Dist., 777 F. Supp. 2d 669, 673 [S.D.N.Y. 2011]; Gavrity v. New Lebanon Cent. Sch. Dist., 2009 WL 3164435, at *30 [N.D.N.Y. Sept. 29, 2009] [discussing the student's IEP which appropriately identified program modifications, accommodations, and supplementary aids and services]; P.K. v. Bedford Cent. Sch. Dist., 569 F. Supp. 2d 371, 380 [S.D.N.Y. 2008]).

State regulation defines an FBA as the process of determining why a student engages in behaviors that impede learning and how the student's behavior relates to the environment" and

> include[s], but is not limited to, the identification of the problem behavior, the definition of the behavior in concrete terms, the identification of the contextual factors that contribute to the behavior (including cognitive and affective factors) and the formulation of a hypothesis regarding the general conditions under which a behavior usually occurs and probable consequences that serve to maintain it

(8 NYCRR 200.1[r]). According to State regulations, an FBA shall be based on multiple sources of data and must be based on more than the student's history of presenting problem behaviors (8 NYCRR 200.22[a][2]). An FBA must also include a baseline setting forth the "frequency, duration, intensity and/or latency across activities, settings, people and times of the day," so that a BIP (if required) may be developed "that addresses antecedent behaviors, reinforcing consequences of the behavior, recommendations for teaching alternative skills or behaviors and an assessment of student preferences for reinforcement" (8 NYCRR 200.22[a][3]).

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

It is undisputed that the district did not conduct its own FBA of the student prior to the May 2019 CSE meeting. According to the evidence in the hearing record, the May 2019 CSE had an updated FBA, dated April 2019 (FBA or updated FBA) completed by Gersh staff available at the meeting (see Dist. Ex. 1 at p. 5; see generally Parent Ex. Q). The evidence reflects that Gersh staff had recently updated the "FBA/BIP template" to add the "new" behavior of "physical aggression to [the] behavior list," as Gersh had already been tracking the student's self-injurious behavior and off-task behavior and recording data on those behaviors (Parent Ex. R at pp. 1, 6; see Tr. pp. 540, 806-07; see generally Parent Exs. K-L; U).[29] More specifically, the evidence demonstrates that it became necessary to update the student's FBA when the student began exhibiting physical aggression—such as scratching others and throwing chairs when he was upset or annoyed and could not otherwise communicate those emotions with words—toward the end of the 2018-19 school year (see Tr. pp. 540-42; compare Parent Ex. K at p. 1, and Parent Ex. L at p. 1, with Parent

[29] The evidence in the hearing record indicates that a Gersh school psychologist previously updated the student's FBA and BIP in June 2018 (see Parent Ex. K at pp. 1, 4; L at pp. 1, 4).

Ex. Q at p. 1, and Parent Ex. R at p. 1). When the student began exhibiting those behaviors, the Gersh classroom teacher spoke with the Gersh social worker, who then conducted the updated FBA and modified the student's BIP—dated April 2019 (updated BIP or BIP)—accordingly (see Tr. pp. 542; see Parent Exs. Q at p. 4; R at p. 6). In addition, both the updated FBA and the updated BIP reflected April 30, 2019 as the implementation date (see Parent Exs. Q at p. 1; R at p. 1). Therefore, by the time the CSE met on May 22, 2019, Gersh had been implementing the student's updated BIP for approximately three weeks (compare Parent Ex. R at p. 1, with Dist. Ex. 1 at p. 1).

With respect to the updated FBA, there is no evidence that the May 2019 CSE actually reviewed the FBA during the CSE meeting even though the document was available; instead, the CSE proceeded to review the updated BIP, which the CSE also had available to it and which had been completed by a Gersh social worker based upon the updated FBA (see Dist. Ex. 1 at pp. 3, 5; see generally Parent Exs. R; AA; Dist. Ex. 16).[30] If the CSE had reviewed the document, the CSE would have found that Gersh's updated FBA of the student—while not required to adhere to State regulations in its development because it was generated by a nonpublic school—included all of the information mandated by State regulation described above pertaining to an FBA (see 8 NYCRR 200.22[a][2]-[a][3]; see generally Parent Ex. Q). For example, consistent with State regulation, the updated FBA was based on multiple sources of data and on more than the student's history of presenting problem behaviors (8 NYCRR 200.22[a][2]). Here, the FBA listed the following as the data sources relied upon: a record review, "ABC" data, observations, "FAST," and teacher interview (Parent Ex. Q at p. 1).[31] In addition, the evidence reflects that Gersh conducted the updated FBA based upon the student exhibiting a new behavior that occurred at Gersh—i.e., physical aggression—and not based upon the student's history of presenting problem behaviors, such as his continuing behaviors of task avoidance and self-injury (Parent Ex. Q at pp. 1-3, 6; see Tr. pp. 540, 806-07; see generally Parent Exs. K-L; U).

Consistent with State regulation defining an FBA, the updated FBA identified and described in concrete terms three target behaviors: off-task behavior (i.e., "not engaged in task/activity, looking away, ignoring directives, self-directed behavior, out-of-seat, scripting"), self-injurious behavior (i.e., "biting his right hand"), and physical aggression (i.e., "scratching, biting, and grabbing others, throwing chairs") (see 8 NYCRR 200.1[r]); Parent Ex. Q at pp. 1-2). Additionally, consistent with State regulation, the updated FBA included information upon which to develop a BIP, such as baselines setting forth the "frequency, duration, intensity and/or latency across activities, settings, people and times of the day" (8 NYCRR 200.22[a][3]). To wit, the updated FBA included information concerning the frequency, intensity, duration, and function of

[30] It may be possible that the FBA was examined once the district personnel realized on the day of the CSE meeting that the FBA had been forwarded by Gersh, but there is no evidence to that effect, and I will not make that presumption in this case.

[31] As explained in the hearing record, "ABC" refers to antecedents, behaviors, and consequences (Tr. p. 740). Although not explained in the hearing record, "FAST" typically refers to the Functional Assessment Screening Tool. At the impartial hearing, the Gersh BCBA testified that a FAST form was completed by "asking questions specifically about the child to the parent" to identify, for example, "what happened before the behavior, what you did for that behavior, where were you, what did you give the child"—and that was "very specific to the behavior of concern" (Tr. pp. 745-48).

each of the three targeted behaviors; information concerning the impact of each behavior and a hypothesis statement for each behavior; and information describing the setting event, as well as when the behavior was most likely and least likely to occur (see 8 NYCRR 200.1[r]; 200.22[a][3]; Parent Ex. Q at pp. 1-2). In addition, the updated FBA indicated that the student exhibited a "pattern of behavior" that interfered with his own learning and safety, and the learning and safety of "others" (Parent Ex. Q at p. 3). The updated FBA also reflected that the student engaged in behaviors that interfered with "building positive peer relationships" (id.). As a final point, the updated FBA provided information regarding previous interventions used together with the outcome of those interventions, such as the use of "[v]erbal prompting" and "redirection," both of which resulted in a positive outcome—and further reflected reinforcers for the student: "physical activities (running), sensory activities (flapping), ball play, morning meeting, gym, [and] balloons"; "[p]referred staff"; and "[m]usic [and] technology" (id.).

The parents' argue that the district's programming was fatally flawed because the May 2019 CSE did not conduct its own FBA or develop its own BIP for the CSE meeting, and that the district committed a serious procedural violation because, absent this information, "it may [have] prevent[ed] 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). However, this is not a case in which no FBA or BIP was available at the time of the CSE meeting was conducted—the private documents were available and the BIP was actually discussed during the CSE meeting as detailed above. More importantly district's response to the parent's argument is more convincing insofar as it is based in State policy regarding how appropriate FBAs should be conducted as well as case law. As explained more fully below, the weight of the evidence in the hearing record does not support the parents' argument in this case.

As with the FBA, it is undisputed the May 2019 CSE determined in the IEP for the 2019-20 school year that the student required a BIP, even if the CSE did not develop its own BIP for the student while he was still attending Gersh (see Dist. Ex. 1 at p. 12).[32] The evidence in the hearing record reveals, however, that the May 2019 CSE briefly reviewed the student's updated BIP from Gersh during the meeting (see Dist. Ex. 1 at pp. 3, 5; see generally Parent Exs. R; AA; Dist. Ex. 16). The evidence in the hearing record also demonstrates that, as a new student entering the district's 6:1+3 special class placement in the 2019-20 school year, best practice dictated implementation of the student's updated BIP from Gersh (see Tr. pp. 328-29, 749-50).

