The University of the State of New York

The State Education Department
State Review Officer
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No. 22-007

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

Appearances:
The Law Office of Natan Shmueli, attorneys for petitioner, by Natan Shmueli, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Gail M. Eckstein, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from a decision of an impartial hearing officer (IHO) which found that respondent (the district) provided an appropriate educational program to her daughter and denied the parent's request for the district to fund her daughter's tuition costs at the Bais Frieda Child Care Center Inc. (Bais Frieda) for the 2020-21 school year. The appeal must be sustained.

II. Overview—Administrative Procedures

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

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

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

III. Facts and Procedural History

The student presents with delays in her cognition; receptive, expressive, and pragmatic language skills; social/emotional development; academic skills; ability to attend; and fine and gross motor skills (Parent Ex. 2 at pp. 1-6; Dist. Ex. 2).[1] She has been diagnosed as having an autism spectrum disorder and also a "brain injury" (Parent Ex. 2 at pp. 4, 6; Dist. Exs. 2 at p. 1; 3 at pp. 1, 4, 6). Due to developmental delays, the student received special instruction and related services through the Early Intervention Program (Dist. Ex. 2 at pp. 1, 6). In May 2018, the student

[1] The hearing record contains two copies of the May 2020 IEP (compare Parent Exs. 2, with Dist. Ex. 3). For purposes of this decision, only the parent exhibit is cited.

was evaluated to determine her eligibility for special education through the Committee on Preschool Education (CPSE) (see Dist. Ex. 2 at pp. 1, 2). In June 2018, the CPSE found the student eligible for special education as a preschool student with a disability and made recommendations for the 2018-19 school year (see Parent Ex. 3 at pp. 3-4). The parent unilaterally placed the student at Bais Frieda for preschool for the 2018-19 and 2019-20 school years and sought district funding for the costs of the student's tuition, which was the subject of a prior impartial hearing (prior proceeding) (id. at p. 4; see Parent Ex. 2 at p. 1).[2]

On May 4, 2020, a CSE convened and, finding the student eligible to receive special education and related services as a student with autism, recommended the student attend a 12:1+1 special class for English language arts (ELA), math, social studies, and sciences in a community school and receive the following related services: one 30-minute session weekly of individual counseling, one 30-minute session weekly of counseling in a small group, three 30-minute sessions weekly of individual occupational therapy (OT), two 30-minute sessions weekly of individual physical therapy (PT), two 30-minute sessions weekly of individual speech-language therapy, one 30-minute session weekly of speech-language therapy in a small group, and four 60-minute sessions of parent counseling and training per year (Parent Ex. 2 at pp. 1, 16-17, 21).[3]

In a prior written notice to the parent dated May 5, 2020, the district summarized the May 2020 CSE's recommendations for the student for the 2020-21 school year (Dist. Ex. 4). In addition, the May 2020 prior written notice listed the following evaluations, assessments, records, or reports relied on by the May 2020 CSE: a May 2020 OT progress report, a May 2020 PT progress report, a review of the student's portfolio, a May 2020 applied behavior analysis (ABA) report with a functional behavioral assessment (FBA) and a behavioral intervention plan (BIP), and a May 2020 parent report (id. at p. 1).

By letter dated June 1, 2020, the parent notified the district that she had not yet received a "proper or adequate placement" for the student and that, therefore, she was enrolling the student in Bais Freida for the 2020-21 school year and intended to seek district funding for the student's placement (Parent Ex. 8 at p. 2).[4, 5]

In a subsequent prior written notice/school location letter dated June 11, 2020, the district identified the particular school site to which the student had been assigned to attend for the 2020-21 school year (Dist. Ex. 5).

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[2] On December 12, 2020, an IHO found that the district failed to offer the student a FAPE for the 2018-19 and 2019-20 school years and ordered the district to fund the costs of the student's attendance at Bais Frieda for both school years (Parent Ex. 3 at pp. 15-16).

[3] The student's eligibility for special education as a student with autism is not in dispute (see 34 CFR 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

[4] Bais Freida 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).

