



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 21-229

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

#### **Appearances:**

Liz Vladeck, General Counsel, attorneys for petitioner, by Ezra Zonana, Esq.

The Law Offices of Neal H. Rosenberg, attorneys for respondents, by Meredith Duchon, 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. Petitioner (the district) appeals from the decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to respondents' (the parents') son and ordered it to reimburse the parents for their son's tuition costs at the Gillen Brewer School (Gillen Brewer) for the 2020-21 school year. The parents cross-appeal from the IHO's failure to find additional reasons as to why the district failed to offer the student an appropriate educational program. The appeal must be sustained. The cross-appeal must be dismissed.

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

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

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

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

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

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

At the time of the impartial hearing the student was six years old and had previously been found to meet the criteria for diagnoses of an autism spectrum disorder (ASD), language disorder, and speech sound disorder (Dist. Ex. 9 at pp. 1, 16). The student also had fine motor weaknesses and sensory processing deficits, and he needed support to build on his gross motor skills and motor planning (id. at pp. 15-16, 17-18).

The hearing record shows that when the student was approximately 20 months old his parents became concerned "when they noticed a lack of eye contact and less language than they expected" (Dist. Ex. 10 at p. 1; see Dist. Ex. 9 at p. 2). He was evaluated by the Early Intervention Program (EIP) in 2017 at approximately 22 months of age and found to exhibit language delays and characteristics of an ASD (Dist. Ex. 10 at p. 1). As a result, the student received EIP services for about one year, consisting of 20 hours of in-home applied behavioral analysis (ABA) therapy, speech-language therapy, and occupational therapy (OT), and, when the student was almost three years of age, physical therapy (PT) was added (Dist. Exs. 1 at p. 1; 10 at p. 1).

In September 2018, the student began receiving services through the Committee on Preschool Special Education (CPSE) and attended an 8:1+2 special class at center-based preschool five days a week (Dist. Ex. 10 at p. 1).

A CPSE convened on July 30, 2019, and, after finding the student continued to be eligible for special education as a preschool student with a disability, recommended that the student be placed in a 10:1+3 special class in an approved preschool and receive related services consisting of two 30-minute sessions per week in each of speech-language therapy, OT, and PT (Parent Ex. B at pp. 1, 12).<sup>1</sup>

A private developmental-behavioral pediatric evaluation was conducted over three days between November 2019 and January 2020 (January 2020 developmental-behavioral pediatric evaluation report) (Dist. Ex. 10 at p. 1). The developmental pediatrician who evaluated the student indicated that the student continued to meet the criteria for a diagnosis of ASD but, at that time, was most challenged by his language difficulty, specifically his difficulty with articulation and production of speech sounds, which hindered his progression in the social realm (id. at p. 5). The developmental pediatrician recommended that the student attend a "small, structured, specialized school for child with [ASD]" with opportunities for small group and 1:1 instruction and a "full component of social skills as part of the school curriculum" as well as speech-language therapy and OT (id.).

In addition, a private neuropsychological evaluation of the student was conducted in December 2019 and the report of the evaluation was completed on January 22, 2020 (Dist. Ex. 9 at pp. 1, 19). The evaluating neuropsychologist opined, based on her observation and assessment of the student, that significant weaknesses in language and social communication continued to impact his learning and development and he continued to require a small classroom setting and supportive services (id. at pp. 15, 17). The evaluator recommended that instructional information be presented to the student using multi-modalities, that he be provided with models when presented with new materials or needed to improve his skills, and that the student would benefit from the use of manipulatives, structure, behavioral reinforcement, repetition, prompting, and cuing when being taught academic and social skills (id. at p. 18). The evaluator stated that it was "imperative" that the student receive intensive individual and group speech-language therapy, that improving the student's social skills needed to be a core component of his IEP goals, that he required OT to address fine motor weaknesses and sensory processing deficits, that PT was indicated to address

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<sup>1</sup> The hearing record indicates that the student was switched to a 10:1+3 special class based on his "improved functioning" (Dist. Ex. 10 at p. 1).

the student's gross motor and motor planning weaknesses, that in order to support the student's social skills and healthy emotional development he required school-based counseling, that skill building, communication and self-care skills should be incorporated into the student's IEP goals, and that to support the parents' management of the student's behavior at home they participate in private counseling (id. at pp. 17-18).

Around the same time that the neuropsychological evaluation was conducted, the student's preschool special education teacher and related services providers completed reports of the student's progress as of January 27, 2020 (Dist. Exs. 5-8). The student's special education teacher detailed numerous pre-academic skills that the student had mastered including identifying shapes, colors, capital letters, and numerals 1-10 (Dist. Ex. 5 at p. 1). In addition, she noted that the student was working toward identifying letter sounds, could count up to ten objects, was able to copy a simple ABAB pattern and was able to complete a simple interlocking puzzle (id.). She indicated that the student benefitted from structure, positive reinforcement, and visual supports and recommended that the student transition to a structured environment with related services as it would ensure that he was able to enhance his acquired skills (id. at pp. 1, 3). The student's physical therapist reported that the student had demonstrated improvement in ambulation skills including the ability to negotiate non-level surfaces; balance and locomotion skills including his ability to jump and negotiate balance equipment; and object manipulation skills including improved force of kick and decreased avoidance reaction when catching a ball (Dist. Ex. 6 at pp. 2-3). In contrast, the physical therapist noted that the student continued to show weakness in: core strength and posture including decreased trunk rotation during running activities and needed the use of a mid-arm guard when negotiating stairs; coordination skills including immature ball skills and difficulty hopping and skipping; and stability skills including descending stairs with assistance or non-alternating steps and maintaining a single leg stance (id. at p. 3). She recommended PT to address the student's ability to safely and independently negotiate non-level surfaces, develop age-appropriate locomotion and object manipulation skills, and exhibit appropriate postures in all positions (id.). The student's speech-language pathologist reported that the student's receptive and expressive language skills continued to emerge (Dist. Ex. 7 at p. 1). With regard to receptive vocabulary, the student was able to identify familiar objects, object function, simple actions from his environment and pictures, and understand basic spatial concepts (id.). The speech-language pathologist indicated that the student had difficulty following multi-step related and unrelated directives (id.). She noted that the student's receptive language skills were at a 3.0 to 3.5 year-old level and that the student benefitted from redirection, gestural cues, wait time, and visual supports (id.). In terms of expressive language skills, the speech-language pathologist reported that the student continued to make progress using verbalizations for a variety of purposes but noted that the student's expressive language could be hindered as a result of his reduced speech intelligibility (id.). She reported that the student's lexicon consisted of various nouns, verbs, and some adjectives and reported that the student had been observed to engage in repetitive and echolalic language at times (id. at pp. 1-2). The speech-language pathologist reported that the student's pragmatic language skills continued to emerge and he was working to initiate and sustain interaction with peers (id. at p. 2). She judged the student's intelligibility to be "severe-moderately poor" and recommended that the student continue to receive speech-language therapy services (id.). The student's occupational therapist reported that that the student presented with delays in fine-motor and visual-perceptual skills and recommended that the student continue to receive OT (Dist. Ex. 8 at p. 2).

The district conducted an observation of the student in his preschool class on February 25, 2020 (Dist. Ex. 4). The observer reported that the student "appeared to be a quiet, friendly, and happy student who [wa]s well adjusted to his classroom environment (id. at p. 2). She reported that the student was familiar with classroom routines and followed the teacher's directions (id.). The observer noted that the student was able to participate in small group activities, take turns, and follow visually displayed class rules with minimal reminders (id.). In addition, the student the student transitioned without difficulty and interacted appropriately with peers and adults (id.). The observer reported that the student was quiet during the observation except when he was prompted (id.). She stated that no behavioral difficulties were noted or reported (id.).

On or about March 18, 2020, the parents signed a contract for the student to attend Gillen Brewer in a 10:1+2 class for the 2020-21 school year beginning September 10, 2020 (Parent Ex. L).<sup>2</sup>

On March 30, 2020, a CSE convened to determine the student's initial eligibility for special education as a school-aged student with a disability (Dist. Ex. 1 at pp. 1, 22). The CSE reviewed the January 2020 neuropsychological report, the January 2020 progress reports written by the student's related service providers and his preschool special education teacher, the January 2020 developmental-behavioral pediatric evaluation report, and the March 29, 2020 report of the February 25, 2020 classroom observation (Dist. Ex. 1 at pp. 1-9; see Dist. Exs. 4-10). The CSE determined the student was eligible for special education programs and services as a student with a speech or language impairment and recommended he be placed in an 8:1+1 special class for core academic subjects in a district specialized school with related services of individual OT two times per week for 30 minutes, individual PT two times per week for 30 minutes, and individual speech-language therapy three times per week for 30 minutes, as well as group speech-language therapy two times per week for 30 minutes (Dist. Ex. 1 at pp. 17-18, 22).<sup>3</sup> The CSE also recommended group parent counseling and training four times per year for 60 to 90 minutes, as well as special transportation from the closest safe curb location to school "[t]o facilitate travel to [a] specialized school, which might not be within the student's school zone" (id. at pp. 18, 21, 23).

In a prior written notice dated April 22, 2020, the district notified the parents of the March 2020 CSE's determination that the student was eligible for special education services, identified the evaluative information considered by the CSE and the special education program and related services recommended for the student, and advised the parents of their due process rights (Dist. Ex. 2). In a May 20, 2020 prior written notice, the district apprised the parents of the name and location of the particular public school the student was assigned to attend (Dist. Ex. 3 at p. 1). The letter also notified the parents that they could visit the school and provided the parents with the name and contact information for someone who could assist in arranging a visit (id.).