At the impartial hearing, the district BCBA was asked this hypothetical situation: "If a student [was] new to a class, [and] in their previous class they had a [BIP], what happen[ed] on

[32] With regard to a BIP, the special factor procedures set forth in State regulations further 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]).

that first couple of weeks of school in terms of—and they need[ed] to keep having a plan, d[id] anything change, d[id] it stay the same? In your opinion, what should happen when a new student c[ame] in with a plan from a different setting?" (Tr. p. 328). In response, the district BCBA testified that, based upon the "ethics as a behavior analyst"—and specifically noting that it was, therefore, "not [her] opinion"—"the [BIP] w[ould] remain as is" and would be implemented "in a new environment as using the same strategies by the classroom staff until such time as the data being collected showed it was not effective (Tr. pp. 328-30). At that point, the district BCBA testified that if the BIP was no longer effective, then "we would have to look at the function of the behavior, once again, because the function of the behavior will change depending on your environment" (Tr. p. 330 [emphasis added]). When given a similar hypothetical situation, the Gersh BCBA's testimony reinforced this same approach, indicating that she would not change a new student's BIP unless the intervention plan was not working and she would the conduct another FBA (see Tr. pp. 749-50). The district's BCBA emphasizes the importance of the environment for which a BIP will be implemented which is among the required factors for developing an FBA. As noted above, State regulations provide that a "[f]unctional behavioral assessment means 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] [emphasis added]). Once an FBA was conducted a Gersh, there was little point in conducting a second FBA at Gersh for purposes of planning for the student's attendance at an environment other than Gersh.

As noted, the May 2019 CSE also had the student's updated BIP available for review at the meeting (see Dist. Ex. 1 at pp. 3, 5; see generally Parent Exs. R; AA; Dist. Ex. 16). The student's then-current special education teacher from Gersh was asked by Gersh staff to present the updated BIP (see Dist. Ex. 1 at p. 3; Parent Ex. AA; Dist. Ex. 16). The teacher explained that the student displayed off-task behaviors (i.e., task avoidance) when he did not want to engage in an activity, specifying that he looked away, he ignored directives, and exhibited self-directed behavior such as getting out of his seat at times (see Parent Ex. AA; Dist. Ex. 16; see also Dist. Ex. 1 at p. 3). In addition, the teacher indicated that, as district staff observed during the classroom observation, the student exhibited the self-injurious behavior of biting his right hand (see Parent Ex. AA; Dist. Ex. 16; see also Dist. Ex. 1 at p. 3). The teacher further noted that the student also exhibited physical aggression by sometimes scratching and accidentally biting staff or others, and the student would, at times, throw a chair (see Parent Ex. AA; Dist. Ex. 16; see also Dist. Ex. 1 at p. 3).

Next, Gersh staff asked the student's special education teacher to briefly explain the interventions that worked most effectively in addressing the student's behaviors, noting additionally that these were all included in the updated BIP (see Parent Ex. AA; Dist. Ex. 16). In this regard, the special education teacher highlighted that the student definitely benefited from positive reinforcement, such as giving high fives and clapping, which excited the student (see Parent Ex. AA; Dist. Ex. 16; see also Dist. Ex. 1 at p. 3; Parent Ex. R at pp. 1-2). She also explained that the student benefited from three-minute breaks, during which time it was important to keep the student engaged in an activity, such as with balloons or a ball (see Parent Ex. AA; Dist. Ex. 16; see also Dist. Ex. 1 at p. 3; Parent Ex. R at p. 2). In addition, the teacher—with the input of other Gersh staff—stated that the student benefited from the use of a token board and sensory breaks (i.e., rice and beans, squishy toys), and that using timers were very important in helping the student to transition back to his desk at the end of a break (see Parent Ex. AA; Dist. Ex. 16; see also Dist. Ex. 1 at p. 3; Parent Ex. R at pp. 1-2). With respect to the token board, the teacher explained that the student would earn "tokens every two minutes for 10 minutes to get his [three]-

minute break"; she also noted that "[f]irst-then statements [were] also used to get him to stay on task" (Dist. Ex. 1 at p. 3; see Parent Exs. R at pp. 1-2; AA; Dist. Ex. 16).

When the teacher finished her presentation of the updated BIP, the director asked if anyone had any questions or anything else to add (see Parent Ex. AA; Dist. Ex. 16). At that point, the student's father added that the student's self-injurious behaviors had significantly decreased since the beginning of the year (see Dist. Ex. 1 at p. 3; Parent Ex. AA; Dist. Ex. 16). In support of this statement, the director indicated that the graphing charts sent from Gersh demonstrated that the student's self-injurious behaviors continued to show occasional spikes, but it had been constant when the student started (Parent Ex. AA; Dist. Ex. 16).[33]

While brief, because the student was not yet attending a program in the district's environment, the May 2019 IEP accurately captured the discussion of the student's behaviors and updated BIP that were prevalent at the time of the CSE meeting (compare Dist. Ex. 1 at p. 3, with Parent Ex. AA, and Dist. Ex. 16). And although the May 2019 CSE did not develop its own BIP for the student, as previously mentioned, the May 2019 CSE appropriately denoted in the IEP that the student needed "strategies, including positive behavioral interventions, supports and other strategies to address behaviors that impede[d] the student's learning or that of others," and specifically noted that he needed a BIP to "target off task/escape, self-injurious, and physical aggression behaviors through proactive strategies and reinforcing replacement behaviors" (Dist. Ex. 1 at p. 12). In addition, the May 2019 IEP included recommendations for supplementary aids and services, program modifications, and accommodations related to the student's behaviors and as discussed at the CSE meeting, such as the use of a positive reinforcement plan ("token economy and [BIP]") (id. at pp. 18-19). The IEP further included strategies to address the student's management and behavior needs discussed at the meeting, noting specifically that he required the use of "token economy to learn" and the provision of sensory breaks "throughout the school day in order to maintain [an] appropriate state of readiness to learn and [to] decrease frustration" (id. at pp. 11-12).

Having determined that the student required a BIP, State regulation requires that 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

[33] The evidence in the hearing record further reflects that the May 2019 CSE also had "graphing data" or charts for the student's behaviors available for review (Dist. Ex. 1 at p. 3; see generally Parent Ex. AA; Dist. Ex. 16). Gersh sent the graphing data to the district (Dist. Ex. 1 at p. 3; see generally Parent Ex. AA; Dist. Ex. 16). And although the CSE members participating at the Gersh location did not have that same graphing data available to them, the May 2019 IEP reflected that the graphing data—"particularly the self-injurious behaviors"—"noted inconsistent engagement in self-injurious behaviors" and that "overall" these behaviors had been "reduced" but continued to occur "regularly" (Dist. Ex. 1 at p. 3; see generally Parent Ex. AA; Dist. Ex. 16).

scheduled intervals (8 NYCRR 200.22[b][4]).[34] 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 ("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]).

In this case, CSE reviewed the only available BIP being implemented with the student—the one from Gersh—which did not need to comply with State regulation since it was developed at a nonpublic school, and thus not the district's responsibility. Even so, the evidence indicates that although it was not wholly consistent with the requirements for a public school BIP set forth above, the updated BIP from Gersh was nevertheless sufficiently detailed to address the student's interfering behaviors (see 8 NYCRR 200.22[b][4]; see generally Parent Ex. R). As outlined in the updated FBA, the updated BIP targeted the student's off-task behavior, self-injurious behavior, and physical aggression (compare Parent Ex. R at p. 1, with Parent Ex. Q at pp. 1-3). According to the BIP, the student required "[i]ndividualized attention to provide immediate implementation of proactive and reactive strategies," and thereafter, listed "Global Proactive Strategies to Prevent the Targeted Maladaptive Behaviors" (see Parent Ex. R at pp. 1-2).[35] The global strategies included the following: "[p]ositive verbal praise for all appropriate behaviors exhibited" (i.e., including the use of "[h]igh fives, clapping, and thumbs up"); a "[s]tructured, consistent environment"; "[s]cheduled movement/sensory breaks, as needed"; "[u]se of digital/visual timers to signify the end of each working period and/or break period"; a "[t]oileting schedule"; a "[l]anguage rich environment (to increase his use of language)"; "[d]aily social skills training and support"; and "[p]ositive [r]einforcement" (i.e., "'First . . . Then' language to provide classroom and behavioral expectations," use of a token board to "reinforce positive, adaptive behaviors throughout the day") (id.).[36]

Next, the updated BIP identified both proactive and reactive strategies for each of the targeted behaviors (see Parent Ex. R at pp. 3-5). For example, the BIP listed the following as proactive strategies identified (with more specific guidance in bulleted points) to address the student's off-task behavior: the use of a "[v]isual schedule (using pictures and words)"; "[i]ndividualized instruction and modification of classwork"; a "[p]artitioned area for desk tasks/activities with preferential seating"; and the opportunity for the student to "complete his assignments in a separate location, if needed" (id. at p. 3). With respect to reactive strategies (with

[34] 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]).

[35] With respect to the student's need for "[i]ndividualized attention to provide immediate implementation of proactive and reactive strategies," the May 2019 IEP included a recommendation for the services of a full-time, individual aide in addition to the 6:1+3 student-to-teacher-to-adult staff ratio (Dist. Ex. 1 at p. 18). In addition, all of the student's related services were recommended for an individual setting (id. at pp. 1, 17-18).

