The University of the State of New York

The State Education Department
State Review Officer
www.sro.nysed.gov

No. 21-092

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

Appearances:
The Law Offices of H. Jeffrey Marcus, PC, attorneys for petitioners, by Steven L. Goldstein, Esq.

Judy Nathan, Interim Acting General Counsel, attorneys for respondent, by Theresa Crotty, 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 determined that respondent (the district) offered the student an appropriate educational program and denied their request to be reimbursed for their daughter's tuition costs at Gersh Academy (Gersh) for the 2019-20 school year. The appeal must be sustained.

II. Overview—Administrative Procedures

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

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

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

III. Facts and Procedural History

The student has received a diagnosis of autism spectrum disorder and began receiving speech-language therapy, occupational therapy (OT), physical therapy (PT), and instruction using applied behavior analysis (ABA) methods as a young child through the Early Intervention Program (Parent Ex. N at p. 2).[1] She transitioned to the Committee on Preschool Special Education (CPSE) at age three, attended an 8:1+2 classroom, and received special education itinerant teacher (SEIT) services at home (id.). The student began attending a district public school in kindergarten, and

[1] Additionally, the student is an "English Language Learner whose home language is Cantonese" (Dist. Exs. 4 at p. 6; 13 at p. 6).

since first grade attended "a 6:1:1 ABA" classroom (Parent Exs. N at pp. 1-2; BB at p. 1). During the 2018-19 school year (fifth grade), the student continued to attend a 6:1+1 special class where she received instruction using ABA, one session per week each of OT and PT, and two sessions per week of speech-language therapy (Parent Ex. N at p. 3).[2] Additionally, the student received 10 hours per week of home-based ABA instruction provided by an agency through insurance (Parent Exs. N at p. 3; BB at p. 2).

Results of a private psychological evaluation of the student conducted in March 2019 indicated that she had difficulty completing standardized assessments, and "display[ed] deficits across domains of expressive and receptive language, social communication and interaction, and sensory integration" (Parent Ex. N at p. 6). Additionally, the student exhibited challenges with attention, reciprocity, and emotional reactivity, which together affected her communication, socialization, behavior, learning, and participation in the community (id.). The evaluator concluded that the student required a full-time, 1:1 ABA program together with 15 to 20 hours of ABA instruction at home to improve her skills (id. at pp. 6-7). On April 17, 2019 the student's mother sent the March 2019 private psychological evaluation report to the district, and on April 18, 2019 she sent a December 2018 home-based ABA reassessment and treatment plan report to the district, requesting that those reports be added "to [the student's] special education file so that the [district] c[ould] use [them] in developing her IEP" (Parent Exs. N; O).

On May 1, 2019, a CSE convened for the student's annual review and to develop an IEP for the 2019-20 school year (Dist. Ex. 4). Finding the student eligible for special education and related services as a student with autism, the CSE recommended a 12-month program in a specialized school consisting of a 6:1+1 special class placement together with two 30-minute sessions per week of individual OT, two 30-minute sessions per week of individual speech-language therapy, and one 30-minute session per week in a group, school nurse services as needed, and individual paraprofessional services on a "0.8" basis to help manage the student's severe peanut allergy (Dist. Exs. 4 at pp. 1, 18-19, 22; 25).[3] Although reportedly the parents "agreed to the recommended related service mandates" they were "seeking private placement for more 1:1 instruction" (Dist. Exs. 4 at p. 6; 5 at p. 2).

By letter dated May 22, 2019, the parents acknowledged receipt of the prior written notice and May 2019 IEP and relayed their concerns to the district about its "plans" for the student (Parent Ex. D). Specifically, the parents opined that the CSE ignored results and recommendations from the March 2019 private psychological evaluation and expressed their concerns that the IEP could not appropriately address all of the student's needs, including that it did not provide a 1:1 full school day ABA program (id. at pp. 1, 3). The parents also apprised the district of their concerns about the student attending a public school in the district, specifically regarding the possible grouping of the class and that many public schools lacked adequate air conditioning or were too noisy, and requested that they be allowed to visit the school assigned for the student to attend to determine if it was appropriate for the student (id. at pp. 1-3). In closing the parents provided

[2] The parent's testimony indicated that the student did not receive instruction using ABA methods at school (see Parent Ex. BB at pp. 1-2).

[3] The student's eligibility for special education 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]).

permission to the district to conduct any additional evaluations determined to be "needed or would be helpful in figuring out what [the student] needs for the upcoming school year" (id. at pp. 3-4). In an email to the assistant principal dated June 13, 2019 the student's mother reiterated her concerns about the student's IEP and the assigned public school (Parent Ex. E; see Tr. p. 65; Dist. Ex. 8 at p. 1).

In June 2019, the student was referred for an assistive technology evaluation upon parent request (see Dist. Exs. 7; 8). On June 14, 2019, the student's mother provided consent for the district to conduct additional evaluations of the student and requested that the district be made aware of the March 2019 private psychological evaluation report which she attached to the consent (Parent Ex. F; Dist. Ex. 6 at p. 1). The district conducted an assistive technology evaluation with the student on June 17, 2019, which resulted in recommendations for a "dynamic display speech generating device" with specific software applications and equipment (Dist. Exs. 10; 11).

In a letter dated June 17, 2019, the parents, through their counsel, advised the district of their disagreements with how the May 2019 CSE meeting was conducted and the May 2019 IEP (Parent Ex. G). The parents further informed the district that unless their concerns were addressed, they would unilaterally place the student at Gersh for the 2019-20 school year and would seek reimbursement for that placement (id. at p. 3). In the interim, the parents requested that the district provide the student with round trip special transportation services for the student to attend Gersh as of the first day of the 12-month school year in July 2019 (Parent Exs. G at p. 3; H at p. 1; see Parent Ex. I at p. 1).

On June 20, 2019 the CSE reconvened, modified the student's OT and speech-language annual goals, and added assistive technology to the IEP, noting that the dynamic display speech generating device was "integrated into the existing school program" (compare Dist. Ex. 13 at pp. 12-16, 20, with Dist. Ex. 4 at pp. 15-17, 19; see Dist. Ex. 14 at p. 1).

The parent signed an enrollment contract for the student to attend Gersh for the 2019-20 school year on July 4, 2019 (Parent Ex. W).

On July 8, 2019 the parents advised the district that they had received a prior written notice and IEP from the June 2019 CSE meeting, but that the CSE had committed procedural violations during the meeting and the resultant IEP was not appropriate to meet the student's needs (Parent Ex. J).

In a letter dated July 9, 2019, the district informed the parents' counsel that it had received the June 17, 2019 letter advising the district of the parents' disagreement with the program and placement recommendations and intent to unilaterally enroll the student in a private school for the 2019-20 school year at district expense (Parent Ex. K). The district further advised that the parents' unilateral placement claim was "not appropriate for settlement" and that if they wished to pursue that placement at district expense, they must file a due process complaint notice (id.).

The student began attending Gersh on July 10, 2019 for the 12-month school year (Parent Exs. T at p. 1; X).[4]

In an August 16, 2019 letter to the district, the parents' attorney reiterated the parents' position that the CSE had committed procedural violations and failed to develop an appropriate IEP for the student for the 2019-20 school year (Parent Ex. L). The letter further indicated that unless the district addressed the parents' concerns, the student would be placed at Gersh for the 2019-20 school year and the parents would seek reimbursement for that placement (id. at p. 3). The student continued to attend Gersh for the remainder of the 2019-20 school year (Parent Exs. R at p. 2; T at p. 3).

A. Due Process Complaint Notice

In a due process complaint notice dated September 23, 2019, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2019-20 school year (see Parent Ex. A). Specifically, the parents argued that the May and June 2019 CSEs were not properly composed, as the district representatives lacked knowledge of programs and resources available within the district, and challenged the qualifications of the remaining CSE members and the manner in which they participated at the meetings (id. at p. 12-13). The parents also alleged that the district denied their right to meaningfully participate in planning for the student's education by 1) failing to provide prior written notices explaining the district's decisions arising from the May and June 2019 CSE meetings, 2) ignoring the parents' opinions and concerns at those meetings, 3) denying the parents the right to know what the district was planning for the student, 4) failing to allow the parents any input into the IEP, including the development of the annual goals, 5) failing to adequately share with and explain to the parents the evaluative materials it considered, and 6) failing to provide them with adequate information about the functional grouping of students in the recommended assigned public school classroom (id. at pp. 4-6, 8-12). According to the parents, the CSE failed to collect, conduct, and/or consider sufficient "materials," including information from the parents, that was "reflective" of the student (id. at pp. 5, 6). Additionally, the parents asserted that the district failed to conduct a functional behavioral assessment (FBA) of the student, or alternatively, if the district decided to defend an FBA, the parents argued that it was not properly conducted and shared with them (id. at p. 9).