In July 2020, the student began attending Gillen Brewer (Parent Ex. M at p. 1).

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

<sup>3</sup> The student's eligibility for special education as a student with a speech or language impairment is not in dispute (see 34 CFR 300.8[c][11]; 8 NYCRR 200.1[zz][11]).

In an August 25, 2020 letter to the CSE chairperson, the parents indicated they had significant concerns about the program recommended for their son by the March 30, 2020 CSE (Parent Ex. C). In part, the parents indicated that they did not believe the recommended 8:1+1 program would be supportive enough for the student, noting the student required more individualized support and a social skills component, and were additionally concerned about his transition to a school-aged program (*id.* at pp. 1-2). The parents also expressed concern about the composition of the district's 8:1+1 special classes, particularly that the student would not have an opportunity for an appropriate peer grouping for modeling and socialization and that the student should not be placed with other students with behavioral challenges (*id.* at p. 1). The parents also indicated that they spoke with the unit coordinator at the assigned public school site and were informed that the assigned classroom already had a waiting list of students seeking to enroll and that the school did not "normally" provide five sessions per week of speech-language therapy (*id.* at p. 2). The parents advised the CSE that, unless the student was provided with an appropriate program, they would enroll the student at Gillen Brewer for the 2020-21 school year and seek tuition funding from the district, as well as specialized transportation when in-person instruction resumed (*id.* at p. 3).

In another letter to the CSE chairperson, dated September 28, 2020, the parents indicated that as a follow up to their August 25, 2020 letter and as they did not hear back from the district, the parents were rejecting the March 2020 IEP and intended to place the student at Gillen Brewer for the 2020-21 school year and seek tuition funding from the district (Parent Ex. D). The parents also requested that the district ensure the student was provided with specialized transportation, as recommended in the March 2020 IEP, to Gillen Brewer when in-person instruction resumed (*id.* at p. 2).

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

In a due process complaint notice dated November 9, 2020, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2020-21 school year (*see* Parent Ex. A). In particular, the parents alleged that the March 2020 IEP was "procedurally and substantive invalid" (*id.* at p. 1). The parents asserted that the March 2020 CSE was improperly composed and failed to consider evaluative information—specifically the January 2020 private neuropsychological evaluation and the January 2020 private developmental-behavioral pediatric evaluation—notwithstanding that the district did not conduct any psychological testing as part of the student's "turning five" review (*id.* at pp. 1-2). The parents also alleged that the district failed to provide the parents with prior written notice after the March 2020 CSE meeting (*id.* at p. 3).

In addition, the parents contended that the March 2020 IEP included an insufficient description of the student's needs and "insufficient goals and objectives," lacked goals to address the student's daily living, self-care, and independence skills, lacked short-term objectives, and included "goals that could not be reasonably obtained" in the recommended program and that were not "appropriately ambitious" (Parent Ex. A at pp. 1, 3). The parents argued that the recommendations that the student attend an 8:1+1 special class in a district specialized school and receive related services were insufficiently supportive for the student and "contrary to the clear consensus of the evaluative material relied on by the turning-five CSE team" (*id.* at p. 1). The parents opined that the student needed a program similar to the 10:1+3 center-based preschool

program he attended during the 2019-20 school year (*id.* at p. 2). The parents indicated that "there was no discussion" at the March 2020 CSE meeting about how the recommended 8:1+1 special class could meet the student's needs or how much small group or individualized instruction the student would receive (*id.*). Further, the parents alleged that the student needed to attend "a specialized class . . . in a specialized school, geared toward students with ASD and with no behavior issues," as specified on the March 2020 IEP, and that such a placement could not be implemented in the recommended 8:1+1 special class (*id.*). The parents pointed to the description of an 8:1+1 special class on the district's website to show that an 8:1+1 special class was intended for students who required a significant degree of individualized attention, intervention, and behavior management (*id.*). Similarly, the parents alleged that the IEP specified the student's need for access to "higher peer models" but did not include "programmatic recommendations" to address this need (*id.*). The parents argued that the March 2020 CSE did not discuss how the 8:1+1 special class could meet the student's socialization needs and that the information before the CSE indicated that the student required counseling services (*id.* at pp. 2-3). In addition, the parents alleged that the March 2020 CSE did not make any recommendations for how the IEP would or could be implemented via remote instruction in the event schools were closed in fall 2020 due to the COVID-19 pandemic, and that the CSE did not reconvene to determine how the student's program would be implemented through remote or hybrid instruction prior to fall 2020 despite knowing that "schools would not be opening in a pre-Covid fashion" (*id.* at p. 3).

Finally, the parent argued that the assigned public school site was not appropriate and would not have been able to implement the student's IEP (Parent Ex. A at pp. 3-4). In particular, the parents alleged that they were informed that the assigned public school site had a waiting list of students and that the school's unit coordinator and parent coordinator confirmed that some of the students in the proposed classroom had "behavioral outburst issues" or "behavioral problems," which would have been contrary to the requirements of the student's IEP (*id.*). The parents also alleged that they were informed that the school did not "normally" provide related services at the frequency included on the student's IEP and that the only one-to-one support available at the school was for students recommended to receive paraprofessional support (*id.* at p. 4). The parents also indicated that the school did not provide specifics about how the IEP would be implemented remotely (*id.* at p. 3).

The parents alleged that Gillen Brewer was an appropriate placement for the student for the 2020-21 school year and that equitable considerations did not warrant a reduction or denial of an award of tuition (Parent Ex. A at p. 4). For relief, the parent requested that the district be required to reimburse the parents for or directly fund the costs of the student's attendance at Gillen Brewer for the 2020-21 school year (*id.*).

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

An impartial hearing convened on May 21, 2021, and concluded on August 10, 2021, after four days of proceedings (*see* Tr. pp. 1-281).<sup>4</sup> In a decision dated October 14, 2021, the IHO determined that the district failed to offer the student a FAPE for the 2020-21 school year (IHO

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<sup>4</sup> The transcripts of the impartial hearing were included as part of the hearing record as exhibits (IHO Exs. VII-X); however, as the transcripts are consecutively paginated, for ease of reference they will be cited to by page number (Tr. pp. 1-281).

Decision at pp. 8-9, 11). The IHO determined that the March 2020 IEP failed to address the student's needs for a "calm classroom setting" with students who did not exhibit interfering behaviors, counseling, and supports for his daily living, self-care, and independence skills (*id.* at pp. 5-6, 8-9). Regarding the unilateral placement, the IHO found that Gillen Brewer offered the student specially designed instruction to meet his needs in the areas of English language arts (ELA), writing, math, social interactions, daily living skills, and counseling, and that the student made academic, social, and behavioral progress (*id.* at pp. 10-11). The IHO found that the parents participated and cooperated in the CSE process and that, therefore, equitable considerations did not warrant a reduction or denial of tuition (*id.* at p. 11). Further, the IHO found that the "[p]arents [we]re entitled to a 12-month school year" (*id.*). For relief, the IHO ordered the district to reimburse the parents for the costs of the student's attendance at Gillen Brewer for the 12-month 2020-21 school year (*id.* at p. 12).

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

The district appeals, arguing that the IHO erred in finding that it failed to offer the student a FAPE for the 2020-21 school year. The district argues that the IHO erred in finding the March 2020 IEP inappropriate for the student based on the lack of a recommendation for counseling services. As for the calm classroom setting, the district argues that the IEP provided that the student should attend a classroom with students who had received diagnoses of autism spectrum disorders and who did not exhibit interfering behaviors. Further, the district argues that the assigned public school site had the capacity to implement the IEP and that any allegation that the student would not have been appropriately grouped was impermissibly speculative. Finally, the district argues that, to the extent it contributed to her determination that the district denied the student a FAPE, the IHO erred in finding that the March 2020 IEP did not address the student's activities of daily living skills.

In an answer and cross-appeal, the parents respond to the district's request for review and request that the IHO's decision be upheld in its entirety. As for a cross-appeal, the parents assert that there were additional reasons why the IHO could have found a denial of FAPE.

In a reply and answer the district responds to the allegations raised in the parents' answer and cross-appeal. In addition, the district asserts that the answer and cross-appeal should be dismissed for failure to comply with the practice regulations, in that the parents did not serve a notice of intention to cross-appeal within 30 days from the date of the IHO decision.

#### **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]).<sup>5</sup>

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. Preliminary Matters**

#### **1. Compliance with Practice Regulations**

The district asserts that the parents did not serve a notice of intention to cross-appeal within the timelines set forth in State regulation and that, because of this failure, the cross-appeal should be dismissed.