[36] For most of the respective global strategies, the updated BIP included additional, specific guidance in bulleted points (see Parent Ex. R at pp. 1-2).

more specific guidance in bulleted points) to address the student's off-task behaviors, the update BIP listed the use of "[v]isual/verbal reminders of classroom rules and expected behaviors," "[l]imit[ing] the use of verbal interaction—provid[ing] the least amount of attention necessary whenever negative behaviors [were] exhibited," and "[m]odeling appropriate behaviors and actions" (id.). Thereafter, the updated BIP was similarly specific in identifying (with more specific guidance in bulleted points) both the proactive and reactive strategies to address the student's self-injurious behavior and physical aggression (id. at pp. 3-5).[37] Finally, the updated BIP identified methods to be used for data collection for each targeted behavior (see Parent Ex. R at p. 5). For example, the BIP called for the use of "[o]bservations," "[t]eam [m]eetings," "ABC [s]heets," and "[d]aily [d]ata [s]heets" to collect data (id.).

The evidence above does not show that the May 2019 CSE improperly failed to address the student's need for a BIP that was based upon an FBA. The CSE reviewed and discussed the BIP currently in place for the student, which was based upon a recent FBA from Gersh, albeit even if the FBA itself was not discussed per se during the meeting. The district's BCBA explained how the strategies in the BIP would be examined and adjusted as the student acclimated to the new environment in the district. The district's approach had support in the record, State educational policy regarding a properly developed FBA, and has support in caselaw as well. As one court indicated,

> [t]he Second Circuit has found that in some instances, delaying an FBA until a child commences the recommended educational environment is not considered a serious procedural violation that constitutes a denial of FAPE. See, e.g., Cabouli v. Chappaqua Cent. Sch. Dist., 202 Fed.Appx. 519, 522 (2d Cir. 2006); M.N. v. Katonah-Lewisboro Sch. Dist., 2016 WL 4939559, at *15 n.24 (S.D.N.Y. Sept. 14, 2016); J.C.S. v. Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, at *13 (S.D.N.Y. Aug. 5, 2013). Further, courts in this Circuit have found that deferring an FBA until the beginning of the school year or until a child becomes acclimatized to a new location is not considered a denial of FAPE. See S.H. ex rel. W.H. v. Eastchester Union Free Sch. Dist., 2011 WL 6108523, at *9 (S.D.N.Y. Dec. 8, 2011).

Bd. of Educ. of Wappingers Cent. Sch. Dist. v. M.N. on Behalf of J.N., 2017 WL 4641219, at *11 [S.D.N.Y. Oct. 13, 2017] [reversing the SRO's determination that the failure of a district to conduct its own FBA at the time of the CSE meeting was a serious procedural violation]). In view of the forgoing evidence record that a FBA and BIP had been conducted, the State educational policy that favors examining a student's interfering behavior in the context of the relevant environment, and the applicable case law, there is no reason to find that the district failed to offer the student a FAPE on this basis.

[37] The updated BIP also noted that "[i]f the student [was] unresponsive to redirection and engage[d] in aggressive behavior towards themselves or others, [n]on-violent [c]risis [i]ntervention w[ould] be used as a last resort" (Parent Ex. R at p. 5).

3. ABA Programming and BCBA Services

In the main thrust of their appeal, the parents argue that the IHO erred in "excusing" the district's failure to recommend "appropriate ABA programming and BCBA supports and supervision" services in the IEP. The parents contend that "BCBA supervision is essential to ensuring ABA is being properly provided." As explained more fully in the memorandum of law, the parents' arguments related to the failure to recommend "appropriate ABA programming" fall primarily into three categories: the district's alleged failure to recommend an ABA program, the 6:1+3 classroom staff's alleged lack of sufficient experience and training in providing ABA, and 6:1+3 classroom staff's alleged inability to implement ABA based upon observations made during the parents' visit to the 6:1+3 special class placement (see Parent Mem. of Law at pp. 18-20).[38]

The parents similarly use the memorandum of law to more fully explain the arguments with regard to the district's failure to recommend "BCBA services" in the IEP. Here, the parents' allege that while the district—and the IHO—appeared to recognize that "BCBA supervision was 'integral' to the [d]istrict's program," neither the district nor the IHO recognized the district's "failure to recommend this 'integral' component of the program on the IEP" (Parent Mem. of Law at p. 12). In addition, the parents argue that BCBA services are "'essential' for the provision of ABA" as noted in a publication by the Behavior Analyst Certification Board (BACB) (id. at pp. 12-13). Finally, a majority of the parents' arguments focus on the district BCBA's role as a part-time consultant, as opposed to being a full-time district employee; how many hours per week the BCBA allegedly worked; and that without a full-time BCBA, the district's 6:1+3 special class placement and program could not be "properly considered an ABA program" without the necessary oversight and supervision of a full-time BCBA (id. at pp. 12-18).

In response, the district denies the parents' allegations, arguing that the May 2019 IEP recommended an ABA program with discrete trial instruction, and when describing the program to the parents at the CSE meeting, the director noted that the program included the services of a BCBA. In addition, the district asserts that "BCBA services" are not listed among the "required statutory components of an IEP and can be provided to a student without being listed in the recommended program or related services sections of an IEP."

Turning first to the parents' assertion that the district failed to offer an appropriate ABA program, a review of the evidence in the hearing record belies this contention. First, the May 2019 IEP and the audio recordings of the CSE meeting demonstrate that the May 2019 CSE recommended an ABA program, noting in the management needs section of the IEP that the student required an "ABA setting with the use of ABA strategies, including discrete trial instruction and a token economy to learn" (Dist. Ex. 1 at p. 11). Many of the annual goals and short-term objectives in the IEP require the use of discrete trial instruction for implementation (id. at pp. 13-17). In describing the recommendation at the May 2019 CSE meeting, the director specifically stated that the 6:1+3 special class placement and program was "set up based on ABA principles using discrete trial instruction in a very small learning ratio" (id. at pp. 3-4; see Parent

[38] To the extent that the parents' contentions about the classroom staff's training and experience, and relatedly, the district's ability to implement an appropriate ABA program in the 6:1+3 special class placement do not constitute either a substantive or procedural violation of the IEP, itself, or the CSE process, these claims will be addressed below, if necessary, within the "Assigned Public School Site" section of this decision.

Ex. AA; Dist. Ex. 16). In addition, at the impartial hearing, the district special education teacher of the 6:1+3 special class testified about the ABA methodology and strategies used in the classroom, specifying discrete trial instruction, and the use of visuals and a token board or token economy, as well as the use of first-then schedules, program books, toilet training, sensory integration, and social skills (see Tr. pp. 26, 65), testimony that explained ABA as an element that was included as part of the student's written IEP.

With respect to the alleged failure to recommend BCBA services in the student's IEP, the district's assertion that the use of a BCBA by a district is not service to be listed as a required statutory component of an IEP, is correct, at least in one sense. In this case, all of the professionals contemplate delivering instruction using ABA and discrete trial principles to the student. In New York, ABA, the practice of ABA, and the licensure of professionals who may permissibly hold themselves out "licensed behavior analyst" or "certified behavior analyst assistant" have been defined governed by State statute (Educ. Law §§ 8801-8803). For example, "'ABA' means the design, implementation, and evaluation of environmental modifications, using behavioral stimuli and consequences, to produce socially significant improvement in human behavior, including the use of direct observation, measurement, and functional analysis of the relationship between environment and behavior" (Educ. Law § 8801). It is similar to how, for example, the service of speech language therapy that may be found on a student's IEP is provided by a speech language pathologist (see Educ Law Art. 159). But unlike speech language pathology, the practice of ABA is not limited to a "licensed behavior analyst" or "certified behavior analyst assistant" because a very broad exception allows certified teachers and teaching assistants to continue providing ABA to students in the educational environment, an educational practice that long predates the State's statutory oversight of ABA (Educ. Law § 8807[2]-[3]). Thus a BCBA is not a service, generally speaking, at least in context of educational instruction.

However, this clarification does not fully absolve a district its obligation to recommend appropriate supports in a student's IEP, that could be provided by a BCBA if that particular support is necessary to offer the student a FAPE. Indeed, as described in State guidance on IEP development, what the parents label as "BCBA services" could be characterized as a support for school personnel on behalf of a student, which are considered to be services that "would help them to more effectively work with the student" ("Guide to Quality [IEP] Development and Implementation," Office of Special Educ., at p. 42 [Dec. 2010], available at http://www.p12.nysed.gov/specialed/publications/iepguidance/IEPguideDec2010.pdf). Such supports could include "special training for a student's teacher to meet a unique and specific need of the student"; additionally, an "IEP must describe the supports for school personnel that will be provided on behalf of the student in order for the student to advance toward attaining the annual goals, to be involved in and progress in the general curriculum and to participate in extracurricular and other nonacademic activities" (id.). Notably, "[t]hese supports for school personnel are those that are needed to meet the unique and specific needs of the student" (id. [emphasis added]). The same State guidance lists the following as examples of such supports: "information on a specific disability and implications for instruction; training in [the] use of specific positive behavioral interventions; training in the use of American Sign Language; assistance with curriculum modifications; behavioral consultation with school psychologist, social worker or other behavioral consultant; and/or transitional support services" (id. [emphasis added]).