Regarding the May and June 2019 IEPs, the parents asserted that the CSE failed to include adequate and updated statements of the student's present levels of educational performance and how her disability affected her ability to progress in the general education curriculum (Parent Ex. A at pp. 6, 10). The parents further alleged that the IEPs lacked sufficient, measurable annual goals and short-term objectives with adequate completion dates in the areas of academics, attention, social, self-regulation, communication, executive functioning, organization, self-advocacy, and sensory needs (id. at pp. 7, 8). Next, the parents asserted that the annual goals could not be implemented in the CSE's recommended program, rather, they could only be implemented with the student in a 1:1 learning environment (id. at p. 8). Due to the failure to conduct an FBA, the parents alleged that the CSE failed to develop a behavioral intervention plan (BIP) and as such,

[4] 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).

the IEPs failed to properly address the student's behavioral difficulties (id. at p. 9). In the alternative, should the district decide to defend a BIP, the parents asserted that "any such BIP" was not sufficiently individualized, nor did it contain all of the required information (id.). Further, the parents argued that the IEPs did not provide the student with appropriate accommodations to address her sensory needs (id. at p. 10). According to the parents, the IEPs also failed to provide the student with instruction using ABA methods throughout the day, which she required (id. at p. 12). Additionally, the parents asserted that the recommended 6:1+1 special class in a specialized school was not appropriate to meet the student's needs, as she had not previously demonstrated progress in that placement (id. at p. 5).

The parents' claims regarding the assigned public school included 1) that the CSE failed to consider the learning profiles of the other students in the class, 2) the school could not address the student's academic, social safety, transitional, communication, and sensory integration deficits, 3) the school could not provide the student with an adequate level of support, including instruction using ABA, and 4) the physical environment of the school would have put the student at "an unacceptably high risk for physical injury" and was not an appropriate learning environment for her as it would not provide her with appropriate supports to address her needs (Parent Ex. A at p. 11). Additionally, the parents argued that the district excluded the parents and the CSE from the assigned school placement decision (id. at pp. 11-12).[5]

Next, the parents asserted that Gersh was an appropriate unilateral placement for the student for the 12-month 2019-20 school year as it provided an educational program that would address her needs (Parent Ex. A at p. 13). Further, the parents argued that equitable considerations favored the parents as they "sought to cooperate in the CSE review placement process at all relevant times" (id.). As relief, the parents sought reimbursement for monies already paid to Gersh and direct funding by the district to Gersh for monies still owed for the student's attendance during the 2019-20 school year (id. at p. 14). The parents also requested special education transportation to and from Gersh "immediately" (id.).

In a September 28, 2019 email to the parent's counsel, the district acknowledged receipt of the parent's due process complaint notice and informed counsel of the IHO who was appointed to hear the matter (Parent Ex. B). On December 20, 2019 district staff emailed the parent's counsel the prior written notice from the May 2019 CSE meeting (Parent Ex. C). Later that day, counsel for the parent responded to the district, indicating that the document provided did not comply with prior written notice requirements, was not timely, and was not responsive to the parents' due process complaint notice (id. at p. 1).

B. Impartial Hearing Officer Decision

An impartial hearing convened on November 20, 2020 and concluded on January 12, 2021 after two days of proceedings (Tr. pp. 1-126). In a decision dated March 25, 2021, the IHO

[5] The due process complaint notice also provided a notice of intention to raise additional claims during the course of the litigation and to raise any other procedural or substantive issues that may come to their attention during the pendency of this matter (Parent Ex. A at p. 14). Additionally, the parents notified the district that they would raise claims regarding the manner in which the district responded to the due process complaint notice (id. at p. 15).

determined that the district offered the student a FAPE for the 2019-20 school year, and therefore did not make determinations regarding whether Gersh was an appropriate unilateral placement, or whether equitable considerations weighed in favor of the parents' request for an award of district funding of the costs of the student's tuition (IHO Decision at p. 40). Specifically, the IHO determined that "the relevant IEP in this case is the student's IEP dated June 20, 2019" (id. at p. 15). Next, the IHO found that the June 2019 CSE did not include the participation of an additional parent member, which although a procedural deficiency, did not result in a denial of a FAPE (id. at pp. 17-19). The IHO then determined that "[t]he hearing record on the whole reveal[ed] that the [p]arents were not significantly impeded from participating in the decision-making process with respect to the provision of FAPE to the student" (id. at p. 19).

The IHO next identified the evaluative information available and utilized at the June 2019 CSE meeting (IHO Decision at pp. 19-24). He then identified the evaluative information included in the June 2019 IEP, and concluded that the student had been "comprehensively assessed" for the purpose of developing the IEP, noting it was not a case where the student was not properly assessed or where the IEP did not reflect the results of the evaluations that identified the student's needs (id. at pp. 19-27). As such, the IHO found that all of the evaluations cited "clearly" met the criteria for sufficiency as their findings and recommendations were "thorough and comprehensive" (id. at p. 27). Next, the IHO determined that the evaluative information about the student's gross motor skills at school supported the CSE's determination to discontinue PT services and did not render the IEP deficient (id. at pp. 29-30). Turning to the issue of ABA instruction, the IHO cited caselaw that indicated, in general, CSEs are not required to specify methodology on an IEP, and then the IHO determined that the lack of a specific provision for ABA in the June 2019 IEP was not a denial of a FAPE (see id. at pp. 30-31, 40). Further, the IHO determined that the evidence in the hearing record showed that "the comprehensive recommendations [in] the June 2019 IEP would have addressed the student's sensory needs and provided the student with a suitable educational methodology" (id. at p. 32). Additionally, the IHO found "that the overall record [did] not evidence that the student's behaviors interfere[d] with her education to a degree that require[d] a BIP," such that the lack of a BIP in the June 2019 IEP was "not fatal to a finding of FAPE," noting that the CSE recommended the support of an individual paraprofessional and monthly parent counseling and training (id. at pp. 36, 38). Turning to the issue of annual goals, the IHO determined that the CSE had developed "comprehensive" and "[m]easurable" goals to address the student's reading, writing, math, social/emotional, OT, and speech-language needs (id. at p. 37). The IHO concluded that the June 2019 CSE "did a fair and reasonable job of producing an IEP that [was] reasonably calculated to enable the student in this case to make progress" and that the district offered the student a FAPE for the 2019-20 school year (id. at pp. 38, 40). As such, the IHO declined to make findings regarding the parents' request for relief or whether equitable considerations would bar an award to the parents (id. at p. 40). For relief, the IHO directed the district to conduct a re-evaluation of the student and subsequently convene a CSE meeting to consider the results in order to develop an IEP for the 2021-22 school year (id. at p. 41).

IV. Appeal for State-Level Review

The parents appeal, first asserting that the IHO erred in finding that the only relevant IEP in this matter was dated June 2019, as "all substantive decisions" made by the district CSE members occurred during the May 2019 CSE meeting. Next, the parents argue that the IHO erred in determining that they were not significantly impeded from participating in the decision-making

process as the CSE failed to consider information the parents had provided, including a privately obtained psychological evaluation report, and ignored their concerns and objections to the recommended program. The parents further assert that the IHO erred in finding that the CSE considered the results of all relevant evaluations and that the June 2019 IEP accurately reflected the results of those evaluations. Additionally, the parents allege that the IHO erred in determining that the June 2019 CSE considered ABA methodology at the CSE meeting, and that the IEP was appropriate absent a recommendation for ABA instruction, as the evidence showed the student required ABA instruction to learn. Regarding the student's behaviors, the parents assert that the IHO erred when he determined that the failure to provide the student with a BIP did not result in an inappropriate IEP, as the IHO failed to analyze how paraprofessional, parent counseling and training, and related services "could make up for the absence of a BIP" for the student. As to the student's annual goals, the parents argue that the IHO erred in finding that the goals were "comprehensive" as the IEP annual goals did not address the student's needs in attention/focus, shoe-tying, vocabulary, echolalia, sensory processing, sharing, and repetitive, self-stimulatory, and self-injurious behaviors. Further, the parents allege that the IHO incorrectly applied a de minimus standard regarding what the student was entitled to under the IDEA.

The parents next assert that the IHO erred by failing to consider and determine that Gersh was an appropriate placement for the student and that equitable considerations supported the parents' claims. As relief, the parents request reversal of the IHO's decision, a finding that the district failed to offer the student a FAPE, and an order directing the district to reimburse the parents for the tuition paid thus far to Gersh for the 2019-20 school year and direct payment to Gersh for the remainder of what the parents owe for this time period.

In an answer, the district denies all of the allegations set forth in the parents' request for review and requests that the parents' appeal be dismissed.

V. Applicable Standards

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

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

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

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

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

provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).[6]

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

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

VI. Discussion

A. FAPE

1. Preliminary Matters

a. Legal Standard

Initially, regarding the legal standard the IHO stated as follows:

> . . . the DOE is only charged with providing an educational program reasonably calculated to enable the student to make progress appropriate in light of her circumstances. This standard of review is diminimus, arguably below all of the other recognized standards of review in the law, such as "beyond a reasonable doubt", "clear and convincing evidence", "preponderance of the evidence", "substantial evidence" or "rational basis."

(IHO Decision at p. 38 [emphasis in the original] [internal citations omitted], citing Endrew F., 137 S. Ct. 988). The parent argues that the IHO's application of a de minimis standard was inconsistent with the United States Supreme Court's decision in Endrew F. I agree with the parent in that the IHO's articulation of the legal standard appears to be at odds with the Supreme Court's decision in Endrew F., in which the Court clarified the Rowley standard to determine whether a

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

school district has offered a FAPE and stated that the standard "is markedly more demanding than the 'merely more than de minimis' test applied by the Tenth Circuit" (Endrew F., 137 S. Ct. at 1000).