State regulation requires that any party "who intends to seek review by [an SRO] of the decision of an [IHO] shall personally serve upon the opposing party . . . a notice of intention to

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<sup>5</sup> The Supreme Court has stated that even if it is unreasonable to expect a student to attend a regular education setting and achieve on grade level, the educational program set forth in the student's IEP "must be appropriately ambitious in light of his [or her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives" (Endrew F., 137 S. Ct. at 1000).

seek review" in the form described therein (8 NYCRR 279.2[a]). In addition "[a] respondent who wishes to cross-appeal to seek review by [an SRO] of the decision of an [IHO] shall personally serve upon the opposing party . . . a notice of intention to cross-appeal within 30 days after the decision of the [IHO]" (8 NYCRR 279.2[d]). In addition, "[e]very . . . notice of intention to cross-appeal shall be accompanied by a case information statement, which shall identify those issues the party wishes to be reviewed by [an SRO] and may be made on a form prescribed by the Office of State Review" (8 NYCRR 279.2[e]). The notice of intention to cross-appeal is required to be filed with the Office of State Review with the answer with cross-appeal (8 NYCRR 279.5[c]). Whether the petitioner is a school district or a parent, the notice of intention to cross-appeal (along with the accompanying case information statement) provides a petitioner with advance notice of a respondent's imminent challenge to an IHO's determination, which may give a petitioner additional time to contemplate a position to be stated in an answer to a cross-appeal—time that is particularly valuable in light of the short time frame allotted for a petitioner to answer a cross-appeal (see 8 NYCRR 279.2[e]; N.Y. State Register Vol. 38, Issue 26, at p. 50 [June 29, 2016]; see also 8 NYCRR 279.4[b]; 279.5[b]).

In this matter, the IHO decision being reviewed was dated October 14, 2021 (IHO Decision at p. 12). Accordingly, in the event a party wished to cross-appeal, a notice of intention to cross-appeal was due to be served on or before November 15, 2021 (see 8 NYCRR 279.2[d]; 279.11[b]). The parents' notice of intention to cross-appeal was not filed with the Office of State Review as required by State regulation (see 8 NYCRR 279.5[c]). In the answer with cross-appeal, the parents concede that they did not serve a notice of intention to cross-appeal and case information statement within the timelines prescribed by State regulation (Answer & Cross-Appeal at p. 8 n. 3). The parents assert that the district is not prejudiced by the delay in their service of the notice of intention to cross-appeal and contend that they are not challenging the IHO's decision but are only "providing further basis and support for the IHO's findings" (id.).

Initially, it is incumbent on a party to raise any additional bases for finding a denial of FAPE, not addressed by the IHO, in a cross-appeal lest it be deemed waived (see 8 NYCRR 279.8[c][4] [providing that "any issue not identified in a party's request for review, answer, or answer with cross-appeal shall be deemed abandoned and will not be addressed by a State Review Officer"]). When State regulations governing appeals before the Office of State Review were last amended, it was specifically contemplated that a prevailing party would be chargeable with the knowledge that they may have to defend themselves in an appeal and that might require a cross-appeal of any underlying determinations made by the IHO (or failures to rule) that were unfavorable to the prevailing party (see N.Y. State Register Vol. 38, Issue 26, at p. 49 [June 29, 2016]; Application of a Student with a Disability, Appeal No. 18-131). Here, the parents have properly cross-appealed from the IHO's decision not to address certain issues raised in their due process complaint notice; however, the parents did not provide the district timely notice of their intention to cross-appeal.

Nevertheless, under the circumstances presented in this matter, and in my discretion, I will review the issues raised in the parents' cross-appeal. In particular, the district has not asserted that the parent's failure to timely serve, or file, a notice of intention to cross appeal or case information statement prevented it from properly responding to the parents' cross-appeal. Moreover, the district sought and was granted two extensions of its time to serve and file its answer to the parents' cross-appeal.

## 2. Scope of Review

It is next necessary to identify what issues were properly raised in the request for review and in the parents' cross-appeal and are therefore properly before me on appeal. State regulations governing practice before the Office of State Review require that the parties set forth in their pleadings "a clear and concise statement of the issues presented for review and the grounds for reversal or modification to be advanced, with each issue numbered and set forth separately," and identify the IHO's "precise rulings, failures to rule, or refusals to rule presented for review" and further specify that "any issue not identified in a party's request for review, answer, or answer with cross-appeal shall be deemed abandoned and will not be addressed by a State Review Officer" (8 NYCRR 279.8[c][2], [4]; see 8 NYCRR 279.4[a]). Further, an IHO's decision is final and binding upon the parties unless appealed to a State Review Officer (34 CFR 300.514[a]; 8 NYCRR200.5[j][5][v]).

In their cross-appeal, the parents have not pursued their claims related to the composition of the March 2020 CSE, the district's failure to provide the parents with a prior written notice, or the adequacy of the present levels of performance contained in the March 2020 IEP. The parents' cross-appeal raises arguments related to the March 2020 CSE's consideration of the January 2020 neuropsychological evaluation report and the January 2020 developmental-behavioral pediatric evaluation report, specifically noting that the March 2020 IEP did not "adequately provide[] for a social skills curriculum, reinforcement via direct instruction in a one-on-one setting or instruction in a small group environment, as recommended by both private evaluations." In addition, the cross-appeal raises arguments related to the sufficiency of the academic annual goals and that the CSE did not plan for the student's activities of daily living (ADL) needs.<sup>6</sup> Further, the parents raise issues regarding implementation of the March 2020 IEP, asserting more specifically that the district did not show the assigned school could have provided the student with a class for students with autism who did not have behavioral needs, that the school had a waitlist, and that there was a possibility the school could not meet the student's speech-language mandates. Accordingly, only the issues specifically raised in the cross-appeal will be addressed, and the remaining issues not argued in the cross-appeal are deemed abandoned.

In addition, the district has not appealed from the IHO's determinations that Gillen Brewer was an appropriate unilateral placement for the student for the 2020-21 school year or that equitable considerations supported an award of tuition reimbursement. Therefore, those aspects of the IHO's decision have become final and binding and they will not be reviewed on appeal (34

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<sup>6</sup> The parents' argument related to the annual goals contained in the March 2020 IEP is not supported by the evidence in the hearing record. The March 2020 IEP included three annual goals directed at the student's academics, one in each area of reading, math, and writing (Dist. Ex. 1 at pp. 11-12). The parents object to the annual goals as not being appropriate because the student had mastered identifying all letters in capital form and identifying numbers 1 through 10, which are skills that are partially included in two of the annual goals (Answer and Cross-Appeal ¶10). However, those skills are not the entirety of the annual goals and each goal includes skills that the student was still working towards, such as for reading, identifying lowercase letters and identifying the sounds the letters make, and for math, demonstrating one-to-one correspondence and identifying numbers and rote counting up to 20 (compare Dist. Ex. 1 at p. 11, with Dist. Ex. 1 at p. 3). Accordingly, there is no basis to find that the annual goals were not appropriate based on the reasons presented by the parents, and the appropriateness of the goals will not be further discussed.

CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at \*6-\*7, \*10 [S.D.N.Y. Mar. 21, 2013]).

## **B. March 2020 IEP**

### **1. 8:1+1 Special Class**

The district alleges that the IHO erred in stating that the March 2020 IEP would not address the student's need for a calm classroom setting, noting that the IEP specified that the student required a special class geared towards students who had received diagnoses of ASD and did not exhibit interfering behaviors. According to the parents, an 8:1+1 special class would not have provided the student with "the comprehensive and holistic support indicated in the private evaluations and documents submitted to the team."

State regulation provides that an 8:1+1 special class placement is intended to address the needs of students "whose management needs are determined to be intensive, and requiring a significant degree of individualized attention and intervention" (8 NYCRR 200.6[h][4][ii][b]).

The March 2020 IEP included information pulled from the January 2020 neuropsychological evaluation report, the January 2020 developmental-behavioral pediatric evaluation report, the January 2020 progress reports written by the student's related service providers and his preschool special education teacher, and the March 29, 2020 report of the February 25, 2020 classroom observation (Dist. Ex. 1 at pp. 1-9; see Dist. Exs. 4-10). The district school psychologist who attended the March 2020 CSE meeting testified that, in making a program recommendation for the student, the CSE took into account the student's academic needs, his language needs including those related to pragmatic language and socialization, reports from the parents, input from the preschool teacher and related service providers, and the regulatory requirement to recommend the least restrictive environment (LRE) for the student (Tr. pp. 51-52).

The March 2020 CSE considered, and the IEP reflected, the results of two classroom observations conducted of the student in his 10:1+3 preschool special class (Dist. Ex. 9 at pp. 3-4; 4; see Dist. Ex. 1 at pp. 1-2, 4). The first observation took place on December 12, 2019 and was conducted by the neuropsychologist who evaluated the student (Dist. Ex. 9 at p. 4). The neuropsychologist reported that, although there were typically 10 students in the student's class, on the day of her observation there were five students with one special education teacher and two paraprofessionals (id.). The neuropsychologist described the student's participation during a video-watching activity, free time, table activities, and a reading activity (id. at pp. 1-2). She indicated that the student actively participated in each of these activities, complied with teacher directives, and transitioned appropriately between activities (id.). The neuropsychologist commented that throughout the observation the student appeared cheerful and well behaved and engaged in the presented activities (id. at p. 5). She also noted that she did not observe the student initiate conversation with peers or teachers but that he responded positively and "communicate[d] meaningfully" when teachers initiated conversation with him (id.). The neuropsychologist reported that articulation errors reduced the student's intelligibility (id.). She also reported that the student sometimes babbled for reasons that were unclear, frequently smiled to himself as he worked and at teachers when responding to them, and occasionally spoke in "a slightly high-pitched tone" (id.). The neuropsychologist stated that, at times, the student exhibited repetitive

motor mannerisms and occasionally touched other's books unprompted (id.). According to the neuropsychologist, the student's teacher reported that the student was a "well-behaved boy" who showed interest in playing with his peers, was an excited and engaged learner, and appeared confident in class (id.).