Although this State guidance does not answer the specific inquiry regarding a BCBA here, it provides a context for the possible elements that may be recommended in an IEP as support for school personnel, which, based on the foregoing guidance, does not contemplate services provided directly to the student. In this respect, support for school personnel on behalf of the student is more akin to indirect consultant teacher services or transitional support services, which as defined by regulation, provides services to a disabled student's teacher (see generally 8 NYCRR 200.1.[m], [ddd]; 200.6[b][2], [c]-[d]).

With this as backdrop, the necessary inquiry in this specific case focuses on whether a BCBA—as a support for school personnel on behalf of the student—were required to ensure that ABA was being properly provided, as the parents argue, or more broadly, to deliver services recommended in the IEP related to the student's behavior needs. Upon review, the evidence in the hearing record does not support the parents' contentions.

As noted above, the parents rely on a publication issued by a private organization, the BACB to support their contention that the district was required to recommend BCBA services in the student's May 2019 IEP to ensure that the ABA program recommended for the student was being properly implemented. In the publication referenced by the parents, it is not surprising that the Board responsible for credentialing BCBAs finds that BCBA services are essential to providing ABA (see "Applied Behavior Analysis Treatment of Autism Spectrum Disorder: Practice Guidelines for Healthcare Funders and Managers," at p. 11 [2d Ed. 2014], available at https://www.bacb.com/wp-content/uploads/2017/09/ABA_Guidelines_for_ASD.pdf). The publication, while perhaps helpful to healthcare funders, such as insurance companies, does not include any recommendations whatsoever with respect to when a BCBA must be used in an educational setting or notably, address the relevant State statutes or regulations—in either the IDEA or State law—that govern the use of ABA in an educational setting (see generally Applied Behavior Analysis Treatment of Autism Spectrum Disorder: Practice Guidelines for Healthcare Funders and Managers"), available at https://www.bacb.com/wp-content/uploads/2017/09/ABA_Guidelines_for_ASD.pdf). Moreover, the usefulness of this publication in determining whether the student's required BCBA services to be recommended in his IEP is significantly called into question by the following disclaimer:

> These standards are provided for informational purposes only and do not represent professional or legal advice. There are many variables that influence and direct the professional delivery of [ABA] services. The BACB and authors of these standards assume no liability or responsibility for application of these standards in the delivery of ABA services. The standards presented in this document reflect the consensus of a number of subject matter experts, but do not represent the only acceptable practice. These standards also do not reflect or create any affiliation among those who participated in their development. The BACB does not warrant or guarantee that these standards will apply or should be applied in all settings. Instead, these standards are offered as an informational resource that should be considered in consultation with parents, behavior analysts, regulators, and healthcare funders and managers.

(id. at p. 1).

Furthermore, a review of the student's May 2019 IEP—and in particular, the student's needs identified in the present levels of academic achievement, functional performance, and learning characteristics (i.e., present levels of performance)—demonstrates that the student did not require that a BCBA actually deliver the instructional services recommended to meet his needs. Notably, the present levels of performance describing the student's levels of basic cognitive and daily living skills indicated that the student was "able to sit and attend well during academic work with the use of a token board system"; he was "highly motivated by edibles and balloons"; and that while he "often display[ed] task avoidance behaviors by looking away and having self stimulatory behaviors," the student's "visual attention to his work tasks ha[d] improved" (Dist. Ex. 1 at p. 7). Consistent with the updated April 2019 neuropsychological evaluation, the present levels of performance reflected that the student appeared to be demonstrating steady gains in symptom reduction, including notably less self-injurious behaviors and a reduction in behaviors that could jeopardize his safety and the safety of others (such as throwing and kicking objects, banging on surfaces, climbing, and eloping) (compare Dist. Ex. 1 at p. 7, with Parent Ex. F at p. 10). Additionally, the May 2019 IEP reflected that the student appeared to have become more communicative and more readily engaged in tasks compared to previous evaluations (compare Dist. Ex. 1 at p. 7, with Parent Ex. F at p. 10). The present levels of performance regarding the student's study skills indicated that the student had shown great improvement attending to ABA sessions, noting specifically that he was sitting much longer and showing less frustration, he could attend to a task for 10 minutes and earn a 3-minute break, and he was attending morning class meeting well (see Dist. Ex. 1 at p. 8). Furthermore, the May 2019 IEP indicated that the student required frequent sensory breaks in order to maintain an appropriate state of readiness to learn and to decrease frustration; however, when he did become frustrated, he would bite himself on the hand (id.).

The present levels of performance in the May 2019 IEP describing the student's speech-language needs indicated that he had difficulty "staying on task" and engaged in "stimulatory behaviors such as hand flapping and vocalizations" (Dist. Ex. 1 at p. 8). According to the May 2019 IEP, the student exhibited "[c]hallenging behaviors" during both "preferred and non-preferred activities"; however, the use of verbal and visual cues, and "ABA methodologies, including [a] token board and first-then statements" assisted with "redirection," and moreover, "[s]ensory breaks [were] provided to maintain an appropriate alertness level" (id.). The present levels of performance further noted that the student engaged in "self-injurious behavior (biting right hand) and some aggressive behaviors (scratching and grabbing others) when [the student was] frustrated or [wanted to] avoid the tasks at hand" (id.).

With respect to social development, the present levels of performance in the May 2019 IEP described the student as a "happy outgoing boy who enjoy[ed] going to school" and "being around other students and staff throughout the day" (Dist. Ex. 1 at p. 9). In addition, the May 2019 IEP reflected that the student had "shown steady progress in initiating play and ha[d] made a few attempts to play with another student in the classroom this year (walking over to them and hold[ing] their hand to run around together)" (id.). Similar to the information presented with regard to the student's speech-language needs, the student's social development reflected that he exhibited "challenging behaviors during preferred and non-preferred activities" and that "[h]is unsafe

behaviors include[d] physical aggression of kicking, sc[r]at[c]hing and throwing objects, along with self-injurious behaviors (biting right hand)" (id.).

In terms of physical development, the present levels of performance in the May 2019 IEP noted that, during OT, the student occasionally demonstrated "stereotypies such as running in place while shaking his hands" and "c[ould] engage in physical behaviors when frustrated, including grabbing the therapist and biting [him]self on [his] hand" (Dist. Ex. 1 at pp. 9-10). According to the IEP, the "biting ha[d] been noticed during periods of excitement or happiness as well" (id. at p. 10). However, it was further noted that "[p]roprioceptive input to [the student's] jaw with [the] use of massage has had good results with decreasing self-injurious behavior" and that he "benefit[ted] from ABA methodologies, including the use of "first-then" language and "frequent reinforcers" (id.). With respect to the student's OT services, therapy focused on his "sensory needs, fine motor skills, bilateral integration, prewriting skills, visual perceptual/motor skills and self[-]help skills" (id.). The student's "classroom teacher completed" a sensory profile, which indicated that the student "need[ed] to add extra intensity into school activities to remain engaged, he m[ight] react more quickly and intensely to sensory stimuli in the environment, he m[ight] retreat from novel situations, and he m[ight] miss more cues that [were] present in the environment" (id.). In addition, the May 2019 IEP indicated that the student's "overall need for external supports require[d] teacher attention to effectively engage him in learning," "[he] m[ight] require more input to notice what [was] going on in the school environment, and he "m[ight] become overwhelmed in typical learning environments" (id.).

The student's PT needs were also reported in the physical development present levels of performance section of the May 2019 IEP (see Dist. Ex. 1 at pp. 9-11). Here, the IEP indicated that the student "transition[ed] nicely to therapy" and "typically transition[ed] between therapist directed activities well without difficulty"; however, at times, the student would become "frustrated or upset when asked to transition or denied access to a preferred item and he w[ould] become self-injurious or attempt to grab [the] therapist's hair or face" (id. at p. 10). Additionally, it was noted in the IEP that the student "benefit[ted] from the use of ABA methodology, first/then language to improve compliance in PT" (id.).

To further address the student's behavior needs, the May 2019 IEP contained annual goals and short-term objectives addressing several areas related to behavior, such as a social/emotional annual goal that targeted the student's ability to take turns and a behavioral annual goal addressing his ability to attend to a task (see Dist. Ex. 1 at p. 14). In addition, the annual goals and short-term objectives targeted the student's ability to communicate by improving his ability to engage in functional play, using single words to reject an object or action, using a single adjective to describe an object, follow a two-step direction, and request using the bathroom—all skills that would decrease the student's frustration and thus, decrease the likelihood that he would engage in self-injurious or physically aggressive behaviors (id.).