Initially, the IHO's comparison of the Supreme Court's articulation of disabled students' entitlements under the IDEA (i.e., the substantive standard) to various standards of proof used in assessing a party's burden was error. The burden of proof has been described as one of "the slipperiest member[s] of the family of legal terms," in part, because it encompasses different components, including the burden of production and the burden of persuasion (Shaffer v. Weast, 546 U.S. 49, 56 [2005]). The burden of proof is also related to the "standard of proof" or the quantum of proof required to sustain the burden of persuasion. For example, the preponderance of the evidence standard, which is the common burden of proof in a civil case, means proving that something is more likely so than not so (Concrete Pipe & Products of California, Inc. v. Constr. Laborers Pension Tr. for S. California, 508 US 602, 622 [1993]).[7]

The Supreme Court did not address the evidentiary burden or standard of proof in Endrew F., rather the Court set forth "to articulate an overarching standard to evaluate the adequacy of the education provided under the Act" (Endrew F., 137 S. Ct. at 993, 998). The Court determined that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances" (id. at p. 1001). In addition, the Court explained the "reasonably calculated" qualification, highlighted by the IHO, "reflects a recognition that crafting an appropriate program of education requires a prospective judgment by school officials" (id. at p. 999). To the IHO's point, the Court did reference that some deference is owed to school officials; however, the Court also noted that "[a] reviewing court may fairly expect those authorities to be able to offer a cogent and responsive explanation for their decisions that shows the IEP is reasonably calculated to enable the child to make progress appropriate in light of his circumstances" (id.).

Here, the IHO's deficient fact analysis based on application of an erroneous standard of proof is reversible error.

b. Operative IEP

The parents assert that the IHO erred in determining that the June 2019 IEP was the relevant IEP in dispute rather than the May 2019 IEP. Here, the IHO correctly found that the May 2019 IEP was superseded as a result of the June 2019 IEP, which became the operative IEP for the 2019-20 school year (M.P. v. Carmel Cent. Sch. Dist., 2016 WL 379765, at *5 [S.D.N.Y. Jan. 29, 2016] [concluding that a later-developed IEP was the operative IEP, even though it was developed after the parent's placement decision but before the due process complaint notice]; McCallion v. Mamaroneck Union Free Sch. Dist., 2013 WL 237846, at *8 [S.D.N.Y. Jan. 22, 2013] [finding the later developed IEP to be "the operative IEP"]; see also M.C. v. Mamaroneck Union Free Sch. Dist., 2018 WL 4997516, at *25 n.3 [S.D.N.Y. Sept. 28, 2018] [finding the later developed IEP to be operative even though it was developed during the first weeks of school]; Application of the Dep't of Educ., Appeal No. 12-215). However, as the recommendations included in the operative

[7] The IDEA and its implementing regulations specify that the standard of proof at the judicial review stage is the civil standard of preponderance of the evidence (see 20 U.S.C. § 1415[i][2][C][iii]; 34 CFR 300.516[c][3]).

June 2019 IEP were developed at both the May and June 2019 CSE meetings, the conduct of both meetings are relevant to the analysis of the district's offer of a FAPE to the student for the 2019-20 school year (see Application of a Student with a Disability, Appeal No. 16-035).

2. Parent Participation

The parents argue that the IHO erred in finding that the district did not impede the parents from participating at the May and June 2019 CSE meetings. In particular, the parents assert that neither CSE discussed or considered the March 2019 private psychological evaluation report and other evaluative information provided by the parents, ignored the parents' concerns and objections, and failed to consider the student's need for instruction using ABA methodology at the June 2019 CSE meeting.

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 F.L. v. Bd. of Educ. of Great Neck Union Free Sch. Dist., 735 Fed. App'x 38, 40 [2d Cir. Aug. 24, 2018] [noting that "'[a] professional disagreement is not an IDEA violation'"], quoting P.K. v. Bedford Cent. Sch. Dist., 569 F. Supp. 2d 371, 383 [S.D.N.Y. 2008]; T.F. v. New York City Dep't of Educ., 2015 WL 5610769, at *5 [S.D.N.Y. Sept. 23, 2015]; A.P. v. New York City Dep't of Educ., 2015 WL 4597545, at *8, *10 [S.D.N.Y. July 30, 2015]; E.F. v. New York City Dep't of Educ., 2013 WL 4495676, at *17 [E.D.N.Y. Aug. 19, 2013] [stating that "as long as the parents are listened to," the right to participate in the development of the IEP is not impeded, "even if the [district] ultimately decides not to follow the parents' suggestions"]; Sch. for Language & Commc'n Dev. v. New York State Dep't of Educ., 2006 WL 2792754, at *7 [E.D.N.Y. Sept. 26, 2006] ["Meaningful participation does not require deferral to parent choice"]). When determining whether a district complied with the IDEA's procedural requirements, the inquiry focuses on whether the parents "had an adequate opportunity to participate in the development" of their child's IEP (Cerra, 427 F.3d at 192). Moreover, "the IDEA only requires that the parents have an opportunity to participate in the drafting process" (D.D-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at *11 [E.D.N.Y. Sept. 2, 2011], aff'd, 506 Fed. App'x 80 [2d Cir. Dec. 26, 2012], 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]).

One aspect of the parents' right to participate is the requirement that the CSE must consider private evaluations obtained at private expense, provided that such evaluations meet the district's criteria, in any decision made with respect to the provision of a FAPE to a student (34 CFR 300.502[c]; 8 NYCRR 200.5[g][1][vi]). However, "consideration" does not require substantive discussion, that every member of the CSE read the document, or that the CSE accord the private evaluation any particular weight (T.S. v. Bd. of Educ. of the Town of Ridgefield, 10 F.3d 87, 89-

90 [2d Cir. 1993]; G.D. v. Westmoreland Sch. Dist., 930 F.2d 942, 947 [1st Cir. 1991]; but see A.M. v. New York City Dep't of Educ., 845 F.3d 523, 544-45 [2d Cir. 2017] [finding that recommendations included in private evaluation created a consensus as to what the student required where the district did not conduct any evaluations of its own to call into question the opinions and recommendations contained in the private evaluations]).

Here, the evidence in the hearing record shows that the parents provided the district with a copy of the March 2019 private psychological evaluation report on April 17, 2019, and asked that it be added to the student's "special education file so that the [district] can use it in developing her IEP" (Parent Ex. N at p. 1). In addition, on April 18, 2019, the parent provided the district with a December 2018 Achieve Beyond ABA reassessment and treatment plan, which was completed by the teacher who delivered the student's home-based ABA services, and similarly asked that it be placed in the student's file for use in developing her IEP (Parent Ex. O). The district special education teacher testified that the parent gave her "the outside evaluation," as well as the plan from the ABA therapist, and she provided both reports to the "coordinator" for the CSE (Tr. pp. 32-33, 34-35). She indicated that she did not add the ABA reassessment and treatment plan to the student's "file" (Tr. p. 35).

Attendees at the May 2019 CSE meeting included a district special education teacher (who also served as the district representative), a speech-language teacher, an occupational therapist, both parents, and the student's ABA therapist (Dist. Ex. 4 at p. 26). The May 2019 prior written notice summarized the documents used in developing the May 2019 IEP but did not list the March 2019 private psychological evaluation report or the December 2018 ABA reassessment and treatment plan (Dist. Ex. 5). The May 2019 IEP listed standardized test results and summarized some descriptions of the testing results from the March 2019 private psychological evaluation report (compare Dist. Ex. 4 at pp. 2-3, 6, with Parent Ex. N at pp. 4-5, 10-12). As the parents note, in their closing brief to the IHO, the district appears to have conceded that, during the May 2019 meeting, the CSE "did not discuss anything . . . about the psychological evaluation" opining that the evaluation was "not germane to an Annual Review" (Dist. Ex. 27 at p. 1).

According to the affidavit testimony of the student's mother, the parents shared their concerns during the May 2019 CSE meeting and asked the district to consider an ABA program for the student as recommended in the private psychological evaluation report (Parent Ex. BB at p. 3). The mother testified that the district members of the committee informed them that the district "would not include the use of ABA in [the student's] IEP" and that the choice of methodology would be left to the student's teacher but did not offer an explanation for this stance related to the student's needs (id.). The student's mother also testified that the parents expressed their objections to the CSE's recommendation for a 6:1+1 special class in a specialized school given the student's lack of progress in a similar program but that the district members of the CSE informed them that the 6:1+1 special class "was what was available to them and that they could not consider other options" (id.).

The district special education and speech-language teachers testified that the parents were able to participate in the May 2019 CSE meeting (Tr. pp. 33, 58). The speech-language teacher testified that the parents agreed with the goals and that they expressed that they wanted to help the student "communicate better" (Tr. p. 61). She did not recall the parent asking to add ABA to the student's IEP (Tr. pp. 61, 63). The May 2019 IEP documented the parents' concerns about the

student's lack of communication and social skills and their desire to see the student improve in her ability to copy letters and words (Dist. Ex. 4 at pp. 8, 24). In addition, the IEP documented that the parents wanted to have the student "in a private school with [a] 1:1 student ratio" and that the parents, the ABA therapist, and the private reports indicated that the student "respond[e]d well to 1:1 instruction" (id. at p. 6). The May 2019 prior written notice reflected that the parents agreed to the May 2019 CSE's related services recommendations for the student but intended to seek "private placement for more 1:1 instruction" (Dist. Ex. 5 at p. 2).