A second observation of the student in his 10:1+3 preschool special class was conducted by the district in February 2020 (Dist. Ex. 4). As noted above, the observer reported that the student "appeared to be a quiet, friendly, and happy student who [wa]s well adjusted to his classroom environment" (id. at p. 2). In addition, the student was familiar with classroom routines and followed the teacher's directions (id.). According to the observer, the student was able to participate in small group activities, take turns, and follow visually displayed class rules with minimal reminders (id.). In addition, the student transitioned without difficulty and interacted appropriately with peers and adults (id.). The observer reported that the student was quiet during the observation except when he was prompted (id.). She stated that no behavioral difficulties were noted or reported (id.). The observer commented that the student's preschool teacher was recommending that the student attend a 12:1+1 special class for kindergarten (id. at p. 1).

In addition to the classroom observations that described the student's performance in his 10:1+3 special class, the present levels of performance provided a significant amount of information regarding the student's academic skills, communicative ability, social/emotional development, and motor capabilities (Dist. Ex. 1 at pp. 1-9). The IEP cited the results of two cognitive assessments, the first of which placed the student's cognitive functioning in the low average range and the second which placed it in the below average range (id. at pp. 2, 3). With regard to academics, the IEP indicated that on early literacy tests the student had difficulty matching the middle and ending sounds in words (id.). He was able to identify some letters in print but had trouble with letter sound correspondence and rhyming tasks (id. at p. 3). On a math assessment the student was able to identify certain numbers in print, rote count to six, and point to certain shapes but was not able to count using one-to-one correspondence or make comparisons using quantitative concepts (id.). As noted above, in the classroom the student was able to identify upper case letters and count up to ten objects with reminders (id.). The student's teacher reported that he was eager to learn and did better during small group instruction (3-4 students) but could also attend during whole class instruction with a group of 10 students (id. at p. 4). With regard to the student's communicative abilities, the IEP indicated that the student was able to follow one-step directions and simple and familiar multiple step directions (id.). He was able to appropriately answer simple "who," "what," and "where" questions and working toward asking "wh" questions with fading support (id.). The IEP noted that the student was able to appropriately greet peers and familiar adults with support and indicated that his ability to verbalize his basic wants and needs to familiar adults continued to emerge (id.). Receptively, the student was able to identify familiar objects, object functions, actions from his environment, and pictures across content areas and make inferences and complete analogies from pictures (id. at p. 4). He had difficulty following multi-step directions, as well as comprehending gender and possessive pronouns, more advanced quantitative and qualitative concepts, complex sentences, and modified nouns (id. at p. 3). Expressively, the student the student's functional language was hindered by his reduced speech intelligibility (id.). The IEP indicated that the student's lexicon consisted mostly of various nouns, verbs and some adjectives, and that he used word phrases and short sentences to request, comment, and protest (id.). At times the student engaged in repetitive and echolalic language (id.). In terms of the student's social/emotional development (discussed more fully below), the IEP indicated that,

although the student was becoming more interested in having friends than he was in the past, he had trouble relating to peers and adults and forming friendships (*id.* at p. 5). The student demonstrated inconsistent eye-contact, could be awkward during turn taking, and had trouble understanding social cues (*id.*). However, the IEP also noted the student was well-liked by his peers and sought interaction with other children (*id.* at p. 7). The student's ability to initiate play was emerging (*id.* at p. 6). The IEP indicated that the student was able to identify basic emotions in pictures and peers and was working toward identifying and verbalizing his own emotions (*id.*). According to the IEP, the student was able to self-soothe when he was in distress and was working toward increasing his ability to self-regulate in highly stimulating situations (*id.*). Based on the neuropsychological evaluation, the IEP noted the student had difficulty with transitions and changes in routine and at times engaged in restrictive/repetitive behaviors (*id.*). The student knew and followed class routines and schedules well and benefited greatly from visual schedules and understood how to use them (*id.* at p. 7). Turning to the student's physical development, the IEP indicated that the student presented with sensory dysfunction in the areas of taste/smell sensitivity, under-responsive/seeking sensation, auditory filtering, and low energy/weak sensory processing (*id.* at p. 7). With respect to fine motor skills, the student was able to independently write his name with partially accurate upper-case letters, safely and independently use scissors to cut straight and curved lines, self-feed with appropriate feeding utensils and minimal spillage, and manipulate the zipper on his backpack with minimal prompting (*id.*). With regard to gross motor skills, the IEP indicated that the student was able to independently and safely ascend and descend stairs alternating feet (*id.*). The student exhibited poor trunk and core muscle strength and scored in the below average range on a formal measure of locomotion (*id.* at p. 8). The March 2020 IEP indicated that the student required continued support to increase fine motor and gross motor skills to ensure his ability to keep up with the physical demands of kindergarten as they related to writing, daily living skills, physical education, and navigating the school building and grounds (*id.* at p. 9).

The March 2020 IEP indicated that the student required the following to address his management needs: small group and individual reinforcement of whole class instruction; information presented in multiple modalities, especially contextual visual methods; adult modeling, manipulatives, repetition, and verbal/visual prompts and cues when presented with new material or when reinforcing a skill that needed improvement; visual cues, repetition, and increased response time to process auditory information and facilitate language comprehension; redirection, gestural cues, wait time, and visual supports to retain receptive language skills; repetition and verbal and visual models to increase use of language; wait time to process language and form responses to questions; constant verbal, tactile and multimodal cues to increase speech intelligibility across different settings; visual schedules, with scheduled breaks, to enhance attention and manage expectations; verbal warnings before changes in routines or schedules; and one-on-one support, repetition, and higher peer models to process social situations in various settings and contexts (Dist. Ex. 1 at p. 9).

The IEP stated that the ASD diagnosis suggested the student's need for continued support across various areas of functioning, including social, motor, and daily living skills (Dist. Ex. 1 at p. 5). The IEP further stated that the student required an increase in speech-language therapy in consideration of his severe delays and the increased demand inherent in transitioning from preschool to kindergarten (*id.*). According to the IEP, the team was in agreement that the student's language deficits were the primary barrier to his progress at that time (*id.*). With regard to the student's social/emotional development, the March 2020 IEP indicated the student required explicit

instruction and support to learn effective coping strategies to regulate negative emotional states (id. at p. 7).

The neuropsychologist who evaluated the student opined that he required "a small, structured, and specialized classroom setting within a small, specialized, and nurturing school environment with language-based instruction" (Dist. Ex. 9 at p. 17). She recommended that the student's classroom offer one-to-one instruction and support as needed, as well as small group instruction, for his specific areas of need (id.). Similarly, the developmental pediatrician who evaluated the student recommended that he be placed in a "small, structured, specialized school for children with ASD and/or other disorders of communicating and relating (Dist. Ex 10 at p. 5). She stated that the student-to-teacher ratio should be low, as the student would need direct instruction in order to achieve and opined that one-to-one and small group instruction should be available in the program (id.).

The hearing record shows that the March 2020 CSE considered placing the student in general education class setting, but determined that the student's then-current level of functioning precluded placement in a general education environment and rejected that option due to the student's delays in language, socialization, and motor skills (Tr. p. 52; Dist. Exs. 1 at pp. 9, 21, 24; 2 at p. 2). A 12:1+1 special class was also considered but rejected because the student "require[d] a smaller student-teacher ratio to ensure targeted interventions [we]re carried out in small group or individually" (Dist. Ex. 1 at p. 24). The school psychologist testified that students in a 12:1+1 special class tended to demonstrate greater independence so that they did not need a low student-teacher ratio and they also tended to have higher level language skills than the student (Tr. p. 75). The psychologist confirmed that a 6:1+1 special class was considered by the CSE but rejected because it was deemed "too restrictive" for the student due to his cognitive, academic, and language profile (Tr. pp. 52; Dist. Ex. 1 at p. 24). According to the school psychologist, students enrolled in a 6:1+1 special class were generally students with an ASD diagnosis who tended to present with more severe characteristics than the student such as being nonverbal, showing more frequent and intense repetitive behaviors (i.e., "stimming"), and needing "a less academic program, especially in the earlier years" (Tr. pp. 74-75). The school psychologist indicated that the CSE deemed the 8:1+1 special class the most appropriate for the student and also the "least restrictive" for him (Tr. p. 52). She also indicated placement in a district specialized school could meet the needs of students with ASD and communication disorders (Tr. pp. 52-53).

Contrary to the parents' assertions, the March 2020 CSE recommended a program for the student that was, in large part, consistent with the recommendations of their private evaluators. In addition to recommending a special class with a low student-to-teacher ratio, the CSE indicated on the IEP that the student "required small group and individual reinforcement of whole group instruction" and referenced "the need to ensure targeted interventions [we]re carried out in [a] small group or individually" (Dist. Ex. 1 at pp. 9, 24). The IEP noted that the parents were in agreement with the recommended program and services but were concerned about school placement and wanted to be sure that the student would not be placed in a program for students with behavioral challenges rather than one for students with similar social and language-based deficits (id. at p. 24). To the extent the parents equate a "calm classroom" with the absence of students with behavior problems, the IEP stated that the student required a program "geared toward students with ASD and with no behavior issues" (id. at p 5). Moreover, to the extent the parents



argue that the student would be inappropriately grouped based on the definition of an 8:1+1 special class, their claim is speculative, as discussed further below.

Based on the foregoing, the evidence contained in the hearing record establishes that the district's recommended 8:1+1 special class in a specialized school was reasonably calculated to enable the student to receive educational benefits for the 2020-21 school year. Consequently, I find that the IHO erred to the extent that she determined that the district's recommendation for an 8:1+1 special class was not appropriate for the student for the 2020-21 school year, and I reverse that portion of her decision.