In summary, State law explicitly contemplates that school districts may use certified teachers and teaching assistants to deliver ABA to students in educational settings, and in this case, the IEP itself also noted the district's use of a BCBA who consults with and trains the program staff and works on programs for students, all of which considerably undermines the parents' claims. It might have been a better practice for the district to have listed the BCBA in the section of the

IEP designated for supports for school personnel, but the failure to do so was not a denial of a FAPE. In considering the student's behavior needs, the evidence in the hearing record supports a finding that the May 2019 CSE was not required to recommend "BCBA services" to the student in the IEP in order to address his behavior needs or to otherwise implement or deliver the services recommended in the IEP.

4. Least Restrictive Environment

The parents contend that the IHO failed to assess or analyze the accuracy of the director's statement that the district's 6:1+3 special class placement and program constituted the student's LRE. In addition, the parents argue that the district failed to consider relevant evaluative information—Gersh reports on regression or the updated neuropsychological evaluation—which documented that the student experienced substantial regression. The parents also argue that the student would not benefit from placement in a "mainstream school." The district denies these allegations, arguing that the May 2019 CSE, as documented in the IEP itself, reviewed and discussed Gersh reports and moreover, that the neuropsychologist who conducted the updated neuropsychological evaluation of the student attended the meeting and described the contents of that report to the CSE. The district also asserts that the director explained at the May 2019 CSE meeting that the recommended, in-district 6:1+3 special class placement and program was the LRE within which to meet the student's needs. Upon review, the evidence in the hearing record does not support the parents' contentions.

Initially, the IDEA does not automatically require the provision of school services during the summer months; rather, such services must be provided when they are a necessary element of a FAPE for the student (see Antignano v. Wantagh Union Free Sch. Dist., 2010 WL 55908, at *11 [E.D.N.Y. Jan. 4, 2010]). Pursuant to State regulations, students "shall be considered for 12-month special services and/or programs in accordance with their need to prevent substantial regression" (8 NYCRR 200.6[k][1]). State regulation defines substantial regression as a "student's inability to maintain developmental levels due to a loss of skill or knowledge during the months of July and August of such severity as to require an inordinate period of review at the beginning of the school year to reestablish and maintain IEP goals and objectives mastered at the end of the previous school year" (8 NYCRR 200.1[aaa]; see 34 CFR 300.106). Generally, a student is eligible for a 12-month school year service or program "when the period of review or reteaching required to recoup the skill or knowledge level attained by the end of the prior school year is beyond the time ordinarily reserved for that purpose at the beginning of the school year" ("Extended School Year Programs and Services Questions and Answers," VESID Mem. [Feb. 2006], available at http://www.p12.nysed.gov/specialed/applications/ESY/2014-QA.pdf). Typically, the "period of review or reteaching ranges between 20 and 40 school days," and in determining a student's eligibility for a 12-month school year program, "a review period of eight weeks or more would indicate that substantial regression has occurred" (id. [emphasis in original]).

In this instance, the parents' argument that the May 2019 CSE failed to consider relevant evaluative information demonstrating substantial regression is not supported by the evidence in the hearing record, especially where, as here, the CSE recommended a 12-month school year program to meet this need, in accordance with State regulation (see Dist. Ex. 1 at pp. 1, 18-19). The evidence in the hearing record also supports the district's argument that the May 2019 CSE—as described within section VI.B above—considered all of the Gersh progress reports and that the neuropsychologist explained, at length, the contents of her reevaluation report prior to the CSE

making its placement and program recommendations for the student (see Dist. Ex. 1 at pp. 2-3, 17-19; see also Parent Exs. F; M-S; X; see generally Parent Ex. AA; Dist. Ex. 16). Moreover, the evidence in the hearing record demonstrates that the issue of whether the student experienced substantial regression—or regression at all—was first raised when the CSE expressed the recommendation for the district's 6:1+3 special class placement and program in light of its LRE obligations, noting that it would provide the student with access to nondisabled peers and meet his needs (see Dist. Ex. 1 at pp. 3-4; see generally Parent Ex. AA; Dist. Ex. 16). At that point in the CSE meeting, the parents, their educational advocate, the Gersh principal, and the neuropsychologist spoke about whether the student was developmentally ready for interacting with nondisabled peers and specifically voiced opinions that the student would regress as a result of these interactions and as a result of transferring from Gersh to a different environment at the district (see Dist. Ex. 1 at pp. 3-4; see generally Parent Ex. AA; Dist. Ex. 16).[39]

Contrary to the parents' assertions, the IHO did consider their concerns expressed at the May 2019 CSE meeting about regression and the student's access to nondisabled peers within the decision (even if the IHO did not specifically set forth legal authority) (see IHO Decision at pp. 13-14). The IHO found the precluding a student from access to his nondisabled peers—as reflected conceptually by the parents' concerns—was "antithetical to the IDEA concepts of [FAPE] and [LRE]" (id. at p. 13). The IHO also explained that, "[w]hen [he was] ready the student w[ould] be able to interact with typical peers with the support of the classroom staff and [d]istrict social worker" and, in further consideration of the student's comfort level, the nondisabled peers would "'push in' to the classroom" (id. at p. 14).

In determining an appropriate placement in the LRE, the IDEA requires that students with disabilities be educated to the maximum extent appropriate with students who are not disabled and that special classes, separate schooling or other removal of students with disabilities from the general educational environment may occur only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily (20 U.S.C. § 1412[a][5][A]; see 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.6[a][1]; Newington, 546 F.3d at 112, 120-21; Oberti v. Bd. of Educ., 995 F.2d 1204, 1215 [3d Cir. 1993]; J.S. v. North Colonie Cent. Sch. Dist., 586 F. Supp. 2d 74, 82 [N.D.N.Y. 2008]; Patskin, 583 F. Supp. 2d at 430; Watson v. Kingston City Sch. Dist., 325 F. Supp. 2d 141, 144 [N.D.N.Y. 2004]; Mavis v. Sobol, 839 F. Supp. 968, 982 [N.D.N.Y. 1993]). The placement of an individual student in the LRE shall "(1) provide the special education needed by the student; (2) provide for education of the student to the maximum extent appropriate to the needs of the student with other students who do not have disabilities; and (3) be as close as possible to the student's home" (8 NYCRR 200.1[cc]; 8 NYCRR 200.4[d][4][ii][b]; see 34 CFR 300.114; 300.116).

[39] In the memorandum of law, the parents now allege for the first time on appeal that, contrary to the district's assertions, the 6:1+3 special class placement did not allow for access to nondisabled peers by sheer virtue of the location of that classroom (see Parent Mem. of Law at pp. 24-25). More specifically, the parents contend that the 6:1+3 special class was "physically isolated from general education peers and students were kept separated from mainstream peers," and therefore, the district could not "seriously argue its program" was the LRE "simply because the special education classroom [was] housed in a community school" and the student would remain "segregated from mainstream peers" (id. at p. 25).

Initially, this is not a case where the parents contend that the 6:1+3 special class placement and program were overly restrictive; indeed, the parents preference to place the student at Gersh indicates a desire for a more restrictive placement in a nonpublic school, as opposed to a public school. Contrary to the parents' arguments on appeal, the evidence in the hearing record supports the conclusion that the 6:1+3 special class placement and program was appropriate to meet the student's needs in the LRE for the 2019-20 school year.

As already noted, the parents—together with other CSE members—expressed concern about regression if the student was transferred to the district's program and if the student interacted with nondisabled peers in that setting (see Dist. Ex. 1 at p. 4; see generally Parent Ex. AA; Dist. Ex. 16). However, the evidence does not support the concerns expressed at the May 2019 CSE meeting, and instead, indicates that the student had made progress in his social skills, weighing in favor of the CSE's decision to recommend a placement that would allow access to his nondisabled peers. For example, the Gersh special education teacher reported at the CSE meeting that, socially, the student was "eager to start the school day and like[d] being around students and staff"; he was "showing progress in initiating play, as he w[ould] walk over to a peer on occasion and hold their hand and run around together"; and the student was "also making good eye contact," was "affectionate with adults," and often smiled and gave hugs throughout the day (Dist. Ex. 1 at pp. 2, 9). As further noted in the IEP, the student needed to "learn to engage in cooperative play," "learn to attend to tasks for longer periods of time," and "to use happy and sad in context," as areas of need with respect to his social development (id. at p. 9). His occupational therapist at Gersh reported that the student could now independently climb up the slide without prompting and enjoyed "tactile play"; the student's physical therapist at Gersh noted that he was "also interested in [playing] tag now," he enjoyed running, and was working on his "accuracy in throwing and kicking a ball" (id. at pp. 2-3; 10-11). To continue to address the student's social skills, the May 2019 IEP, in part, included two annual goals with short-term objectives targeting the student's ability to "independently engage in functional action with a toy" and to "engage in turn taking play for a 15 second turn with verbal prompting" (short-term objective to engage in "cooperative play with a model peer") (id. at pp. 13-14).