In their May 2019 letter expressing disagreement with the May 2019 CSE meeting, the parents stated their concern that, among other things, the CSE had not considered the private reports they provided to the district (Parent Ex. D). Leading up to the planned reconvene of the CSE, on June 14, 2019, the parents signed a consent for the district to evaluate the student and, on the consent form, hand wrote that they wanted to be sure the district was "aware of the attached psychologist report from March 2019" (Parent Ex. F; Dist. Ex. 6; see Dist. Ex. 7).

The CSE reconvened on June 20, 2019 for the purpose of considering assistive technology for the student (see Tr. p. 91). Attendees at the June 2019 CSE meeting mirrored those who attended the May 2019 CSE with the omission of the student's father and the addition of the district school psychologist (compare Dist. Ex. 13 at p. 22, with Dist. Ex. 4 at p. 26). The June 2019 prior written notice summarized the documents used in developing the June 2019 IEP and listed only the June 2019 assistive technology evaluation (Dist. Ex. 14). However, according to the district school psychologist, the June 2019 CSE also considered the March 2019 private psychological evaluation report (Dist. Ex. 26 at p. 1). The school psychologist testified that the failure to list the private evaluation on the prior written notice "must have been an oversight" (Tr. p. 88). The district speech-language teacher thought that an evaluation provided by the parents "was discussed at [the June 2019 CSE] meeting" but she did not "remember the specifics" (Tr. p. 64).

The student's mother testified by affidavit that she "talked about [her] concerns and [the student's] noted needs" during the June 2019 CSE meeting (Parent Ex. BB at p. 4).). However, the parent testified that the June 2019 CSE "merely reiterated its' refusal" to place the student in the kind of program recommended in the private psychological evaluation and in the private ABA reassessment and treatment plan (id. at pp. 3-4).

The district speech-language teacher testified that the parents had the opportunity to participate in the June 2019 CSE and did not recall them expressing disagreement with the CSE's recommendations (Tr. p. 59). Likewise, the district school psychologist testified by affidavit that the parents had the opportunity at the June 2019 CSE meeting to ask questions and express concerns and that they did not express any disagreement with the CSE's recommendations for the student and did not request that ABA be included on the IEP (Dist. Ex. 26 at p. 1). During cross-examination, the school psychologist clarified that she did not recall the parents "specifically saying they agree[d]" with the CSE's recommendations (Tr. p. 93).

As set forth above, the evidence in the hearing record shows that, while the May 2019 CSE did not discuss the March 2019 private psychological evaluation report, information from the evaluation report was included on the May 2019 IEP and the evaluation was later discussed at the June 2019 CSE meeting (compare Dist. Ex. 4 at pp. 2-3, 6, with Parent Ex. N at pp. 4-5, 10-12;

see Tr. pp. 64, 88; Dist. Exs. 26 at p. 1; 27 at p. 1).[8] In contrast, there is no evidence that either CSE considered the December 2018 reassessment and treatment plan from the teacher who delivered the student's home-based ABA services; the student's ABA teacher who completed the December 2018 plan attended the May and June 2019 CSE meetings but there is no evidence that she reviewed the contents of the December 2017 plan with the CSE (compare Parent Ex. O at p. 20, with Dist. Ex. 4 at p. 26, and Dist. Ex. 13 at p. 22).

As for the parents' description of district staff's dismissal of their objections to the recommended class placement and request for ABA for the student, placement decisions must be based on a student's unique needs as reflected in the IEP, rather than based on the existing availability of services in the district or general policies unrelated to a student's needs (34 CFR 300.116[b][2]; 8 NYCRR 200.6[a][2]; see T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 163 [2d Cir. 2014] [finding that the IDEA's LRE requirement is not limited, in the extended school year context, by what programs the school district already offers, but rather must be based on the student's needs]; Adams v. State, 195 F.3d 1141, 1151 [9th Cir. 1999]; Reusch v. Fountain, 872 F. Supp. 1421, 1425-26 [D. Md. 1994]; Placements, 71 Fed. Reg. 46588 [Aug. 14, 2006] [noting that "placement decisions must be individually determined on the basis of each child's abilities and needs and each child's IEP, and not solely on factors such as . . . availability of special education and related services, configuration of the service delivery system, availability of space, or administrative convenience"]). The considerations that the CSEs weighed in making its program and placement determinations are discussed further below. There is no other indication that the parents were prevented from sharing their concerns at the CSE meetings.

Ultimately, it is unnecessary to determine whether the district's failures in this regard would independently or cumulatively support a finding that the district denied the student a FAPE since, as set forth below, the district otherwise failed to meet its burden to show that the June 2019 IEP offered the student a FAPE.

3. June 2019 IEP

a. Present Levels of Performance

The parents raise a number of allegations on appeal with respect to the sufficiency of the June 2019 IEP, the first of which is that the IHO erred in determining that the IEP accurately

[8] While the May 2019 CSEs failure to discuss the March 2019 private psychological evaluation report may not be determinative in this instance, the implication of the district's representative at the conclusion of the hearing that the evaluation was "not germane to an Annual Review" meeting is contrary to State and federal regulations requiring that a private evaluation obtained at private expense must be considered "in any decisions made with respect to the provision of a free appropriate public education for the student" (Dist. Ex. 27; see 34 CFR 300.502[c][1]; 8 NYCRR 200.5[g][1][vi][a]). It may be that, in referencing that the district school psychologist did not attend the May 2019 CSE meeting, the district representative was alluding to the difference between a committee and a subcommittee on special education; however, no such difference exists regarding the consideration of a privately obtained evaluation and even a subcommittee on special education must include a school psychologist "whenever a new psychological evaluation is reviewed" (8 NYCRR 200.3[c][2][v]).

reflected the results of the student's evaluations, particularly the March 2019 private psychological evaluation.[9]

Among the other elements of an IEP is a statement of a student's academic achievement and functional performance and how the student's disability affects his or her progress in relation to the general education curriculum (20 U.S.C. § 1414[d][1][A][i][I]; 34 CFR 300.320[a][1];8 NYCRR 200.4[d][2][i]; see 8 NYCRR 200.1[ww][3][i]). In developing the recommendations for a student's IEP, the CSE must consider the results of the initial or most recent evaluation; the student's strengths; the concerns of the parents for enhancing the education of their child; the academic, developmental and functional needs of the student, including, as appropriate, the student's performance on any general State or district-wide assessments as well as any special factors as set forth in federal and State regulations (34 CFR 300.324[a]; 8 NYCRR 200.4[d][2]).

As noted above, the CSE convened on May 1, 2019 to conduct an annual review and develop the student's IEP for the 2019-20 school year (Dist. Exs. 4 at p. 22; 5 at p. 2). According to the resultant IEP and the May 13, 2019 prior written notice, the CSE had evaluative information about the student consisting of the following: an April 2018 psychoeducational report, an April 2018 social history update, a May 2018 classroom observation, the May 2018 IEP, results of a spring 2018 administration of the New York State English as a Second Language Achievement Test, September 2018 home survey/student interest inventory, a September 2018 IEP questionnaire completed by the parents, teacher and provider documented observations from September 2018-April 2019, an April 2019 PT school function assessment, April 2019 fine motor subtest Student Annual Needs Determination Inventory (SANDI) results, and October 2018 and spring 2019 results of assessments including the SANDI, Dolch Sight Word list, Reading A-Z/Raz-Kids, Formative Assessment of Standards Tasks (FAST), Unique Learning System, and EQUALS (Dist. Exs. 4 at pp. 1-8; 5 at p. 2). In addition to this information, when the CSE reconvened in June 2019, it reviewed a June 2019 assistive technology evaluation report (Dist. Exs. 10; 14 at p. 2).[10] As noted above, the May 2019 IEP reflected results from the March 2019 private psychological evaluation (compare Dist. Ex. 4 at pp. 2-3, 6, with Parent Ex. N at pp. 4-5, 10-12), and the evaluation report was discussed by the CSE at the June 2019 meeting (see Tr. pp. 64, 88; Dist. Exs. 26 at p. 1; 27 at p. 1).

According to the June 2019 IEP, the student followed "an instructional program based on the Common Core Learning Standards (CCLS) with accommodations and modifications" (Dist.

[9] On appeal, the parents assert that "the June 19, 2019 CSE had more than sufficient information that the [p]arents had provided" (Req. for Rev. ¶ 11). As such, the sufficiency of the evaluative information available to the May and June 2019 CSEs is not an issue to be resolved in this matter.

[10] The hearing record does not contain the physical documents the May and June 2019 CSEs relied on, except the March 2019 private psychological evaluation report and the June 2019 assistive technology evaluation report (Parent Exs. F at pp. 2-12; N at pp. 2-12; Dist. Exs. 2; 10). Although the parents allege that the IHO erred in finding that "the June 20, 2019 IEP accurately reflected the results of the evaluations" their argument specifically relates to the allegation discussed above that based on the district's admission that the CSE did not consider the March 2019 private psychological evaluation, the district "could not have produced a plan that considered the report's findings" (Req. for Rev. ¶ 7). Absent an assertion that the remainder of the June 2019 IEP present levels of performance are inaccurate, they will be discussed in the context of identifying the student's needs in order to address the parents' remaining claims on appeal.