## **2. Supports for Social/Emotional Needs**

The district argues that the IHO relied solely on the January 2020 private neuropsychological evaluation to determine that the student needed counseling but failed to consider other evidence in the hearing record that supported the CSE's recommendations. The district also argues that the student made progress during the 2019-20 school year, despite the fact that he did not receive counseling services, and his progress in the social/emotional realm supported the CSE's decision to not recommend counseling. Further, the district points to the January 2020 private developmental-behavioral pediatric evaluation report, which did not include a recommendation for counseling but instead recommended a program with a built-in social skills curriculum. The district argues that, consistent with this, the IEP contemplated that the 8:1+1 special class would have programmatically addressed the student's socialization needs. The district also notes that one of the student's annual goals was developed to target the student's social/emotional needs.

While the March 2020 IEP included much of the information and even many of the recommendations made in the January 2020 neuropsychological evaluation report and the January 2020 developmental-behavioral pediatrics evaluation report (compare Dist. Ex. 1 at pp. 1-9, with Dist. Exs. 9; 10), the parents assert that both of the evaluation reports included recommendations for social skills curricula and 1:1 and small group sessions for the student to practice his social skills as he transitioned into a school-age program, which were not included in the March 2020 IEP. As these claims relate directly to how the March 2020 CSE addressed the student's social/emotional skills, they will be addressed below along with the district's assertion that the IHO erred in finding that the district denied the student a FAPE because the March 2020 IEP did not include a recommendation for counseling services.

The present levels of performance of the March 2020 IEP included narrative descriptions of the student's social/emotional development taken from the January 2020 developmental-behavioral pediatrics evaluation report, the March 22, 2020 neuropsychological evaluation report, the January 27, 2020, progress reports completed by the student's preschool special education teacher and related services providers, and the March 29, 2020 classroom observation report (see generally Dist. Exs. 1 at pp. 1-8; 2 at pp. 1-2; 4-10). The January 2020 neuropsychological evaluation report included a record review and a brief social history obtained from the student's parents (Dist. Exs. 1 at p. 1; 9 at p. 1).

The March 2020 IEP reflected information regarding the student's social/emotional development from the January 2020 neuropsychological evaluation report in that it indicated that

the student's social communication and related behaviors were assessed using parent interview, parent and teacher administration of the Social Responsiveness Scale—Second Edition (SRS-2), and parent administration of the Child Sensory Profile—Second Edition (CSP-2) (Dist. Exs. 1 at p. 5; 9 at p. 13). The IEP noted that, in terms of social communication and interaction, the student's parents reported that, although he was more interested in having friends at that time than he was in the past, the student had trouble relating to peers and adults and forming friendships (Dist. Ex. 1 at p. 5; Parent Ex. 9 at p. 12). The IEP indicated that the student approached other children to initiate play but needed support to do so appropriately, as he might communicate and behave in a way that appeared odd (Dist. Ex. 1 at p. 5; 9 at p. 12). Further, his eye contact had improved substantially but was inconsistent (Dist. Ex. 1 at p. 5; 9 at p. 12). According to the IEP, the student tried to engage with adults in addition to peers but had trouble starting conversations (Dist. Ex. 1 at p. 5; 9 at p. 12). He could be awkward during turn-taking activities and had trouble understanding social cues (Dist. Ex. 1 at p. 5; 9 at p. 12). The student's social communication had been complicated by his substantial language delays, which made his verbal messages difficult to understand (Dist. Ex. 1 at p. 5; 9 at p. 12).

The IEP reflected additional information from the neuropsychological evaluation report, which noted that, with regard to restricted and repetitive interests and behaviors, the student had difficulty with transitions and changes in routine at home but not at school (Dist. Ex. 1 at p. 5; 9 at p. 12). He often responded by crying, yelling, or throwing himself on the floor for five to fifteen minutes (Dist. Ex. 1 at p. 5). Verbal warnings helped him experience more successful transitions (Dist. Ex. 1 at p. 5; 9 at p. 12). Additional restrictive behaviors included the student's the need for everything he ate to be in sandwich form, and repetitive behaviors included certain hand and finger mannerisms and the student's tendency to jump and bounce when excited (Dist. Ex. 1 at p. 5; 9 at p. 12). He also displayed unusual sensory interests and was sensitive to loud sounds (Dist. Ex. 1 at p. 5; 9 at p. 12).

The March 2020 IEP noted that the neuropsychologist's administration of the SRS-2 to the student's parents and teacher yielded somewhat variable reports of the student's functioning in social communication, interaction, and behavior (Dist. Ex. 1 at p. 5; 9 at p. 13). Specifically, parent responses suggested that the student was a socially motivated child with mild difficulties in social awareness and social cognition (Dist. Ex. 1 at p. 5; 9 at p. 13). Additionally, parent responses endorsed moderate difficulties in social communication and with restricted/repetitive behaviors (Dist. Ex. 1 at pp. 5-6; 9 at p. 13). Responses by the student's teacher yielded a slightly different outcome with the student's social awareness and social motivation rated as being within normal limits for a child his age and the teacher reported that the student exhibited mild difficulties with social cognition, social communication, and restricted/repetitive behaviors (Dist. Ex. 1 at p. 6; 9 at p. 13).

The IEP also included information from the neuropsychological evaluation that indicated the student's parents completed the CSP-2 as a means of evaluating the student's sensory processing patterns (Dist. Ex. 1 at p. 6; 9 at p. 13). Results suggested that the student showed oral sensory processing behaviors much more than his peers (Dist. Ex. 1 at p. 6; 9 at p. 13). Specifically, he frequently put objects in his mouth, half the time smelled nonfood objects, and was particular about what he ate (Dist. Ex. 1 at p. 6; 9 at p. 13). Although not reported to be clinically significant overall, the IEP stated that the student both sought sensory input and was bothered by it and missed certain sensory input more than his same-age peers (Dist. Ex. 1 at p. 6; 9 at p. 13).

The March 2020 IEP noted that, according to the neuropsychological evaluation report, the student's emotional functioning was further assessed using the Behavior Assessment for Children-Third Edition (BASC-3) (Dist. Ex. 1 at p. 6). The parents did not report any problems in externalizing behaviors overall or in subscales on depression and anxiety (Dist. Ex. 1 at p. 6; 9 at p. 14). However, their responses endorsed a mildly elevated frequency in somatization, suggesting the student experienced somatic symptoms (e.g., stomachache, complaints of ailments) that might stem from possible emotional concerns (Dist. Ex. 1 at p. 6; 9 at p. 14). The IEP noted the parents' concerns related to adaptive functioning (Dist. Ex. 1 at p. 6; 9 at p. 14). Notably, parent responses endorsed problems in communication and basic self-care skills appropriate for his age, and mild concerns with social skills (Dist. Ex. 1 at p. 6; 9 at p. 14). According to the IEP, the student's teacher endorsed the absence of internalizing problems and misbehavior (Dist. Ex. 1 at p. 6; 9 at p. 14). However, her responses suggested mildly elevated hyperactive behaviors in school (Dist. Ex. 1 at p. 6; 9 at p. 14). For example, her responses indicated that the student was often in constant motion and overly active and had trouble sitting still (Dist. Ex. 1 at p. 6; 9 at p. 14). He sometimes spoke out of turn and occasionally bothered other children when they were working (Dist. Ex. 1 at p. 6; 9 at p. 14). The IEP noted that the atypicality scale was mildly elevated on the teacher form, with responses of "often" for "saying things that do not make sense," "sometimes" for "babbling to himself," and "sometimes" for "showing feelings that did not fit a given situation" (Dist. Ex. 1 at p. 6; 9 at p. 14). The teacher also endorsed mild concerns about social skills and the student's ability to express and communicate ideas so that others could understand him (Dist. Ex. 1 at p. 6; 9 at p. 14). The IEP reflected the results of a parent interview conducted by the neuropsychologist that suggested the student was a sensitive, emotional boy who tried his best to listen but could sometimes be disruptive (Dist. Ex. 1 at p. 6; 9 at p. 14). He became "teary eyed" when corrected or disciplined, which was substantiated by the classroom teacher (Dist. Ex. 1 at p. 6; 9 at p. 14). The parents also stated that the student had started to occasionally hit himself in the face for reasons that were unclear (Dist. Ex. 1 at p. 6; 9 at p. 14).

The present levels of performance of the March 2020 IEP also included information on the student's social/emotional development that was provided by the student's preschool special education teacher (Dist. Ex. 1 at p. 6; see Dist. Ex. 5). According to the teacher's educational progress report, the student engaged in both self-directed and teacher-directed activities (Dist. Exs. 1 at p. 6; 5 at p. 2). He was able to attend to and participate in small group activities for up to fifteen minutes and in whole group activities with occasional redirection (Dist. Exs. 1 at p. 6; 5 at p. 2). The student's ability to attend to activities through distractions was emerging (Dist. Exs. 1 at p. 6; 5 at p. 2). The IEP noted that the student had mastered the ability to engage in parallel play and cooperative physical play (i.e. chase games) (Dist. Exs. 1 at p. 6; 5 at p. 2). His ability to initiate play was emerging (Dist. Exs. 1 at p. 6; 5 at p. 2). The student was able to engage in dramatic play and was working toward engaging in cooperative dramatic play with teacher support (Dist. Exs. 1 at p. 6; 5 at p. 2). According to the IEP, and based on the preschool teacher's report, the student was able to take turns with two to three friends with support (Dist. Exs. 1 at p. 6; 5 at p. 2). He demonstrated pleasure upon seeing familiar adults and peers and was able to appropriately greet them with prompting (Dist. Exs. 1 at p. 6; 5 at p. 2). The student was working toward engaging in simple back and forth verbal interactions with peers (Dist. Exs. 1 at p. 6; 5 at p. 2). He was able to vocalize his basic wants and needs to familiar adults (Dist. Exs. 1 at p. 6; 5 at p. 2). The student was working toward maintaining appropriate eye contact during social interactions (Dist. Exs. 1 at p. 6; 5 at p. 2). The IEP indicated that the student was able to identify basic emotions (happy, sad, angry) in pictures and in peers, and was working toward identifying

and verbalizing basic emotions in himself (Dist. Exs. 1 at p. 6; 5 at p. 2). It noted he was able to self-soothe when in distress and was working toward increasing his ability to self-regulate during highly stimulating situations (Dist. Exs. 1 at p. 6; 5 at p. 2). The IEP stated that the student followed class rules that were visually displayed with minimal reminders (Dist. Exs. 1 at p. 6; 5 at p. 2). He was able to verbalize some simple preferences (color, food, activity, book) (Dist. Exs. 1 at p. 6; 5 at p. 2). He was also able to identify his name, age, and gender (Dist. Exs. 1 at p. 6; 5 at p. 2).