As reflected in the April 2019 neuropsychological reevaluation report, the student's father reported that the student was "much more socially engaged since his last evaluation in May 2018" (Parent Ex. F at p. 1). For example, the student "now greet[ed] and sa[id] 'bye' to people with prompting" (id.). The student's father also reported that the student "repeat[ed] more words than he did at the time of his last evaluation" and that the student's "attention span appear[ed] to have improved over the course of this past year" (id.). Overall, the student's father reported "considerable progress over the past year" and with "slowly developing adaptive skills" (id.).

Based upon behavioral observations made during the April 2019 reevaluation, the evaluator noted that the student made "eye contact sometimes in response to his name" and he sat "on the floor with her to look at a book, and he spontaneously sat down with [her] and oriented toward the book, looking at its pages"—all in contrast to the behavioral observations the evaluator made of the student during the May 2018 reevaluation (Parent Ex. F at pp. 3, 5-6; see Parent Ex. E at p. 4). In April 2019, the student "responded immediately upon request" and "remained seated" as he "looked at and tapped the pages" of the book (Parent Ex. F at p. 3). Compared to the May 2018 reevaluation, the student—in April 2019—"handled the book differently" and no longer

"manipulated test books forcibly" or "tried to pull them away from the examiner" or "batted the pages" (id.). Instead, the student "tapped the pages lightly" (id.).

In addition, in April 2019 the student "demonstrated improvements from his last evaluation including more appropriate imitation and play, engaging and communicating more readily and a marked decrease in behaviors that could jeopardize his safety or damage property such as banging surfaces or throwing and kicking objects hard" (Parent Ex. F at pp. 5-6). As part of the reevaluation process, the student "engaged in playing catch with the examiner," but did not "seek engagement with the examiner or his father" during free play or "spontaneously try to communicate with his father, his sister, or the examiner" (id.). The student demonstrated a "dramatic improvement from his last evaluation when he did not respond to the examiner calling his name" when the student, in the April 2019 reevaluation, "responded by making eye contact [with the examiner] after the first attempt" at calling his name (id. at p. 6). The student also engaged in playing with bubbles with the examiner, joined in the "countdown" to shoot off foam rockets "by saying some numbers and saying 'blast off,'" and engaged in "some functional play by taking a toy frog from the examiner when offered and saying 'ribbit'" after a demonstration (id.). The student also engaged in self-directed play, but was "more easily redirected than he was in the past two evaluations" (id.). Overall, while the student continued to demonstrate difficulties in social interactions, the examiner indicated a "trend for less difficulty with social interaction" from previous evaluations (id. at p. 11).

After hearing a complete recitation of the student's progress during the previous school year, the director described the recommendations for the 2019-20 school year and the opportunity to access nondisabled peers (see Dist. Ex. 1 at pp. 2-4; see generally Parent Ex. AA; Dist. Ex. 16). As correctly noted by the IHO in the decision, the May 2019 CSE discussion reflected an opportunity for the student to interact with nondisabled peers when he was ready, and that the district did not expect the student to "immediately jump into the fray" with his nondisabled peers (compare IHO Decision at pp. 13-14, with Dist. Ex. 1 at p. 4, and Parent Ex. AA, and Dist. Ex. 16). At the May 2019 CSE meeting, the director described the thoughtful approach the district used to integrate students in the 6:1+3 special class placement and program with nondisabled peers, using the support of the social worker, and "as appropriate for this youngster" (Dist. Ex. 1 at p. 4; see generally Parent Ex. AA; Dist. Ex. 16). She also noted, after hearing the concerns expressed about the regressive effect interacting with nondisabled peers would allegedly have on this student, that access to nondisabled peers was not the only basis for recommending the 6:1+3 special class placement and program (see Parent Ex. AA; Dist. Ex. 16). The director also stated that the 6:1+3 special class placement offered an intensive program for the student and that access to nondisabled peers was a bonus (see Parent Ex. AA; Dist. Ex. 16).

Having found no support in the hearing record for the parents' arguments, the IHO's determination that the district's 6:1+3 special class placement and program was appropriate to meet the student's needs in the LRE will not be disturbed.

D. Assigned Public School Site

Generally, the sufficiency of the program offered by the district must be determined on the basis of the IEP itself (R.E., 694 F.3d at 186-88). The Second Circuit has explained that "[s]peculation that the school district will not adequately adhere to the IEP is not an appropriate

basis for unilateral placement" (R.E., 694 F.3d at 195; see E.H. v. New York City Dep't of Educ., 611 Fed. App'x 728, 731 [2d Cir. May 8, 2015]; R.B. v. New York City Dep't of Educ., 603 Fed. App'x 36, 40 [2d Cir. Mar. 19, 2015] ["declining to entertain the parents' speculation that the 'bricks-and-mortar' institution to which their son was assigned would have been unable to implement his IEP"], quoting T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 419 [2d Cir. 2009]; R.B., 589 Fed. App'x at 576).[40] However, a district's assignment of a student to a particular public school site must be made in conformance with the CSE's educational placement recommendation, and the district is not permitted to deviate from the provisions set forth in the IEP (M.O. v. New York City Dep't of Educ., 793 F.3d 236, 244 [2d Cir. 2015]; R.E., 694 F.3d at 191-92; T.Y. 584 F.3d at 419-20; see C.F. v. New York City Dep't of Educ., 746 F.3d 68, 79 [2d Cir. 2014] [holding that while parents are entitled to participate in the decision-making process with regard to the type of educational placement their child will attend, the IDEA does not confer rights on parents with regard to the selection of a school site]). The Second Circuit has held that claims regarding an assigned school's ability to implement an IEP may not be speculative when they consist of "prospective challenges to [the assigned school's] capacity to provide the services mandated by the IEP" (M.O., 793 F.3d at 245; see Y.F. v. New York City Dep't of Educ., 659 Fed. App'x 3, 5-6 [2d Cir. Aug. 24, 2016]; J.C. v. New York City Dep't of Educ., 643 Fed. App'x 31, 33 [2d Cir. Mar. 16, 2016]; B.P. v. New York City Dep't of Educ., 634 Fed. App'x 845, 847-49 [2d Cir. 2015]). Permissible prospective challenges must be "tethered" to actual mandates in the student's IEP (see Y.F., 659 Fed. App'x at 5). Additionally, the Second Circuit indicated that such challenges are only appropriate if they are evaluated prospectively (as of the time the parent made the placement decision) and if they were based on more than "mere speculation" that the school would not adequately adhere to the IEP despite its ability to do so (M.O., 793 F.3d at 244). In order for such challenges to be based on more than speculation, a parent must allege that the school is "factually incapable" of implementing the IEP (see M.E. v. New York City Dep't of Educ., 2018 WL 582601, at *12 [S.D.N.Y. Jan. 26, 2018]; Z.C. v. New York City Dep't of Educ., 222 F. Supp. 3d 326, 338 [S.D.N.Y. 2016]; L.B. v. New York City Dep't of Educ., 2016 WL 5404654, at *25 [S.D.N.Y. Sept. 27, 2016]; G.S. v. New York City Dep't of Educ., 2016 WL 5107039, at *15 [S.D.N.Y. Sept. 19, 2016]; M.T. v. New York City Dep't of Educ., 2016 WL 1267794, at *14 [S.D.N.Y. Mar. 29, 2016]). Such challenges must be based on something more than the parent's speculative "personal belief" that the assigned public school site was not appropriate (K.F. v. New York City Dep't of Educ., 2016 WL 3981370, at *13 [S.D.N.Y. Mar. 31, 2016]; Q.W.H. v. New York City Dep't of Educ., 2016 WL 916422, at *9 [S.D.N.Y. Mar. 7, 2016]; N.K. v. New York City Dep't of Educ., 2016 WL 590234, at *7 [S.D.N.Y. Feb. 11, 2016]).

In this case, the parents argue on appeal that the district was unable to implement ABA programming based upon observations they made—or more specifically, made by their

[40] The Second Circuit has held that a district's assignment of a student to a particular public school site is an administrative decision that 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 (R.E., 694 F.3d at 191-92; T.Y. 584 F.3d at 419-20; see C.F., 746 F.3d at 79 [holding that, while parents are entitled to participate in the decision-making process with regard to the type of educational placement their child will attend, the IDEA does not confer rights on parents with regard to the selection of a school site]). The 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]).

educational consultant—during the visit to the 6:1+3 special class placement in July 2019, the district's failure to have a full-time BCBA employed with a set schedule, and the classroom staff's lack of training and experience sufficient to implement ABA with fidelity.[41] The parents also assert that the student would not be appropriately grouped with similar peers in the 6:1+3 special class placement. In order to reach a determination on these issues, it is first necessary to determine whether such claims constitute permissible prospective challenges to the IEP as contemplated by the Second Circuit cases allowing such challenges in the first instance (see, e.g., Y.F., 659 Fed. App'x at 5).