Ex. 13 at p. 3). Results of reading assessments administered to the student in spring 2019 indicated that she had achieved 80 percent accuracy on the Dolch pre-primer sight vocabulary word list and reading skills at a first grade level (id. at pp. 1, 3-4, 19). The IEP provided specific details about the student's skills, including that she read 20 common high frequency words, read and followed five simple instructions to perform actions, identified letters, verbalized letter sounds, decoded consonant-vowel-consonant words, and read stories with picture supports and repetitive vocabulary (id. at p. 3). Additionally, the student answered multiple choice comprehension questions with supports, and read and matched vocabulary words to pictures (id. at pp. 3-4). Regarding reading needs, the IEP indicated that the student struggled to make and read new rhyming words in word families, and worked on skills such as identifying familiar survival signs/symbols, using pictures to retell the main topic and key details of a familiar text, and identifying book aspects including title and author (id. at p. 3). The student also struggled to make inferences and draw conclusions from a story, identify the author's purpose, the main topic, key details, and the setting of a text (id. at p. 4).

In writing, the June 2019 IEP indicated that the student's skills were at a kindergarten level, and that she could perform tasks such as tracing various shapes, copying simple words, writing numbers 1-10, and copying letters from a model (Dist. Ex. 13 at p. 4). According to the IEP, the student wrote her first name independently, and drew pictures of houses and people with five recognizable features (id.). The student struggled using straight and curved lines to make certain shapes, and the teacher reported that the student was working on coloring within the lines and extending two-shape patterns (id.).

Regarding math, the June 2019 IEP reflected results of assessments indicating that the student's skills were on a kindergarten level (Dist. Ex. 13 at pp. 1, 2, 4, 19). Specifically, the student was able to match pairs of circles by size, build a tower using two sets of blocks, tell "how many" on request given sets of objects in varying amounts, and give one item to each member in a group (id. at p. 4). The student also counted using 1:1 correspondence, counted forward numbers from a number, counted numbers 1-40, matched numbers 1-40 in correct number sequence, attended/explored math tools, repeated a daily schedule, located dates on a calendar, and matched ABAB patterns, objects by color attribute, and analog and digital time on a clock; telling analog time to the hour with support (id.). According to the IEP, the student needed to improve her ability to identify coins, count forward by threes, solve addition problems with sums up to 10, sort 20 pictures into 5 groups by category, read and answer questions about a pictograph, and identify amounts of whole, half, and quarter (id.).

Results of the SANDI reflected in the June 2019 IEP indicated that the student "made progress since her last assessment" and reported increased scores in reading, writing, math, and social/emotional measures (Dist. Ex. 13 at pp. 5-6). Further, FAST assessment results showed progress from benchmark 1 to benchmark 2 (id. at p. 6). The IEP indicated that the student was expected to master her new goals within one year, while working on new skills using instructional strategies such as class activities, discrete trial instruction, independent work, 1:1 instruction, technology, related services, and hands-on practice (id.).

The June 2019 IEP described that the student was "minimally verbal" and communicated using mostly single words but could use/imitate simple sentences up to four words with prompting (Dist. Ex. 13 at pp. 5, 7). At times her speech was unintelligible due to articulation errors (id. at

p. 5). The student followed simple and familiar two-step commands with repetition, demonstrated fair vocabulary knowledge of familiar items, and answered some Wh questions with prompting (id.). The IEP indicated that the student needed to improve her skills at answering a variety of Wh questions and sequencing four scene cards (id.). According to the IEP, the student received English as a New Language (ENL) services and her "home language" was Cantonese (id. at p. 6). During ENL sessions, the student needed frequent verbal prompts to stay on task and reminders that she could earn choice time after completing a task (id. at p. 5). She achieved a score at the first level (entering) on a New York State English as a Second Language Test (id. at p. 6).

Regarding activities of daily living (ADLs) and adaptive behavior, the June 2019 IEP indicated that the student was able to sign in, greet the teacher with eye contact, put away her materials, and eat independently (Dist. Ex. 13 at p. 5). The student used the bathroom appropriately, managed clothing fasteners and needed help tying her shoes (id.). In school, the teacher reported that the student was comfortable and familiar with classroom routines, transitioned easily to new activities, and was motivated by "play time" (id.).[11] She followed directions during art activities with prompts, and reportedly learned well when concrete examples and materials were provided (id.). According to the IEP, the student required verbal prompts, visual cues, manipulatives, graphic organizers, classroom rules chart, first/then board, daily schedule, and various types of reinforcements to complete all her daily activities (id. at pp. 5, 6). Her teacher reported that the student was a visual learner who participated more when lessons incorporated music, visual cues, and technology, and also a kinesthetic learner who learned best through modeling, hands on approaches, art, movement, and repetition (id. at p. 5). Additionally, the IEP indicated that the student learned best in a distraction free environment (id.).

Socially, the June 2019 IEP indicated that the student demonstrated the ability to show awareness of people in the environment, show enjoyment of self-initiated activities, respond to greetings, label emotions using pictures of real people, communicate food and drink preferences during mealtime, and express wants and needs (Dist. Ex. 13 at pp. 6-7). The teacher reported that the student had difficulty sharing toys and interacting with peers, and required language models to teach her to initiate interactions and communicate (id. at p. 7). The IEP reflected that the student needed continuous prompting to look at the task at hand and that she "engage[d] in random verbalizations/singing and repetitive body movement patterns which detract[ed] from her ability to attend" (id. at p. 5). The student also required motivating reinforcement and a variety of behavior management strategies to stay focused and elicit appropriate behaviors at school (id. at p. 7). Additionally, the IEP indicated that the student "exhibit[ed] inappropriate behaviors such as scratching herself, humming sounds, touching her face, [and] crying and screaming in the class if asked to do [a] non-preferred activity" (id.). According to the IEP the student required reminders and visual cues to stop those behaviors and was working on appropriately gaining attention in the classroom and actively participating during small group instruction by responding to requests or cues (id.). The IEP also reflected the parents' concerns about the student's repetitive behaviors; noting that the teacher reported the student exhibited behaviors such as taking items out of her backpack and putting them back in, swiping her hands away when someone tries to hold them,

[11] The June 2019 IEP also included the student's preferences regarding materials used to help her stay on task, results of a student interest inventory identifying food preferences and activities, and teacher and parent reports regarding activity preferences (Dist. Ex. 13 at pp. 6, 7).

opening and closing a closet door, and pushing her chair in and out (id.). Further, the teacher reported that those behaviors interfered with the student's ability to stay focused and that she needed visual and verbal cues to stop engaging in those behaviors (id.).

Specific to the parents' allegation on appeal regarding the CSE's consideration of the March 2019 private psychological evaluation, review of the June 2019 IEP shows that it accurately included select subtest and composite results of the March 2019 administration of the Test of Nonverbal Language-Fourth Edition (TONI-4), Wechsler Intelligence Scale for Children-Fifth Edition (WISC-V), Expressive Vocabulary Test-Third Edition (EVT-3), Peabody Picture Vocabulary Test-Fifth Edition (PPVT-5), Kaufman Test of Educational Achievement-Third Edition (KTEA-3), Behavior Assessment System for Children-3rd Edition (BASC-3), and the Adaptive Behavior Assessment System-3 (ABAS-3) (compare Parent Ex. N at pp. 10-11, with Dist. Ex. 13 at pp. 2-3). From the March 2019 private psychological evaluation report the IEP reflected "'cognitive testing was attempted, but quite limited given [the student's] degree of disability and therefore a Full Scale IQ and composite scores on the WISC-V were not able to be calculated validly'" (Dist. Ex. 13 at p. 6; see Parent Ex. N at p. 4). Results indicated that the student's performance fell at the 19th percentile on a measure of nonverbal intelligence (TONI-4); she demonstrated an area of relative strength on a measure of pattern analysis and problem solving, achieving a score in the average range (Dist. Ex. 13 at p. 6; see Parent Ex. N at pp. 4-5). The IEP also included that results of single-word vocabulary tasks indicated that the student's "performance fell well below expectations," academic testing revealed delays in reading, spelling, and math skills (Dist. Ex. 13 at p. 6; see Parent Ex. N at p. 5). The student's mother's responses on the BASC-3 indicated "clinically significant concerns in the areas of atypicality, somatization, attentional problems, and functional communication skills," as well as at-risk concerns regarding the student's hyperactivity (Dist. Ex. 13 at p. 6; see Parent Ex. N at p. 5). Result of the ABAS-3 reflected in the IEP indicated that the student's adaptive behavior skills were "significantly underdeveloped" (Dist. Ex. 13 at p. 6, see Parent Ex. N at pp. 5-6).

As discussed above, the evidence in the hearing record shows that the CSE reviewed the March 2019 private psychological evaluation report and incorporated some of the evaluative information into the June 2019 IEP, together with evaluative information from a number of other sources (Tr. pp. 88, 91; Dist. Ex. 13 at pp. 1-7). The parents take issue with the CSEs' failure to adopt the recommendations in the private evaluation—discussed below—but do not point to specific needs of the student described in the evaluation that the IEP present levels of performance omitted or inaccurately stated. Accordingly, the evidence in the hearing record does not provide a basis to find that any deficiency in the June 2019 IEP present levels of performance rises to the level of a denial of a FAPE.

b. Special Factors—Interfering Behaviors

Next, the parents argue that the IHO erred in determining that the student's program was appropriate despite the lack of a BIP, in light of the CSE's recommendations for other services including paraprofessional services, OT, and speech-language therapy. The parents also assert that the June 2019 IEP lacked goals to address the student's "complex behavioral issues" (Parent Mem. of Law at pp. 19-20).