The March 2020 IEP also included information regarding the student's social/emotional development gleaned from the January 2020 speech-language progress report (Dist. Exs. 1 at p. 6; 7 at p. 2). The IEP indicated that, according to the progress report, the student's pragmatic language skills continued to emerge (Dist. Exs. 1 at p. 6; 7 at p. 2). The student was working to initiate and sustain peer interactions (Dist. Exs. 1 at p. 6; 7 at p. 2). He was able to take turns during group activities provided verbal cues (Dist. Exs. 1 at p. 6; 7 at p. 2). His imaginative and cooperative play skills continued to expand with varying levels of support (Dist. Exs. 1 at p. 6; 7 at p. 2).

With regard to the student's social/emotional strengths, the March 2020 IEP indicated that he was well-liked by his classmates, and sought interaction with other children (Dist. Ex. 1 at p. 7). With regard to the student's social/emotional needs, including consideration of student needs that were of concern to the parent, the IEP indicated that the student demonstrated longstanding impairments in social communication, social interaction, restricted/repetitive behaviors and speech, and sensory behaviors (*id.*). As such, the student's presentation was consistent with his prior diagnosis of ASD (*id.*). With regard to emotional functioning, the IEP stated that the student required explicit instruction and support to learn effective coping strategies to regulate negative emotional states (*id.*). Furthermore, the IEP indicated that the student's language and articulation deficits and difficulty managing social interactions resulted in him being vulnerable during peer interactions (*id.*).

As noted by the IHO, the neuropsychologist recommended that the student receive both individual and group counseling services, in school, to support the development of his social skills and emotional development (IHO Decision at p. 5; Dist. Ex. 9 at p. 18). The neuropsychologist also recommended that the student's classroom include a wrap-around social skills curriculum with educators specifically trained to work with students with expressive, receptive, and pragmatic language difficulties, as well as attentional weaknesses, social challenges, and sensory sensitivities (*id.* at p. 17).

In finding the IEP failed to address the student's social/emotional needs, the IHO relied on the recommendations in the neuropsychologist's report and found insufficient evidence of how the recommended program would meet the student's social/emotional needs (IHO Decision at p. 5). While the CSE was required to consider the evaluation and the neuropsychologist's recommendations, it was not obligated to adopt the recommendations in this instance (J.C.S. v. Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, at \*11 [S.D.N.Y. Aug. 5, 2013] [holding that "the law does not require an IEP to adopt the particular recommendation of an expert; it only requires that that recommendation be considered in developing the IEP"]; Watson, 325 F. Supp. 2d at 145 [holding that a CSE's recommendation is not necessarily rendered inappropriate by "[t]he mere fact that a separately hired expert has recommended different programming"]). Here, the CSE had other information before it which supported its determination not to recommend counseling. The developmental pediatrician who evaluated the student did not recommend school-

based counseling services for the student; however, she suggested that his program include a built-in social skills curriculum (Dist. Ex. 10 at p. 5). In addition, the student had not received counseling during preschool (see Parent Ex. 12). However, progress reports before the CSE indicated that the student had mastered several social/emotional skills and was working on several others, including skills related to communicating with peers, identifying emotions, and engaging in play, as summarized above (Dist. Exs. 5 at p. 2; 7 at p. 2). As noted above, observations of the student in his preschool classroom indicated that he was cooperative and actively engaged in class activities but had difficulty with social interactions, due in part to his compromised intelligibility (Dist. Exs. 4; 9 at pp. 3-4).

As a whole, the IEP addressed the student's social/emotional needs (Karl v. Bd. of Educ. of the Geneseo Cent. Sch. Dist., 736 F.2d 873, 877 [2d Cir. 1984] [finding that although a single component of an IEP may be so deficient as to deny a FAPE, the educational benefits flowing from an IEP must be determined from the combination of offerings rather than the single components viewed apart from the whole]; see also Bell v. Bd. of Educ. of Albuquerque Pub. Schs., 2008 WL 5991062, at \*34 [D.N.M. Nov. 28, 2008] [explaining that an IEP must be analyzed as whole in determining whether it is substantively valid]; Lessard v. Wilton-Lyndeborough Co-op. Sch. Dist., 2008 WL 3843913, at \*6-\*7 [D.N.H. Aug. 14, 2008] [noting that the adequacy of an IEP is evaluated as a whole while taking into account the child's needs]; W.S. v. Rye City Sch. Dist., 454 F. Supp. 2d 134, 146-47 [S.D.N.Y. 2006] [upholding the adequacy of an IEP as a whole, notwithstanding its deficiencies]). The March 2020 IEP included an annual goal that targeted the student's need to increase his social/emotional skills to initiate play with peers and to request support from an adult when distressed or frustrated (Dist. Ex. 1 at p. 13). The school psychologist testified that this goal was "to increase . . . social-emotional skills related to the need for increased socialization" and was "included so that teachers and service providers . . . could address it when working with [the student]" (Tr. p. 35). The IEP recommended individual and group speech-language therapy with the individual sessions working on "articulation concerns" (Tr. p. 44; Dist. Ex. 1 at pp. 13-14, 18). As noted above, the student's intelligibility contributed to his difficulties with social interactions (Dist. Ex. 1 at p. 3). The IEP also identified resources the student needed to address his management needs including the need for 1:1 support, repetition, and higher-level peer models to process social situations in various settings and contexts (*id.* at p. 9). The March 2020 IEP stated that "[c]ounseling was not recommended at th[at] time due to request for placement in a class with a programmatic socialization curriculum for all students and in an effort to minimize related service mandates at this time" (Dist. Ex. 1 at p. 7).<sup>7</sup> The recommendation for

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<sup>7</sup> The district argues that the CSE's decision was based on the goal of minimizing related services mandates and that this was consistent with the district's obligation to educate the student in the LRE; however, there is no indication that, as a result of fewer related services mandates, the student would have greater access to nondisabled peers and, therefore, LRE considerations were not implicated in the CSE's determination (see 20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2]; 300.116[b], [c]; 300.117; 8 NYCRR 200.1[cc]; 200.6[a][1]). That is, as described by the Second Circuit, the LRE determinations are made by considering the extent to which the student has been placed with nondisabled peers; i.e., "whether education in the regular classroom, with the use of supplemental aids and services, can be achieved satisfactorily for a given child," and, if not, then "whether the school has mainstreamed the child to the maximum extent appropriate" Newington, 546 F.3d at 120, quoting Daniel R.R. v. State Bd. of Educ., 874 F.2d 1036, 1048 [5th Cir. 1989]; see J.G. v. Kiryas Joel Union Free Sch. Dist., 777 F. Supp. 2d 606, 639 [S.D.N.Y. 2011]). There may, however, be other reasons for minimizing related services, such as balancing the student's related services needs with the student's instructional needs and ensuring both areas are met in the course of a school week.

a programmatic socialization curriculum was consistent with the recommendations of the developmental pediatrician (compare Dist. Ex. 1 at p. 7, with Dist. Ex. 10 at p. 5).

The school psychologist testified that "part of the discussion around program recommendations included the diagnosis of autism spectrum disorder, as well as [the student's] difficulty with pragmatic language and social skills" (Tr. pp. 48-49). She explained that the district's recommendation for an 8:1+1 special class was made with the intention of the student being placed in a class with other students with similar profiles and that socialization skills would be addressed within the 8:1+1 special class (Tr. p. 49). The psychologist recalled a conversation with the parents in which she addressed the distinction between the two profiles of students recommended to attend an 8:1+1 special class (id.). She further recalled that she indicated that students with an ASD diagnosis were placed together in programs that specifically addressed the needs of students with an ASD and that "those programs include[d] a curriculum around socialization" (id.). She reported that the district did not think that counseling was necessary if it recommended a class for students with an ASD (id.). The school psychologist further testified that the CSE recommended the student for an 8:1+1 special class because it "took into account the diagnoses indicated in the neuropsychological evaluation, the student's needs with regard to instruction, including the student/teacher ratio that he required, as well as his social skills, and we wanted to recommend a program that would address all of those needs simultaneously" (Tr. p. 41). The psychologist opined that the annual goal that targeted the student's social skills would likely target his pragmatic language weaknesses (Tr. pp. 45-47).