As noted above, permissible prospective challenges must be "'tethered' to actual mandates in the student's IEP" (Y.F., 659 Fed. App'x at 5); the parents "must allege that the school is 'factually incapable' of implementing the IEP" to be considered "more than speculation" (see, e.g., M.E., 2018 WL 582601, at *12); and such challenges "must be based on something more than the parents' speculative 'personal belief' that the assigned public school site was not appropriate" (see, e.g., K.F., 2016 WL 3981370, at *13). Given these parameters, although the parents' alleged violations related to the functional grouping and classroom age-range do not fall within the permissible prospective challenges to a district's capacity to implement the May 2019 IEP, as these issues are neither tethered to actual mandates in the IEP, nor do such issues rise to "more than speculation" that the district was factually incapable of implementing the May 2019 IEP, these issues will be addressed. The parents' allegations that the district was unable to implement ABA programming, however, constitute an issue tethered to actual mandates in the May 2019 IEP, and will also be addressed.

1. Functional Grouping

The parents assert that the IHO failed to analyze whether the student cohort within the 6:1+3 special class placement was appropriate, especially with regard to the fact that this student would be the only student to have an individual aide, he would be only one of two verbal students in the classroom, and he required peers "who were all beginning to work on social interaction skills and early academic skills." The parents also contend that the district violated the 36-month age range of the students in the 6:1+3 special class and failed to obtain a variance to ameliorate that violation by the start of the school year.

The district denies these allegations, arguing that the students in the 6:1+3 special class placement had similar management needs—including the need for a small student-to-teacher ratio ABA program, discrete trial instruction, token economy, frequent breaks throughout the day, and reinforcements. In addition, the district asserts that four out of the five students enrolled in the class were students with autism and had verbal needs similar to this student. Upon review, the evidence in the hearing record does not support the parents' contentions.

Neither the IDEA nor federal regulations require students who attend a special class setting to be grouped in any particular manner. The United States Department of Education has opined that a student must be assigned to a class based upon his or her "educational needs as described in

[41] To the extent that the May 2019 CSE was not required to recommend BCBA services in the student's IEP for the 2019-20 school year in order to offer the student a FAPE, there is no longer any need to address the parents' allegations concerning the employment status of the BCBA or whether the BCBA had a set schedule.

his or her IEP" and not on "a categorical placement," such as one based on the student's disability category (Letter to Fascell, 18 IDELR 218 [OSEP 1991]). While unaddressed by federal law and regulations, State regulations set forth some requirements that school districts must follow for grouping students with disabilities. In particular, State regulations provide that in many instances the age range of students in a special education class in a public school who are less than 16 years old shall not exceed 36 months (8 NYCRR 200.6[h][5]).

Nevertheless, even if there were students in the class who were outside of the 36-month age range requirement set forth in State regulations, such a violation would not amount to a denial of FAPE (E.A.M., 2012 WL 4571794, at *11, citing M.P.G. v. N.Y.C. Dep't of Educ., 2010 WL 3398256, at *10 [S.D.N.Y. Aug. 27, 2010] [finding that the "'failure to adhere to the age-related guidelines is not always fatal . . . if the students are grouped appropriately in terms of functional needs'"]). The Commissioner also allows school districts to seek variances from the age requirements, which the district sought and received in this case (see Dist. Ex. 15; see also Tr. pp. 443-44). According to the evidence, the district received a letter, dated July 31, 2019, permitting the district's 6:1+3 special class to "exceed the limitations in the Regulations of the Commissioner of Education by three months" (Dist. Ex. 15). Moreover, the age variance was "approved for the 2019 extended school year program and the 2019-20 school year" (id.). As such, the parents' argument is not supported by the evidence and must be dismissed.

State regulations also require that in special classes, students must be suitably grouped for instructional purposes with other students having similar individual needs (8 NYCRR 200.1[ww][3][ii]; 200.6[a][3], [h][3]; see Walczak, 142 F.3d at 133 [approving an IEP that placed a student in a classroom with students of different intellectual, social, and behavioral needs, where sufficient similarities existed]).[42] State regulations further provide that determinations regarding the size and composition of a special class shall be based on the similarity of the individual needs of the students according to levels of academic or educational achievement and learning characteristics, levels of social development, levels of physical development, and the management needs of the students in the classroom (see 8 NYCRR 200.6[h][2]; see also 8 NYCRR 200.1[ww][3][i][a]-[d]). SROs have often referred to grouping in the areas of academic or educational achievement, social development, physical development, and management needs collectively as "functional grouping" to distinguish that set of requirements from grouping in accordance with age ranges (see, e.g., Application of a Student with a Disability, Appeal No. 17-026).

If a district operates a special class wherein the range of achievement in reading and mathematics exceeds three years, the district shall provide the CSE, parents, and teacher of the students in the class with a "description of the range of achievement in reading and mathematics, and the general levels of social development, physical development and management needs in the class, by November 1st of each year"—which is typically referred to as a class profile (8 NYCRR 200.6[h][7][emphasis added]).

According to the evidence in the hearing record, the director—at the conclusion of the May 2019 CSE meeting—provided the parents with a "projected classroom profile" of the students

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

expected to attend the 6:1+3 special class placement and program during the 2019-20 school year (see Dist. Exs. 1 at p. 4; 14 at p. 1). At the impartial hearing, the director testified that she provided the parents with a class profile at the May 2019 CSE meeting because, in "previous years, the parents did ask for a copy of the class profile" and she anticipated them asking for similar information; in addition, the director testified that this information was "one of the considerations to look at" when considering the LRE (Tr. pp. 438-39; see Dist. Ex. 14 at p. 1). The director gleaned the information to generate the class profile from those students' 2018-19 IEPs, including the "information that [was] listed under the Management Needs," and based upon which students she "felt were going to be in the program for the following school year" (see Tr. p. 439).

However, during the impartial hearing, the director prepared an updated class profile of the students in the 6:1+3 special class in September 2019 (see Tr. pp. 440-41; Dist. Ex. 14 at p. 2; see also Tr. pp. 45-50). The director was asked to prepare an updated class profile when, at the impartial hearing, the parties observed that all of the students' birthdays listed on the original class profile all fell on the first day of the month—which, according to the director, happened because the Excel program she used to compile the class profile automatically filled in that field (see Tr. pp. 440-41; Dist. Ex. 14 at p. 2; see also Tr. pp. 45-50). The updated class profile reflected information about the five students actually enrolled in the 6:1+3 special class for the 2019-20 school year (see Tr. pp. 440-41; Dist. Ex. 14 at p. 2). Rather than preparing the updated class profile from the students' 2018-19 IEPs—as the director had done for the original class profile—the director, instead, relied upon information from the students' 2019-20 IEPs, which had not been developed at the time she created the original class profile (see Tr. p. 441). The director explained that some of the scores listed on the updated class profile differed from the original class profile because some students had reevaluations or new testing completed, so the director used the updated information (see Tr. p. 442).

Here, a review of both of the class profiles prepared of the 6:1+3 special class placement and program demonstrates that, consistent with State regulation, all of the students assigned to attend the particular special class exhibited similar adaptive functioning, expressive and receptive language skills, as well as verbal and nonverbal skills—and were similar to this particular student's skills in those same areas (see Dist. Ex. 14 at pp. 1-2). In addition, the management needs listed on both class profiles further demonstrates the similarity of needs for all the students enrolled in the 6:1+3 special class placement, and that this particular student's management needs aligned with those students in the class (id.).

At the impartial hearing, the district special education teacher of the 6:1+3 special class further described the students attending the classroom for the 2019-20 school year (see Tr. pp. 50-53). With respect to communication skills, at least one student was "fully verbal"—meaning that the student could "use functional communication properly verbally"; two students used an iPad with the "Proloquo" application ("app"), which these two students used as a "device to speak" and which enabled the students to "have functional communication using the iPad" even if they did not "have language" to use verbally; and the final two students were "just getting started on using their app on their iPads," so they had "very limited true functional language" (Tr. pp. 50-52, 226-27). At that time, one student in the classroom was "currently being toilet trained," but all of the students had a "toileting schedule" (Tr. p. 52; see Tr. pp. 53-60; Dist. Ex. 13). In addition, the special education teacher testified that all of the students in the classroom received daily discrete trial instruction and a specific sensory diet during the day (see Tr. pp. 64-65, 170-71).

Based upon the foregoing, the evidence does not support the parents' contentions that the student would not be appropriately grouped with similar peers in the district's 6:1+3 special class placement and program.

2. Capacity to Implement ABA Programming

Turning next to the parents' allegations that the district was not capable of implementing the ABA programming within the 6:1+3 special class placement and program, the evidence in the hearing record does not support a finding that the district lacked the capacity to implement the ABA programming.