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. of Shenendehowa Cent. Sch. Dist., 361 Fed. App'x 156, 160 [2d Cir. Oct. 16, 2009]; A.C., 553 F.3d at 172). State procedures for considering the special factor of a student's behavior that impedes his or her learning or that of others may also require that the CSE consider developing a BIP for a student that is based upon an FBA (8 NYCRR 200.4[d][3][i], 200.22[a]-[b]). Additionally, a district is required to conduct an FBA in an initial evaluation for students who engage in behaviors that impede their learning or that of other students (8 NYCRR 200.4[b][1][v]). State regulation defines an FBA as "the process of determining why a student engages in behaviors that impede learning and how the student's behavior relates to the environment" and includes, but is not limited to:

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

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

The Second Circuit has indicated 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; see L.O. v. New York City Dep't of Educ., 822 F.3d 95, 113 [2d Cir. 2016]). 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 (R.E., 694 F.3d at 190).

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

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

(8 NYCRR 200.22[b][1]). If the CSE determines that a BIP is necessary for a student "the [BIP] shall identify: (i) the baseline measure of the problem behavior, including the frequency, duration, intensity and/or latency of the targeted behaviors . . . ; (ii) the intervention strategies to be used to alter antecedent events to prevent the occurrence of the behavior, teach individual alternative and adaptive behaviors to the student, and provide consequences for the targeted inappropriate behavior(s) and alternative acceptable behavior(s); and (iii) a schedule to measure the effectiveness of the interventions, including the frequency, duration and intensity of the targeted behaviors at scheduled intervals (8 NYCRR 200.22[b][4]).[12]

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

As discussed above, the June 2019 IEP indicated that the student "exhibit[ed] inappropriate behaviors such as scratching herself, humming sounds, touching her face, [and] crying and screaming in the class if asked to do [a] non-preferred activity" for which, in order to stop, she required "reminders and visual cues" (Dist. Ex. 13 at p. 7). The IEP reflected teacher reports that the student exhibited repetitive behaviors such as taking items out of her backpack and putting them back in, swiping her hands away when someone tries to hold them, opening and closing a closet door, and pushing her chair in and out (id.). Further, the teacher reported that those behaviors interfered with the student's ability to stay focused and that she needed visual and verbal cues to stop engaging in those behaviors (id.).

As noted above, it does not appear that the May or June 2019 CSEs considered the December 2018 Achieve Beyond ABA reassessment and treatment plan, notwithstanding that the report was available to the CSE as the parents provided the report to the district on April 18, 2019 and requested that it be considered in developing the student's IEP (Parent Ex. O at p. 1; see Tr. pp. 34-35; Dist. Exs. 5 at p. 2; 14 at p. 2).[13] The report provided results from an FBA of the student

[12] The Official Analysis of Comments to the federal regulations explains that the decision regarding whether a student requires interventions such as a BIP rests with the CSE and is made on an individual basis (Consideration of Special Factors, 71 Fed. Reg. 46683 [August 14, 2006]). However, neither the IDEA nor its implementing regulations require that the elements of a student's BIP be set forth in the student's IEP. State guidance indicates that New York State regulations merely "require that a student's need for a BIP be documented in the student's IEP" ("Student Needs Related to Special Factors," Office of Special Educ. [April 2011], available at http://www.p12.nysed.gov/specialed/formsnotices/IEP/training/QA-411.pdf). Once a student's BIP is developed and implemented, "such plan shall be reviewed at least annually by the CSE or CPSE" (8 NYCRR 200.22[b][2]). Furthermore, "[t]he implementation of a student's [BIP] shall include regular progress monitoring of the frequency, duration and intensity of the behavioral interventions at scheduled intervals, as specified in the [BIP] and on the student's IEP. The results of the progress monitoring shall be documented and reported to the student's parents and to the CSE or CPSE and shall be considered in any determination to revise a student's [BIP] or IEP" (8 NYCRR 200.22[b][5]).

[13] The student's "ABA [t]herapist" participated at the May and June 2019 CSE meetings by telephone (Tr. pp. 31, 34-45; Dist. Exs. 4 at p. 26; 13 at p. 22).

conducted between September and December 2018, and goals to reduce or eliminate target behaviors (see Parent Ex. O at pp. 1-7). According to the report, Achieve Beyond staff identified ritualistic behavior (repeating actions immediately following them being previously completed by another individual out of a natural context) and negative vocalizations (any instance of crying, whining, or screaming without tears) (id. at pp. 3-4). The plan included behavior reduction goals with short-term objectives for each target behavior and a functional replacement behavior goal to be achieved by June 2019 (id. at pp. 6-7). Additionally, the plan included a list of proactive strategies (verbal praise, verbal reminders, movement breaks) and reactive strategies (verbal redirection, continue with demand, block access to an item the student was not allowed to touch, find an alternate manipulative) (id. at p. 7). During the impartial hearing, the special education teacher was questioned about the ritualistic and negative vocalization behaviors described in the Achieve Beyond report, at which time she acknowledged that "sometimes" the student exhibited those behaviors in class (Tr. p. 37). She explained that there wasn't any "behavior intervention" for those behaviors because the student had a 1:1 paraprofessional "[s]o therefore she doesn't require [a] BIP or [an] FBA, . . . because her behavior [wa]s not . . . too bad" (Tr. pp. 37-38). The special education teacher testified that the student's behavior occurred "once in a while" and that when it occurred, "we redirect[ed] her" using visual cues and that the student "calm[ed] down right away," adding there was "not harm to anyone" (Tr. p. 38).

The special education teacher testified that she was aware of information included in the March 2019 private psychological evaluation report from a classroom observation of the student (Tr. pp. 28, 36-37; Parent Ex. N at p. 4). The report indicated that during the observation the student "initially appeared distractible and required prompting for the morning greeting and maintaining eye contact" (Parent Ex. N at p. 4). Next, the student displayed difficulty with fine motor skills and coloring in the lines (id.). While she accurately identified lowercase letters and some close-ended questions the student otherwise had difficulty with independent work (id.). She was observed to "smoothly" transition to a group activity but required support to engage with her peers (id.). According to the March 2019 private psychological evaluation report, the teacher reported during the observation that although the student's ADL skills had improved, "she require[d] a lot more prompting and redirection throughout the day" (id.). The teacher also reported that the student "continue[d] to display repetitive, obsessive-compulsive behaviors," and that, when interventions were attempted to prevent the behaviors, the student "appear[ed] to get frustrated and scream[ed]" (id.). Regarding the teacher's description of the student's behaviors at the time of the observation, the special education teacher testified that "sometimes that's [the student's] behavior," which "sometimes" was disruptive to the student's learning or others in her classroom (Tr. pp. 36-37). The private evaluators concluded that the student "require[d] a consistent and individualized behavioral plan to increase the likelihood of positive behaviors (e.g., social interaction, attention, participation) and decrease the likelihood of negative behaviors (e.g., avoidance, self-injury, elopement, tantrums), in addition to a "highly structured classroom with behavioral supports that [could] address her complicated language, behavioral, and social needs" (Parent Ex. N at p. 7).

The special education teacher testified that during the course of the 2018-19 school year she observed "improvement" in the student's behaviors, in that at the beginning of the year the student's behaviors "happened most of the time," but by "the end of the year, she was pretty good" (Tr. pp. 42-43). The special education teacher explained that she used visual cues, provided time for the student to "calm down" and redirected the student "all the time" so she would focus more

(id.). In the management needs section of the June 2019 IEP, the CSE determined that the student "require[d] a highly structured learning environment with visual supports-including prompts, redirection and repetition," and also that [s]he benefit[ted] from having a daily schedule, discrete trial instruction (DTI), visual cues, verbal praise, and related services to meet her academic, language, social and emotional needs" (Dist. Ex. 13 at p. 8). Additionally, the CSE identified that the student's management needs required supports including a "first and then board, computer time, [and a] happy face chart for her positive behavior" (id.).

The June 2019 IEP provided approximately nine annual goals and corresponding short-term objectives to address the student's reading, writing, math, social/emotional, graphomotor, visual motor, and communication skills (Dist. Ex. 13 at pp. 10-14). The special education teacher testified that the June 2019 IEP did not include annual goals to reduce the student's "negative behaviors" such as screaming or engaging in ritualistic behaviors because her "responsibility" was to develop academic and social/emotional goals (Tr. p. 40). Additionally, according to the special education teacher, behavior goals needed to be developed only if it was determined that a student required a BIP (Tr. pp. 40-41).

The June 2019 CSE determined that the student did not require positive behavioral interventions to address behaviors that impeded the student's learning or that of others, and also that she did not require a BIP (Dist. Ex. 13 at p. 9). Although the special education teacher testified that part of the rationale for the student not needing a BIP was that she had 1:1 paraprofessional services, the IEP specifically designated that the "health paraprofessional" was for "safety issues" related to the student's allergies and her tendency to put various things in her mouth and did not otherwise indicate those services would address the student's behavior needs (Tr. pp. 37-38; Dist. Ex. 13 at pp. 9, 15). Further, the special education teacher's testimony suggested that she "tried to do one-to-one" with the student at times, and use ABA methods when the student exhibited behaviors, but 1:1 instruction is not offered in the June 2019 IEP, and, as discussed below, the district has not shown that it addressed the recommendations for ABA included in the private evaluation reports within the student's IEPs (see Tr. pp. 42-43; Dist. Ex. 13). That the special education teacher used particular methodologies or provided more individualized support for the student during the 2018-19 school year was not a guarantee that such methods or level of support would be continued during the 2019-20 school year absent provision for the same on the student's IEP.