Here, the foregoing demonstrates that, notwithstanding the omission of counseling services, the IEP was reasonably calculated to enable the student to make progress in light of his circumstances, including in the social/emotional realm. While the parents may have preferred that the CSE adopt the program exactly as envisioned by the private neuropsychologist, the CSE's failure to do so does not support a finding that the district failed to offer the student a FAPE in this instance where other sources of information supported the CSE's recommendations, the student had made progress in preschool without counseling services, and the IEP as a whole address the student's needs.

### **3. Activities of Daily Living Needs**

The district argues that, to the extent the IHO found that the March 2020 IEP failed to address the student's needs related to daily living, self-care, and independence and that such finding contributed to the determination that the district denied the student a FAPE, such a determination was unsupported by the evidence in the hearing record. In particular, the district argues that the March 2020 IEP addressed the student's fine and gross motor skills including those related to activities of daily living. Moreover, the district argues that to the extent the lack of annual goals specifically targeting the student's activities of daily living skills factored into the IHO's reasoning, the absence of such goals would not rise to the level of a denial of a FAPE.

A review of the neuropsychological evaluation report shows completion of the BASC-3 by the parent and teacher revealed concerns about the student's adaptive functioning and that "[n]otably their responses highlight[ed] problems with communication and basic self-care skills appropriate for his age" (Dist. Ex. 9 at p. 14). In addition, completion of the Vineland Adaptive Behavior Scales, Third Edition (VABS-3) by the student's parents yielded a score for daily living

skills that was in the moderately low range (*id.*). The report does not detail those self-care and/or daily living skills with which the student struggled other than to indicate that the student wore diapers at night (*id.* at p. 2). The neuropsychologist stated that the student presented with delays in age-appropriate daily living and independence skills and, as such, skill building and communication and self-care skills should be incorporated into the student's IEP goals (*id.* at p. 18). Her recommendation did not identify specific self-care or daily living skills to be targeted (*id.*). The developmental pediatrician who evaluated the student did not assess or address the student's ADL skills (*see* Dist. Ex. 10). The hearing record contains other, more detailed, sources of information regarding the student's ADLs. In her January 2020 educational progress, the student's preschool teacher indicated that the student was able to self-feed with appropriate feeding utensils with minimal spillage (Dist. Ex. 5 at p. 2). She noted that he was also able to manipulate the zipper on his backpack with minimal prompting (*id.* at p. 3). The student's occupational therapist reported that with minimal assistance the student was able to open and close extra-large buttons while wearing an ADL vest and could open and close a zipper with maximal assistance to thread the hook and latch (Dist. Ex. 8 at p. 2). The March 29, 2020 classroom observation report indicated that the student was independent with most ADLs (Dist. Ex. 4 at p. 2). He was fully toilet trained and washed and dried his hands without assistance (*id.*). In addition, he was able to take off and zipper his jacket but asked for assistance to button the buttons on clothing (*id.*).<sup>8</sup> The classroom observation report indicated that the student fed himself using utensils and cleaned up after meals (*id.*). In addition, the student was able to take off his coat and shoes without assistance but needed help in putting his coat back on (*id.*). The March 2020 IEP indicated the student's physical development needs were such that he required continued support to increase fine motor and gross motor skills to ensure his ability to keep up with physical demands of kindergarten as they related to writing, daily living skills, physical education, and navigating the school building and grounds (Dist. Ex. 1 at p. 9).

Based on the information available to the CSE it appears that the student's difficulty with ADLs related primarily to his ability to manipulate fasteners such as buttons or zippers and navigate the school environment. Here, the hearing record supports the district's assertion that the student's needs would have been addressed through the OT and PT services recommended for the student as well as the goals that targeted his fine motor and locomotor skills (*see* Dist. Ex. 1 at pp. 15-16, 18). Accordingly, to the extent the IHO's determination that the district failed to offer the student a FAPE rested in part on the degree to which the IEP addressed the student's ADLs, such a finding is not supported by the evidence in the hearing record.

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

The parents cross-appeal from the IHO's decision in that it did not address their allegations regarding implementation of the March 2020 IEP, more specifically that the district did not show the assigned school could have provided the student with a class for students with autism who did

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<sup>8</sup> In the paragraph describing the student's ADLs, the classroom observation report referenced the student's first name twice but included the first name of another student once (*see* Dist. Ex. 4 at p. 2). The inclusion of an incorrect first name in the report appeared to have been a typographical error.

not have behavioral needs, that the school had a waitlist, and that there was a possibility the school could not meet the student's speech-language mandates. The district points to the testimony of the assistant principal of the assigned public school site to show that the school could have implemented the IEP. Additionally, the district asserts that any allegation that the student would have been inappropriately grouped with students with behavioral needs was impermissibly speculative.

Generally, the sufficiency of the program offered by the district must be determined on the basis of the IEP itself (R.E., 694 F.3d at 186-88). The Second Circuit has explained that "[s]peculation that the school district will not adequately adhere to the IEP is not an appropriate basis for unilateral placement" (R.E., 694 F.3d at 195; see E.H. v. New York City Dep't of Educ., 611 Fed. App'x 728, 731 [2d Cir. May 8, 2015]; R.B. v. New York City Dep't of Educ., 603 Fed. App'x 36, 40 [2d Cir. Mar. 19, 2015] ["declining to entertain the parents' speculation that the 'bricks-and-mortar' institution to which their son was assigned would have been unable to implement his IEP"], quoting T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 419 [2d Cir. 2009]; R.B. v. New York City Dep't of Educ., 589 Fed. App'x 572, 576 [2d Cir. Oct. 29, 2014]). However, a district's assignment of a student to a particular public school site must be made in conformance with the CSE's educational placement recommendation, and the district is not permitted to deviate from the provisions set forth in the IEP (M.O. v. New York City Dep't of Educ., 793 F.3d 236, 244 [2d Cir. 2015]; R.E., 694 F.3d at 191-92; T.Y., 584 F.3d at 419-20; see C.F. v. New York City Dep't of Educ., 746 F.3d 68, 79 [2d Cir. 2014] [holding that while parents are entitled to participate in the decision-making process with regard to the type of educational placement their child will attend, the IDEA does not confer rights on parents with regard to the selection of a school site]). The Second Circuit has held that claims regarding an assigned school's ability to implement an IEP may not be speculative when they consist of "prospective challenges to [the assigned school's] capacity to provide the services mandated by the IEP" (M.O., 793 F.3d at 245; see Y.F. v. New York City Dep't of Educ., 659 Fed. App'x 3, 5-6 [2d Cir. Aug. 24, 2016]; J.C. v. New York City Dep't of Educ., 643 Fed. App'x 31, 33 [2d Cir. Mar. 16, 2016]; B.P. v. New York City Dep't of Educ., 634 Fed. App'x 845, 847-49 [2d Cir. Dec. 30, 2015]). Such challenges must be "tethered" to actual mandates in the student's IEP (see Y.F., 659 Fed. App'x at 5). Additionally, the Second Circuit indicated that such challenges are only appropriate, if they are evaluated prospectively (as of the time the parent made the placement decision) and if they were based on more than "mere speculation" that the school would not adequately adhere to the IEP despite its ability to do so (M.O., 793 F.3d at 244). In order for such challenges to be based on more than speculation, a parent must allege that the school is "factually incapable" of implementing the IEP (see M.E. v. New York City Dep't of Educ., 2018 WL 582601, at \*12 [S.D.N.Y. Jan. 26, 2018]; Z.C. v. New York City Dep't of Educ., 2016 WL 7410783, at \*9 [S.D.N.Y. Nov. 28, 2016]; L.B. v. New York City Dep't of Educ., 2016 WL 5404654, at \*25 [S.D.N.Y. Sept. 27, 2016]; G.S. v. New York City Dep't of Educ., 2016 WL 5107039, at \*15 [S.D.N.Y. Sept. 19, 2016]; M.T. v. New York City Dep't of Educ., 2016 WL 1267794, at \*14 [S.D.N.Y. Mar. 29, 2016]). Such challenges must be based on something more than the parent's speculative "personal belief" that the assigned public school site was not appropriate (K.F. v. New York City Dep't of Educ., 2016 WL 3981370, at \*13 [S.D.N.Y. Mar. 31, 2016]; Q.W.H. v. New York City Dep't of Educ., 2016 WL 916422, at \*9 [S.D.N.Y. Mar. 7, 2016]; N.K. v. New York City Dep't of Educ., 2016 WL 590234, at \*7 [S.D.N.Y. Feb. 11, 2016]).



Turning first to the parent's claims related to the functional grouping of the proposed class at the assigned school, neither the IDEA nor federal regulations require students who attend a special class setting to be grouped in any particular manner. The United States Department of Education has opined that a student must be assigned to a class based upon his or her "educational needs as described in his or her IEP" and not on "a categorical placement," such as one based on the student's disability category (Letter to Fascell, 18 IDELR 218 [OSEP 1991]). While unaddressed by federal law and regulations, State regulations set forth some requirements that school districts must follow for grouping students with disabilities. In particular, State regulations provide that in many instances the age range of students in a special education class in a public school who are less than 16 years old shall not exceed 36 months (8 NYCRR 200.6[h][5]). State regulations also require that in special classes, students must be suitably grouped for instructional purposes with other students having similar individual needs (8 NYCRR 200.1[ww][3][ii]; 200.6[a][3], [h][3]; see Walczak, 142 F.3d at 133 [approving an IEP that placed a student in a classroom with students of different intellectual, social, and behavioral needs, where sufficient similarities existed]).<sup>9</sup> State regulations further provide that determinations regarding the size and composition of a special class shall be based on the similarity of the individual needs of the students according to levels of academic or educational achievement and learning characteristics, levels of social development, levels of physical development, and the management needs of the students in the classroom (see 8 NYCRR 200.6[h][2]; see also 8 NYCRR 200.1[ww][3][i][a]-[d]). SROs have often referred to grouping in the areas of academic or educational achievement, social development, physical development, and management needs collectively as "functional grouping" to distinguish that set of requirements from grouping in accordance with age ranges (see, e.g., Application of a Student with a Disability, Appeal No. 17-026).