[5] Although the letter is dated June 1, 2020, the document is accompanied by a facsimile cover sheet that reflects a transmittal date of June 17, 2020 (Parent Ex. 8).

The parent executed a contract to enroll the student at Bais Freida for the 2020-21 school year on June 29, 2020 (Parent Ex. 4 at pp. 1-3).

By letter dated September 15, 2020, the parent notified the district that she was rejecting the district's assigned school and intended to continue the student's enrollment at Bais Freida and would seek district funding for the costs of the student's tuition (Parent Ex. 9).[6]

A. Due Process Complaint Notice

In an amended due process complaint notice, dated July 7, 2021, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2020-21 school year (Parent Ex. 1).[7] The parent summarized the recommendations of the May 2020 CSE, the progress the student made at Bais Frieda during the school years (2018-19 and 2019-20) leading up to the relevant timeframe, as well as the student's needs, including in the areas of attention, articulation, and behavior (noting that the student's behaviors included tantrums, crying, and eloping), and a need for 12-month services to avoid regression (id. at pp. 1-2). The parent alleged that the student required a full-time 12-month school year program in a 12:1+1 special class placement for the 2020-21 school year (id. at p. 2). The parent also contended that the assigned public school site was not appropriate for the student since the student would have to wear a mask all day, related services would be held in a group room which would be distracting to the student, bathrooms were not located in the classroom which would pose a safety risk given the student's tendency to elope, and, if remote instruction became necessary, delivery of three hours of instruction per day would be insufficient (id.).

The parent alleged that the student attended a 12-month program in a 12:1+1 special class at Bais Frieda for the 2020-21 school year, which was appropriate to meet her needs (Parent Ex. 1 at p. 2). For relief, the parent sought district funding of the costs of the student's tuition at Bais Frieda for the 2020-21 school year (id. at pp. 1-2). The parents also requested a finding that the program and services that the student was receiving at Bais Frieda constituted the student's stay-put placement during the pendency of the proceedings (id. at p. 3).

B. Impartial Hearing Officer Decision

An impartial hearing convened on August 6, 2021, and concluded on December 10, 2021, after four days of proceedings (see Tr. pp. 1-172). In an interim decision dated August 6, 2021, the IHO found that the student's pendency placement consisted of a 12:1+1 special class, along with related services of two 30-minute sessions per week of counseling (one individual and one group), three 30-minute sessions per week of individual OT, two 30-minute sessions per week of individual PT, three 30-minute sessions per week of speech-language therapy (two individual and one group), and four 60-minute sessions per year week of group parent counseling and training (Interim IHO Decision at p. 5). The IHO acknowledged that the December 2020 IHO decision arising from the prior matter "confirmed the appropriateness of the Student's placements at Bais

[6] Although the letter is dated September 15, 2020, the document is accompanied by a facsimile cover sheet and a facsimile confirmation page that reflects a transmittal date of September 16, 2020 (Parent Ex. 9 at pp. 1-3).

[7] The parent's original due process complaint notice was dated April 15, 2021 (see Due Process Compl. Notice).

Frieda . . . for the 2018-2019 and 2019-20 school years," which "program location remained in place at the time the [April 2021] complaint was filed" (id. at p. 4). The IHO specified that the student was entitled to the pendency placement retroactive to the filing of the due process complaint notice on April 16, 2021 (id. at p. 5).

In a decision dated December 16, 2021, the IHO found that the district offered the student a FAPE for the 2020-21 school year (IHO Decision). In particular, the IHO found that the May 2020 IEP addressed "the full spectrum of the Student's unique needs" (id. at p. 10). The IHO concluded that the CSE appropriately recommended a 10-month program since the student was "functionally performing near grade level" (id.). In addition, the IHO determined that the district offered an appropriate "Placement" and "reasonably responded to the Parent's concerns concerning how the Proposed Placement would manage the Student from both a behavioral and safety perspective" (id. at pp. 10-11).