At the impartial hearing, the district special education teacher—who was present during the parents' and their educational consultant's visit to the 6:1+3 special class placement in July 2019—specifically addressed the parents' allegations set forth in the amended due process complaint notice about the visit (see Tr. pp. 26, 112-58).[43,44] Prior to that testimony, however, the special education teacher—who holds a Master's degree in early childhood education—testified, at length, about her experience in learning about and utilizing ABA methodology and strategies through her own education, work experiences, and professional development opportunities (see Tr. pp. 28-34). In addition, she testified about her role as the 6:1+3 special class placement teacher since the program began in September 2017 (see Tr. pp. 33-34).

With respect to the parents' observation of the 6:1+3 special class placement and program, the special education teacher testified that she was in the classroom along with her three teaching assistants, the director, and the district BCBA (see Tr. p. 112). At the time of the parents' observation, discrete trial instruction was occurring and she was "working one to one with a student"; the classroom aides were working with "their designated students for that day" (Tr. pp. 112-13). As for the parents' allegation in the amended due process complaint notice that they observed a student engaged in discrete trial instruction "trapped in a wooden cubby by furniture," the special education teacher described the student's work area in the classroom as a "[f]our [foot]-by-four [foot]" "L-shaped workstation set up where [her] back was inward" toward the wall and the student's desk "was directly next to" her, noting further that the student "freely was able to move out of the workstation by his own choice" (Tr. pp. 114-15; see Parent Ex. B at p. 8). She

[43] Realistically, the parents' contentions about the district's alleged inability to implement proper ABA programming resonate with their earliest reservations about the 6:1+3 special class placement and program: to wit, that it was not well-established.

[44] The parents' educational consultant also testified about the perceived short-comings of the 6:1+3 special class placement and program at the impartial hearing (see Tr. pp. 1057-64). However, her testimony mirrored many, if not all, of the parents' allegations in the amended due process complaint notice and will not be separately dissected point by point (compare Tr. pp. 1057-64, with Parent Ex. B at pp. 8-9). Moreover, the IHO found that the educational consultant "los[t] all credibility in this case"—which calls into question the reliability of her testimony with respect to her criticisms of the district's 6:1+3 special class placement and program (IHO Decision at pp. 9-10). In addition, the student's father testified about other concerns he observed during the visit; however, the parents do not continue to argue these concerns, such as the physical location of the 6:1+3 classroom, the physical size of the classroom, whether students would have access to an area to deescalate, or the size of the students in the class, therefore, this testimony is irrelevant and will not be discussed (compare Parent Ex. B at pp. 9-10, with Tr. pp. 884-92).

also indicated that the student was not "trapped," as the "opening" for the student to walk through to access the workstation was "well within his range" (Tr. pp. 114-15). She also indicated that the student got up and moved about his workstation but did not request to take "a break to walk out" (Tr. p. 115). The special education teacher then described how the classroom workstations were configured in the 6:1+3 special class and how each student had the "physical freedom to move around in their area" (Tr. pp. 115-18).

Next, the special education teacher responded to the parents' concern that a "small plastic filing cabinet was being used to block students from moving away from instruction" and could easily be open[ed]" to allow access to small, dangerous objects, such as scissors (Parent Ex. B at pp. 8-9; see Tr. pp. 118-21). Here, the special education teacher testified that each student in the classroom has a "three drawer bin on wheels" that contained their materials, reinforcers, and independent work, "depending on the student" (Tr. pp. 118-19). With respect to the specific contention about a student's access to scissors, the special education teacher acknowledged that one student was "working on fine motor skills cutting" and those scissors had been provided by the occupational therapist (Tr. p. 119). She described the scissors as "[a]daptive scissors" that were part of that specific student's program and that a spring mechanism prevented opening the scissors so far that the student would not be able to bring their fingers back together to close the scissors (Tr. pp. 119-20). The special education teacher testified that a student who was not working with scissors would not have access to scissors (see Tr. p. 120). In addition, the special education teacher testified that if a student with pica enrolled in her classroom, she would remove all small items from her classroom and specified that any materials another student was working on would be locked in a drawer and only taken out when needed (see Tr. pp. 120-21; Parent Ex. B at p. 9).

With regard to the parents' contention that a student was engaging in self-injurious behavior during the July 2019 observation (see Parent Ex. B at pp. 8-9), the special education teacher explained that, "throughout [her] work session [with] the student"—who would work for 10 minutes and then receive a 2-minute break interval—the student remained "completely on task, completely did his work" for the full 10-minute period (Tr. pp. 121-22). In particular, the student "worked for an iPad" during his 2-minute break interval, which "really excited" him and he would often "jump up and down" when he gained access to the iPad (Tr. pp. 121-22). And according to that student's BIP, the student would be allowed to "engage in the self-stimulatory behavior when [he was] excited" (Tr. p. 122). Nonetheless, the special education teacher did "use a nonverbal picture cue for quiet hands," but the student had earned his break time and the iPad, so the behavior was allowed (Tr. pp. 122-23). Consequently, the special education teacher explained that someone who did not "know [the student]" would not necessarily understand that this excited behavior was "safe" and allowed pursuant to that student's particular plan (Tr. pp. 122-23). When asked if she "specifically reinforce[d] that behavior" or did something different, the special education teacher explained that she "gave a nonverbal cue, the picture for quiet hands"—and the student "quieted down for a minute and then reengaged and then quieted down for a minute" (Tr. p. 123). But she also noted that the student had earned his iPad during break time and therefore, she did not give "any verbal re-directive" (Tr. p. 123). She also noted that the iPad was a reinforcer that he earned from his token board (see Tr. p. 123). Finally, the special education teacher indicated that she would not describe the behavior observed—notably, the jumping up and down, or giggling—as a self-injurious behavior (see Tr. p. 123).

Next, the special education teacher addressed the parents' allegations concerning how staff conducted discrete trial teaching with the students, and in particular, that staff did not address a student who was licking his arm repetitively (see Tr. pp. 124-26; Parent Ex. B at p. 9). Here, the special education teacher explained that, for the student allegedly licking his arm (or hand), a "protocol" addressed this issue that an "outsider looking in" would not necessarily recognize as being implemented because that specific protocol involved nonverbal redirection strategies (Tr. pp. 124-25). The special education teacher further explained that this student often engaged in the behavior more if he was given verbal attention, and therefore, nonverbal redirection was used, which an observer was "not supposed to know" was being implemented (Tr. pp. 124-25). She further explained that many factors were involved when working on behavioral management, including the use of a discrete visual for "hands down" or a chewy as a distractor and that an observer would not necessarily know what procedures were in place unless they asked (Tr. pp. 124-25). Finally, when asked how staff knew where a student was with respect to "a certain skill or particular goal"—for example, whether a student had already mastered a skill or was continuing to work on a skill—the special education teacher explained that "[e]verything [was] based on the IEP" and the "expectation of . . . moving forward via prompt levels" (Tr. pp. 125-26). In addition, "every data sheet for every goal" includes specific language for mastery, such as "75 percent success on five occasions," and she trained the staff "how to properly score everything" (Tr. p. 126). In this case, neither the parents nor their educational consultant asked questions about specific discrete trials being worked on with the students (see Tr. p. 126).

With regard to the parents' contention that "[o]ne aide . . . became increasingly verbally frustrated and used a harsh tone when the student with whom she was working did not respond to her prompt" (Parent Ex. B at p. 9), the special education teacher testified that one staff member "just naturally ha[d] a very loud voice" but was not improperly conducting discrete trial teaching on discrete trial training incorrectly (Tr. pp. 126-27). As for the parents' contention that they observed the BCBA intervene during instruction four or five times during the observation to "correct inappropriate ABA techniques" (Parent Ex. B at p. 9), the special education teacher testified that this was not the case, and instead, the BCBA—on one of the two total occasions where the BCBA did assist—stepped in to "support the maintenance skills" being worked on with a student new to the classroom (Tr. pp. 126-27). According to the special education teacher, the BCBA's "purpose in the classroom [was] to support us and make sure that if she s[aw] something, she help[ed] us correct it" (Tr. pp. 126-27). In addition, the special education teacher explained that, during discrete trial instruction in the classroom, the BCBA's role was to "support[] any questions" or ideas, specifying that "any idea that people have to update, change, modify [were] just really helpful" (Tr p. 128). Moreover, the BCBA assisted staff when they were "conducting instruction correctly" (Tr. p. 128). The teacher further testified that the BCBA did not supervise the classroom, but instead, supervised or monitored progress, provided support, and "implement[ed] the programs training [herself] and [her] staff on how to implement them properly" (Tr. p. 158).

Based on the foregoing, the evidence sufficiently addressed and rebutted all of the concerns the parents' alleged in the amended due process complaint notice that they continue to press now, on appeal. As a result, the evidence does not support a finding that the district lacked the capacity to implement the ABA programming.

VII. Conclusion

Having determined that the evidence in the hearing record establishes that the district offered the student a FAPE in the LRE for the 2019-20 school year, the necessary inquiry is at an end and there is no need to reach the issue of whether Gersh was an appropriate unilateral placement for the student (see Burlington, 471 U.S. at 370).

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
April 3, 2020

JUSTYN P. BATES
STATE REVIEW OFFICER