In this instance, in addition to the grouping requirements set forth in State regulations, included in the student's present levels of performance on the March 2020 IEP, at the end of the section describing the students' academic achievement, functional performance, and learning characteristics, is a statement that the student "require[d] a specialized class (8:1:1) in a specialized school, geared toward students with ASD and with no behavior issues" (Dist. Ex. 1 at p. 5). In arguing that the IHO erred in finding that the March 2020 IEP did not address the student's need for a calm classroom setting, the district argues that the IEP addressed this issue by including the above statement (Req. for Rev. ¶12). Thus, the parties agree that the March 2020 IEP included a requirement that the student be placed in a class with other students with autism who did not have behavior issues (see Req. for Rev. ¶ 12; Answer & Cross-Appeal ¶¶ 6, 7, 11).

However, the student never actually attended the March 2020 CSE's recommended 8:1+1 special class, as he was unilaterally placed at Gillen Brewer for the 2020-21 school year (Parent Exs. K; L; M). Further, although the parents expressed concern that the student would not have had an appropriate peer group in the recommended 8:1+1 special class, the parents' concern was based on their "own research and understanding of the composition of 8:1:1 classes in District 75 programs," rather than on the composition of the class the student would have attended (Parent Ex. C at p. 1). Accordingly, any evidence about how the student would have been grouped if he had attended the public school is necessarily speculative (J.C., 643 Fed. App'x at 33 [finding that

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<sup>9</sup> To be clear, there is no requirement in the IDEA or State regulation requiring that grouping be conducted in accordance with a student's chronological grade.

"grouping evidence is not the kind of non-speculative retrospective evidence that is permissible" where the school possessed the capacity to provide an appropriate grouping for the student, and plaintiffs' challenge is best understood as "[s]peculation that the school district [would] not [have] adequately adhere[d] to the IEP", quoting R.E., 694 F.3d at 195; see G.S., 2016 WL 5107039, at \*15; L.C. v. New York City Dep't of Educ., 2016 WL 4690411, at \*4 [S.D.N.Y. Sept. 6, 2016] ["Any speculation about which students [the student] would have been grouped with had he attended [the proposed placement] is just that—speculation. And speculation is not a sufficient basis for a prospective challenge to a proposed school placement"]. Although the student was not placed in the district's 8:1+1 special class due to his unilateral placement at Gillen Brewer and I find that the parents' argument regarding functional grouping is impermissibly speculative, I will review evidence in the hearing record regarding how the assigned public school would have grouped the student for the sake of thoroughness, as well as the evidence regarding the parents' other concerns with the assigned school.

By prior written notice, dated May 20, 2020, the district notified the parents of the school the student was assigned to attend for the 2020-21 school year (Dist. Ex. 3 at p. 1). The notice also included contact information for the school and for a representative of the district who could assist the parents in "arranging for a visit: Before 6/26/2020" (id.). The student's mother testified that she received the placement recommendation identifying the school, but also indicated that it did not provide any contact information (Tr. p. 245). According to the parent, she found information for the school's parent coordinator online, and after leaving voicemails and sending emails, she was referred to the unit coordinator for the school and was eventually able to speak with the unit coordinator on August 13, 2020 (Tr. pp. 245-46). According to the parent, the unit coordinator "indicated . . . that the class had a wait list for students for enrollment" and that "[i]t was just very vague if there was going to be space for [the student] or not" (Tr. pp. 246-47). In addition, the parent testified that she spoke about some of the things in the IEP and the unit coordinator "said that they normally don't provide five periods per week of speech services" and that "[t]hey need to adjust [the student's] IEP if needed" (Tr. p. 247). Additionally, the parent testified that she asked "that [the student] shouldn't be with kids with behavioral needs, as it could be a distraction to him" and the unit coordinator responded by saying "that some of the students in the class have behavioral outbursts" (id.). According to the parent, after the parents raised these concerns in their August 25, 2020 letter to the CSE, the parents never received a response (Tr. pp. 248-49; see Parent Ex. C).

In a September 28, 2020 follow up letter to the CSE, the parents reiterated their concerns regarding the assigned public school, indicated that they had not received a response from the CSE regarding the August 25, 2020 letter, and further indicated that they had an additional conversation with the unit coordinator and the parent coordinator at the assigned school (Parent Ex. D). According to the parents, the unit coordinator and parent coordinator told the parents the class would be a "'blended class'" and "'there will be a few kids with behavioral issues' in the class" (id. at p. 2).<sup>10</sup> According to the student's mother, she did not receive a response from the district regarding the September 28, 2020 letter (Tr. pp. 251-52).

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<sup>10</sup> The parent coordinator for the assigned school testified that she never had a conversation with the parent (Tr. p. 151).

The unit coordinator for the school the student was assigned to attend testified that she had a few conversations with the student's mother, in August 2020 (Tr. pp. 136-37). According to the unit coordinator, the parent called to ask about the school and had IEP related questions, "just basically asking if her son w[ould] get the services that [we]re mandated on the IEP" and the unit coordinator told the parent that he would (Tr. p. 137). She testified that she told the parent that the school follows whatever is on the IEP (id.). She also testified that the parent asked about other students' behaviors and she advised the parent that that information was confidential; however, she also gave the parent "a brief rundown of . . . what are some typical behaviors that you would see in a classroom" (Tr. pp. 137-38). In elaborating on this point, the unit coordinator testified that the school does have students who have aggressive behaviors, but she could not determine which students those were right away (Tr. p. 144). Additionally, according to the unit coordinator, the school never had a wait list and any student who had a placement letter had a guaranteed seat (Tr. p. 138).

Testimony by the assistant principal of the assigned school indicated the school serviced students in pre-K through grade eight with a variety of disabilities (Tr. pp. 101, 103, 107). When asked to explain what was meant by an 8:1+1 special class, the assistant principal indicated there were "eight students, one special education teacher, and one paraprofessional teacher's assistant" (Tr. p. 111). With regard to the number of 8:1+1 special classes at the assigned school as of September 2020, the assistant principal testified there were six (Tr. p. 113). When asked if any of these classes were full, the assistant principal indicated that, while some of the 8:1+1 special classes might have been full, the school had quite a few vacancies (id.). He noted that if the school received a student that would be more appropriately placed in a class that was already full, the school could move students around (id.). The assistant principal also indicated the school did not have a wait list in September 2020 and in fact had 11 vacancies appropriate for a kindergartner with an 8:1+1 special class mandate (Tr. pp. 114-15). With regard to the student in the instant case, the assistant principal testified that the recommended school had availability in an 8:1+1 classroom for him (Tr. p. 117).<sup>11</sup> In addition, contrary to the parent's concerns that the student might not have received his mandated five sessions of speech-language therapy per week in the recommended 8:1+1 program, the assistant principal testified that the school meets whatever related service mandates students come in with and that, had the student attended the assigned school beginning in September 2020, he would have received the five mandated speech-language therapy sessions per his IEP (id.; see Tr. p. 247).

Based on the number of kindergarten classes that the assigned school had at the start of the 2020-21 school year, the assistant principal indicated "Yes and no" when asked if there was any way he could have known what class the student would have been in prior to his enrollment (Tr. p. 118). According to the assistant principal, the school would have been able to assign the student to a specific classroom; however, the initial classroom assignment would have just been based on a name, until the school received the IEP (Tr. p. 118). Additionally, he testified that the classroom assignments often changed within the first month of school as school staff met the students and had an opportunity to personally assess them to figure out which groupings worked best (Tr. p.

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<sup>11</sup> The assistant principal's testimony indicated that the student's name was not on his roster because he would not put a student's name on the roster until a parent accepted placement of their child in the school (Tr. p. 123). He was aware that the student in the instant case was offered placement at his school (Tr. p. 123).

118). He also indicated "nothing is ever permanent" as all decisions are made in the best interests of the students, particularly that adjustments are made if staff realizes the class is not the best grouping due to range of abilities, needs, or behaviors (Tr. pp. 118-19).

As the parents did not enroll the student in the recommended school, any discussion about the parents' allegation that the student would have been inappropriately grouped with students with behavioral needs was impermissibly speculative. Moreover, the parents arguments about the wait list and the school's willingness to implement the student's speech-language therapy mandate are not supported by the hearing record. Therefore, based on the above I find the district's recommended assigned public school site was appropriate for the student for the 2020-21 school year.

## **VII. Conclusion**

In summary, the hearing record supports a finding that the district offered the student a FAPE for the 2020-21 school year. I have also considered the parties' remaining contentions and find them to be without merit.

**THE APPEAL IS SUSTAINED.**

**THE CROSS-APPEAL IS DISMISSED.**

**IT IS ORDERED** that the IHO's decision, dated October 14, 2021, is modified by reversing those portions which determined that the district did not offer the student a FAPE for the 2020-21 school year and awarded the parents' tuition reimbursement/funding for the cost of tuition at the parents' unilateral placement of the student at Gillen Brewer for the 2020-21 school year.

**Dated: Albany, New York  
February 3, 2022**

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