IV. Appeal for State-Level Review

The parent appeals, arguing that the IHO erred in finding that the district offered the student a FAPE for the 2020-21 school year. In particular, the parent alleges that the IHO erred in finding the May 2020 IEP appropriate for the student. The parent argues that the IEP "failed to appropriately address the Student's behavioral and social challenges" and failed to include a recommendation for 12-month services. Concerning the student's behaviors, the parent points to evidence showing that the student exhibited social and behavioral challenges, including descriptions in the May 2020 IEP, and argues that the CSE ignored the extent of the student's behaviors and failed to recommend strategies and supports in the IEP to address the interfering behaviors. Regarding 12-month services, the parent alleges that, in finding that the student was performing near grade-level and therefore did not require 12-month services, the IHO applied an incorrect standard. Moreover, the parent points to evidence that the student was not performing near grade level. The parent argues that the student needed 12-month services to prevent substantial regression and notes that the student's June 2018 CPSE IEP recommended 12-month services. The parent argues that the May 2020 CSE should have explored the topic of regression before "removing that significant aspect of the Student's program."

Next, the parent alleges that the IHO erred in finding that the assigned public school site was appropriate. The parent notes that she was not permitted to tour the school to assess its appropriateness. In addition, the parent argues that the school was "unable to provide consistent in-person instruction," deliver the student's instruction using ABA methodology, or address the student's social and behavioral needs.

The parent also argues that the IHO erred in not addressing the appropriateness of the unilateral placement or equitable considerations. The parent asserts that the IHO should have directed the district to fund the costs of the student's tuition at Bais Frieda for the 2020-21 school year.

In an answer, the district responds to the parent's allegations and argues that the IHO's decision should be upheld in its entirety. As a preliminary matter, the district argues that the parent's request for review should be dismissed for failing to appeal the IHO's specific adverse determinations and, instead, making general arguments regarding the May 2020 IEP and assigned

public school site. The district argues that the IHO did not make specific determinations regarding the degree to which the IEP addressed the student's behavioral challenges, the appropriateness of a 10-month program, or the ability of the assigned public school site to implement the IEP.

Turning to the parent's specific contentions, the district argues that the parent exaggerates the intensity of the student's behaviors and that the May 2020 CSE did not recommend a BIP for the student because Bais Frieda staff who participated in the meeting "failed to substantiate the behaviors that would necessitate" such a plan. As for 12-month services, the district argues that no evidence in the hearing record demonstrated that the student would have suffered substantial regression during summer 2020. Concerning the assigned public school site's capacity to implement the student's IEP, the district argues that the parent's allegations are impermissibly speculative and/or her particular concerns are not tethered to the IEP. In addition, the district notes that there is no requirement that the parent be permitted to tour the assigned school site and that the school's restrictions on tours were related to the COVID-19 pandemic.

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]).[8]

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

[8] 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).

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—Compliance with the Practice Regulations

Before turning to the merits, I will address the district's argument that the parent's request for review does not comply with State regulations governing practice before the Office of State Review. State regulation provides that a request for review "shall clearly specify the reasons for challenging the [IHO's] decision, identify the findings, conclusions, and orders to which exceptions are taken, or the failure or refusal to make a finding, and shall indicate what relief should be granted by the [SRO] to the petitioner" (8 NYCRR 279.4[a]). Additionally, a request for review must provide a "clear and concise statement of the issues presented for review and the grounds for reversal or modification to be advanced, with each issue numbered and set forth separately, and identifying the precise rulings, failures to rule, or refusals to rule presented for review" 8 NYCRR 279.8[c][2]). Further, the request for review "must conform to the form requirements in section 279.8 of this Part" (8 NYCRR 279.4[a]). Section 279.8 requires that a request for review shall set forth:

> (1) the specific relief sought in the underlying action or proceeding;
>
> (2) a clear and concise statement of the issues presented for review and the grounds for reversal or modification to be advanced, with each issue numbered and set forth separately, and identifying the precise rulings, failures to rule, or refusals to rule presented for review; and
>
> (3) citations to the record on appeal, and identification of the relevant page number(s) in the hearing decision, hearing transcript, exhibit number or letter and, if the exhibit consists of multiple pages, the exhibit page number.