Therefore, given the lack of annual goals or a BIP to address the student's behaviors that interfered with her learning or that of others, the evidence in the hearing record does not support the IHO's finding that the June 2019 IEP offered the student a FAPE.

c. ABA Methodology

Finally, the parents assert on appeal that the IHO erred in finding that the June 2019 IEP was appropriate absent a recommendation for the use of ABA methods throughout the school day, noting that the evaluative information provided by the parents showed that the student required ABA instruction, which was not contradicted by any other evaluative information available to the May and June CSEs.

The precise teaching methodology to be used by a student's teacher is usually a matter to be left to the teacher's discretion—absent evidence that a specific methodology is necessary (Rowley, 458 U.S. at 204; R.B. v. New York City Dep't of Educ., 589 Fed. App'x 572, 575-76 [2d Cir. Oct. 29, 2014]; A.S. v. New York City Dep't of Educ., 573 Fed. App'x 63, 66 [2d Cir. July 29, 2014]; K.L. v. New York City Dep't of Educ., 530 Fed. App'x 81, 86 [2d Cir. July 24, 2013]; R.E., 694 F.3d at 192-94; M.H., 685 F.3d at 257). As long as any methodologies referenced in a student's IEP are "appropriate to the [student's] needs," the omission of a particular methodology is not necessarily a procedural violation (R.B., 589 Fed. App'x at 576 [upholding an IEP when there was no evidence that the student "could not make progress with another methodology"], citing 34 CFR 300.39[a][3] and R.E., 694 F.3d at 192-94).

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

At the conclusion of the March 2019 private psychological evaluation, the evaluators indicated that the student "display[ed] deficits across domains of expressive and receptive language, social communication and interaction, and sensory integration" (Parent Ex. N at p. 6). Additionally, the evaluators determined that the student "evidence[d] challenges with attention, reciprocity, and emotional reactivity" (id.). Although the student "ha[d] made some progress in her current school setting, all of her skills remain[ed] well below the expected level when compared to same-age peers" (id.). As such, the evaluators found that "intensive intervention [wa]s of supreme importance" and that the student "require[d] a full-time [] ABA program in order to develop the prerequisite skills for a less restrictive setting" (id. at pp. 6, 7). Specifically, the evaluators recommended that the student's placement entail a "1:1 teacher-to-student ratio which [could] provide intensive direct instruction utilizing a data-driven, full-time ABA program," and that 1:1 ABA instruction be provided "throughout the day" (id. at p. 7). The evaluators also determined that "it [wa]s essential" that [the student] receive at least 15 to 20 hours of home-based ABA services in order to improve adaptive skills, facilitate generalization of skills across settings, and prevent regression" (id. at p. 6). Further, the evaluators indicated that the level of intervention recommended was "required in order to increase [the student's] functional communication, improve her emotion regulation skills and adaptability, decrease her self-directed behaviors, and support her attentional needs" (id.).

The evidence in the hearing record shows that during the 2018-19 school year the student received some in-school instruction using ABA methods (see Tr. pp. 42-44; Parent Ex. O at p. 2).

Specifically, the special education teacher testified that "every day" students received "two periods" or approximately 80 minutes of 1:1 ABA instruction in subjects such as reading, writing and math from either herself or the paraprofessional (Tr. pp. 43-45).

The student's mother testified that during the May and June 2019 CSE meetings she requested that the student be provided with an ABA program as outlined in the March 2019 private psychological evaluation report (Parent Ex. BB at pp. 3, 4; see Tr. p. 119; Parent Exs. D; J). According to the parent, district CSE members informed her that they would not include ABA on the student's IEP, and that once the student was placed in a class, the teacher of that class "would decide what was best for [the student]" (Parent Ex. BB at pp. 3, 4).

While there is some merit to the proposition that methodology be left to the teacher's discretion, under the circumstances presented here, the district has not met its burden of showing that the student's program did not require the inclusion of ABA instructional methodologies on her IEP in order for the student to receive a FAPE. More specifically, in light of the student's prior receipt of instruction using ABA methodology, the recommendations in the private evaluation, and the parents' request for ABA, it was incumbent upon the district to offer evidence during the impartial hearing that the student could receive educational benefit without the inclusion of ABA methodology on her IEP, which the district failed to do (see A.M., 845 F.3d at 543 [2d Cir. 2017] ["when the reports and evaluative materials present at the CSE meeting yield a clear consensus, an IEP formulated for the child that fails to provide services consistent with that consensus" does not offer a FAPE]). Therefore, in combinations with the CSEs' failure to recommend sufficient support to address the student's interfering behaviors, the district's failure to meet its burden to show that the student did not require ABA methodology contributes to a finding that the district failed to offer the student a FAPE for the 2019-20 school year.

B. Unilateral Placement

A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak, 142 F.3d at 129). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (Carter, 510 U.S. at 13-14). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ. of the City Sch. Dist. of Yonkers, 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement'" (Gagliardo, 489 F.3d at 112, quoting Frank G. v. Bd. of Educ. of Hyde Park, 459 F.3d 356, 364 [2d Cir. 2006]; see Rowley, 458 U.S. at 207). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). When determining whether a unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether the placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see Gagliardo, 489 F.3d at 115; Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] ["evidence of academic progress at a private school does not itself establish that the private

placement offers adequate and appropriate education under the IDEA"]). A private placement is appropriate if it provides instruction specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; Educ. Law § 4401[1]; 34 CFR 300.39[a][1]; 8 NYCRR 200.1[ww]; Hardison v. Bd. of Educ. of the Oneonta City Sch. Dist., 773 F.3d 372, 386 [2d Cir. 2014]; C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 836 [2d Cir. 2014]; Gagliardo, 489 F.3d at 114-15; Frank G., 459 F.3d at 365).

The Second Circuit has set forth the standard for determining whether parents have carried their burden of demonstrating the appropriateness of their unilateral placement.

> No one factor is necessarily dispositive in determining whether parents' unilateral placement is reasonably calculated to enable the child to receive educational benefits. Grades, test scores, and regular advancement may constitute evidence that a child is receiving educational benefit, but courts assessing the propriety of a unilateral placement consider the totality of the circumstances in determining whether that placement reasonably serves a child's individual needs. To qualify for reimbursement under the IDEA, parents need not show that a private placement furnishes every special service necessary to maximize their child's potential. They need only demonstrate that the placement provides educational instruction specially designed to meet the unique needs of a handicapped child, supported by such services as are necessary to permit the child to benefit from instruction.

(Gagliardo, 489 F.3d at 112, quoting Frank G., 459 F.3d at 364-65).

With regard to whether the parents' unilateral placement was appropriate to address the student's needs during the 2019-20 school year, the evidence shows that Gersh is a full-time special education school primarily for students on the autism spectrum between the ages of 5 and 21 years old (kindergarten through the last year of high school eligibility) (Parent Exs. Z at pp. 8, 10, 24; CC at pp. 1, 2). According to the assistant principal for students on the autism spectrum (assistant principal), students at Gersh generally have diagnoses including autism, anxiety, attention deficit hyperactivity disorder, obsessive compulsive disorder, and nonverbal learning disability, with behavior problems resulting from language deficits, compulsions, hyperactivity, mood swings, and social skill deficits (Parent Ex. CC at p. 2). During the 2019-20 school year, 180 students were enrolled and attended Gersh in kindergarten through high school, and students were grouped into classes by age, functional levels, and social skills levels (id. at pp. 3, 10). Each classroom at Gersh, the majority of which have no more than six students, is staffed with a teacher, at least one teaching assistant, and usually one to two paraprofessionals, depending on the needs of the students in the class (id. at p. 4). All teachers at Gersh have a degree or are pursuing a degree in special education, and many have State-issued teaching licenses; teaching assistants at Gersh are either certified as such or have been extensively trained for that role (id. at p. 5). One-to-one assistants work with students directly for both instruction and behavioral support, follow the students' behavior plans, provide sensory breaks, implement ABA strategies, and otherwise support students throughout the day (id.).

Gersh offers related services to students including counseling, speech-language therapy, OT, and PT (Parent Ex. CC at p. 5). The school psychologist conducts FBAs and develops BIPs, which are overseen by Board Certified Behavior Analysts (BCBAs) (Parent Ex. CC at p. 6). Gersh also employs crisis intervention specialists, trained in Collaborative Problem-Solving (a therapeutic methodology) and Crisis Intervention and Prevention (a specific technique); the crisis intervention specialists provide therapeutic intervention to students who present with aggression, acting out behavior, or tantrums (id. at pp. 7-8).

Beginning in July 2019, the student was enrolled in the behavioral, academic, and social enrichment (BASE) program, which the assistant principal described as a program for students with cognitive impairments whereby the primary focus is on improving life skills and ADL skills and learning functional academic skills (Parent Ex. CC at pp. 3, 11). Gersh used ABA as an instructional methodology for students in the BASE program (id. at p. 8). The student's class was composed of a special education teacher, a teacher assistant, and five other students with autism between the ages of 11 and 13 who exhibited academic, social, and functional deficits similar to those of the student (id. at pp. 12-13). According to the student's 2019-20 Gersh schedule, she received daily instruction in math, reading/writing, science, social skills, and ADL skills, and at various times during the week also received instruction in physical education and art (Parent Ex. X). Gersh provided the student with three 30-minute sessions per week of individual OT, one 30-minute session per week of individual PT, and four 30-minute sessions per week of individual speech-language therapy (Parent Ex. P at pp. 1, 12, 20). Additionally, Gersh conducted an FBA and developed a BIP for the student that addressed behaviors including self-injury and repetitive behaviors (id. at pp. 5-11).

In an affidavit, the assistant principal testified that, during the 2019-20 school year, the student's teacher and all related service providers addressed her learning needs by providing the student with supports, such as frequent verbal prompts, encouragement to communicate verbally, self-care and ADL support, sensory and movement breaks throughout the day, and instruction using "ABA throughout the entire day across all settings including discrete trials for academics" (Parent Ex. CC at p. 13). She further testified that using ABA, Gersh staff worked on the student's attention and focusing, academic skills, ability to follow multistep directions, and voice modulation, ADL and self-care, socialization, communication, and motor planning skills (id.). According to the assistant principal, the supports Gersh provided "were effective and allowed the student to make significant progress in all areas of her learning" with the use of discrete trials; for example, the student recognized third grade sight words and answered comprehension questions with minimal verbal prompting, and was able to read a level A book from the Edmark reading program (id. at pp. 14, 15; see Parent Ex. P at pp. 17). Additionally, the student added single digit numbers up to 10 with manipulatives (Parent Ex. CC at p. 14; see Parent Ex. P at p. 18). Further, the student improved her ability to articulate wants and needs, ask for help, and use coping strategies to self-regulate and manage challenging situations (Parent Ex. CC at p. 15; see Parent Ex. P at pp. 18-19). Overall, the assistant principal testified that Gersh was an appropriate placement for the student because she made "significant and meaningful gains" (Parent Ex. CC at p. 15). Review of the Gersh progress reports from spring 2020 show that the student demonstrated improvements in academic skills and skills that were addressed by related services (see Parent Ex. P).

Regarding the instruction the student received during Gersh's school closure due to COVID-19, the assistant principal stated that Gersh began providing remote instruction to students on March 23, 2020 and a distance learning plan was developed for the student which continued through June 2020 (Parent Ex. CC at p. 14; see Parent Ex. AA). According to the distance learning plan, the student received synchronous and asynchronous instruction in ADLs, ELA, math, social thinking/social skills, social studies, science, vocational activities, art, and physical education (see Parent Ex. AA). Additionally, the student received speech therapy and OT (see id.). The assistant principal stated that although she would have liked the student to have made more progress during the remote instruction period, the student did learn and continued to make progress during the school closure, therefore, she concluded that the remote instruction Gersh provided was appropriate and met the student's learning needs (Parent Ex. CC at p. 14).

Overall, the evidence in the hearing record supports a finding that Gersh provided the student with specially designed instruction to meet her unique needs and that she made progress during the 2019-20 school year.

C. Equitable Considerations

The final criterion for a reimbursement award is that the parents' claim must be supported by equitable considerations. Equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; R.E., 694 F.3d at 185, 194; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 68 [2d Cir. 2000]; see Carter, 510 U.S. at 16 ["Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable"]; L.K. v. New York City Dep't of Educ., 674 Fed. App'x 100, 101 [2d Cir. Jan. 19, 2017]). With respect to equitable considerations, the IDEA also provides that reimbursement may be reduced or denied when parents fail to raise the appropriateness of an IEP in a timely manner, fail to make their child available for evaluation by the district, or upon a finding of unreasonableness with respect to the actions taken by the parents (20 U.S.C. § 1412[a][10][C][iii]; 34 CFR 300.148[d]; E.M. v. New York City Dep't of Educ., 758 F.3d 442, 461 [2d Cir. 2014] [identifying factors relevant to equitable considerations, including whether the withdrawal of the student from public school was justified, whether the parent provided adequate notice, whether the amount of the private school tuition was reasonable, possible scholarships or other financial aid from the private school, and any fraud or collusion on the part of the parent or private school]; C.L., 744 F.3d at 840 [noting that "[i]mportant to the equitable consideration is whether the parents obstructed or were uncooperative in the school district's efforts to meet its obligations under the IDEA"]).

Reimbursement may be reduced or denied if parents do not provide notice of the unilateral placement either at the most recent CSE meeting prior to their removal of the student from public school, or by written notice ten business days before such removal, "that they were rejecting the placement proposed by the public agency to provide a [FAPE] to their child, including stating their concerns and their intent to enroll their child in a private school at public expense" (20 U.S.C. § 1412[a][10][C][iii][I]; see 34 CFR 300.148[d][1]). This statutory provision "serves the important purpose of giving the school system an opportunity, before the child is removed, to assemble a team, evaluate the child, devise an appropriate plan, and determine whether a [FAPE] can be provided in the public schools" (Greenland Sch. Dist. v. Amy N., 358 F.3d 150, 160 [1st

Cir. 2004]). Although a reduction in reimbursement is discretionary, courts have upheld the denial of reimbursement in cases where it was shown that parents failed to comply with this statutory provision (Greenland, 358 F.3d at 160; Ms. M. v. Portland Sch. Comm., 360 F.3d 267 [1st Cir. 2004]; Berger v. Medina City Sch. Dist., 348 F.3d 513, 523-24 [6th Cir. 2003]; Rafferty v. Cranston Public Sch. Comm., 315 F.3d 21, 27 [1st Cir. 2002]); see Frank G., 459 F.3d at 376; Voluntown, 226 F.3d at 68).

The evidence in the hearing record shows that the parents provided the district with private evaluation reports, attended both the May and June 2019 CSE meetings, and provided timely notices to the district regarding their disagreement with the CSEs' recommendations and their decision to unilaterally place the student at Gersh and seek reimbursement from the district (Parent Exs. D; E; G J; L; N; O; Dist. Exs. 4 at p. 26; 13 at p. 22). Therefore, there is no basis in the hearing record to reduce or deny the parents' requested relief related to equitable considerations.

D. Relief

The parents request that the district directly pay Gersh the remainder of what the parents owe the school for the 2019-20 school year.

With regard to fashioning equitable relief, courts have determined that it is appropriate under the IDEA to order a school district to make retroactive tuition payment directly to a private school where: (1) a student with disabilities has been denied a FAPE; (2) the student has been enrolled in an appropriate private school; and (3) the equities favor an award of the costs of private school tuition; but (4) the parents, due to a lack of financial resources, have not made tuition payments but are legally obligated to do so (Mr. and Mrs. A. v. New York City Dep't of Educ., 769 F. Supp. 2d 403, 406 [S.D.N.Y. 2011]; see E.M., 758 F.3d at 453 [noting that "the broad spectrum of equitable relief contemplated [by] the IDEA encompasses, in appropriate circumstances, a direct-payment remedy" [internal quotation marks omitted]). The court held that "[w]here . . . parents lack the financial resources to 'front' the costs of private school tuition, and in the rare instance where a private school is willing to enroll the student and take the risk that the parents will not be able to pay tuition costs—or will take years to do so—parents who satisfy the Burlington factors have a right to retroactive direct tuition payment relief" (Mr. and Mrs. A., 769 F. Supp. 2d at 428; see also A.R. v. New York City Dep't of Educ., 2013 WL 5312537, at *11 [S.D.N.Y. Sept. 23, 2013]). Since the parents selected Gersh as the unilateral placement, and their financial status is at issue, it is the parents' burden of production and persuasion with respect to whether they have the financial resources to "front" the costs of Gersh and whether they are legally obligated for the student's tuition payments (Application of a Student with a Disability, Appeal No. 12-036; Application of a Student with a Disability, Appeal No. 12-004; Application of the Dep't of Educ., Appeal No. 11-130; Application of the Dep't of Educ., Appeal No. 11-106; Application of a Student with a Disability, Appeal No. 11-041).

Here, the parents established a legal obligation to pay the student's tuition at Gersh for the 2019-20 school year (Parent Ex. W). The evidence in the hearing record shows that the parents made a payment of $5,000 to Gersh (Parent Ex. U). The student's mother testified that she is responsible for paying Gersh the entire amount they committed to but that the parents could not afford to pay the student's "entire tuition up front" (Parent Exs. BB at p. 5; W). Other than the testimony of the student's mother that they could not afford the entire tuition up front, there is no

evidence in the hearing record regarding the parents' financial resources, such as a copy of a recent tax return or evidence regarding the parents' assets, liabilities, income, or expenses. Given the lack of information in the hearing record regarding the parents' financial resources, I decline to order the district to directly fund the student's tuition. However, the district will be required to reimburse the parents for the costs of the student's tuition at Gersh for the 2019-20 school year upon the parents' submission of proof of payment.

VII. Conclusion

Having determined that the evidence in the hearing record shows that the district failed offer the student a FAPE for the 2019-20 school year, that Gersh was an appropriate unilateral placement and equitable considerations weigh in favor of the parents' request for relief, the parents are entitled to tuition reimbursement for the student's attendance at Gersh.

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

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision, dated March 25, 2021, is modified by reversing that portion which found that the district offered the student a FAPE for the 2019-20 school year; and

IT IS FURTHER ORDERED that the district shall reimburse the parents for the cost of the student's tuition, related services, and transportation at Gersh for the 2019-20 school year upon the parents' submission to the district of proof of payment.

Dated: **Albany, New York**
June 10, 2020

STEVEN KROLAK
STATE REVIEW OFFICER