(8 NYCRR 279.8[c]).

In general, the failure to comply with the practice requirements of Part 279 of the State regulations may result in the rejection of the submitted documents or a determination excluding issues from the scope of review on appeal (8 NYCRR 279.8[a]-[b]; see Davis v. Carranza, 2021

WL 964820, at *12 [S.D.N.Y. Mar. 15, 2021] [upholding an SRO's conclusions that several claims had been abandoned by the petitioner]; M.C. v. Mamaroneck Union Free Sch. Dist., 2018 WL 4997516, at *23 [S.D.N.Y. Sept. 28, 2018] [upholding dismissal of allegations set forth in an appeal to an SRO for "failure to identify the precise rulings presented for review and [failure] to cite to the pertinent portions of the record on appeal, as required in order to raise an issue" for review on appeal]; T.W. v. Spencerport Cent. Sch. Dist., 891 F. Supp. 2d 438, 440-41 [W.D.N.Y. 2012] [upholding dismissal of a petition for review that was untimely and exceeded page limitations]). However, "judgments rendered solely on the basis of easily corrected procedural errors or 'mere technicalities,' are generally disfavored" (J.E. v. Chappaqua Cent. Sch. Dist., 2015 WL 4934535, at *4-*6 [S.D.N.Y. Aug. 17, 2015], quoting Foman v. Davis, 371 U.S. 178 [1962]).

Contrary to the district's contention, the parent's request for review complies with State regulations. The IHO's finding that the district offered the student a FAPE was generally stated but was also based on specific determinations relating to 12-month services and the assigned public school site (see IHO Decision at pp. 10-11). The parent's request for review identifies the specific findings of the IHO with which she takes issue and, further, states the reasons for reversal with specific citations to the record on appeal. To the extent the parent did not grapple with the IHO's reasoning in further detail, any such shortcoming can be attributed to the IHO not setting forth a detailed rationale for her determinations (see generally Application of a Student with a Disability, Appeal No. 19-009 [remanding matter to the IHO due to poorly drafted IHO decision precluding petitioner's ability to formulate a request for review that complied with practice regulations]). Accordingly, I decline to reject the parent's request for review or limit the scope of review of it on this basis.

B. May 2020 IEP

1. Special Factors—Interfering Behaviors

The next issue to be addressed is whether the May 2020 CSE recommended sufficient and appropriate supports to address the student's behavioral needs.[9] Under the IDEA, a CSE may be

[9] While the amended due process complaint notice alluded to the student's behavioral needs, the parent did not specifically allege that the CSE failed to make sufficient or appropriate recommendations to address those needs (see Parent Ex. 1). Generally, the party requesting an impartial hearing has the first opportunity to identify the range of issues to be addressed at the hearing (Application of a Student with a Disability, Appeal No. 09-141; Application of the Dep't of Educ., Appeal No. 08-056). Under the IDEA and its implementing regulations, a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.507[d][3][i], 300.511[d]; 8 NYCRR 200.5[j][1][ii]), or the original due process complaint notice is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.507[d][3][ii]; 8 NYCRR 200.5[i][7][b]). However, here, the district does not allege that the issue was outside of the scope of the impartial hearing and, moreover, review of the hearing transcript reveals that, during direct examination of the district school psychologist who chaired the May 2020 CSE meeting, the district's representative elicited testimony relating to the issue of the student's behavioral needs and the degree to which the IEP addressed those needs (Tr. pp. 134-36; see Parent Ex. 2 at p. 23; M.H., 685 F.3d at 250-51; see also N.K. v. New York City Dep't of Educ., 961 F. Supp. 2d 577, 585 [S.D.N.Y. 2013]; A.M. v. New York City Dep't of Educ., 964 F. Supp. 2d 270, 282-84 [S.D.N.Y. 2013]; J.C.S. v. Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, at *9 [Aug. 5, 2013]; B.M. v. New York City Dep't of Educ., 2013 WL 1972144, at *5-*6 [S.D.N.Y. May 14, 2013]). Accordingly, I find that the issue was within the scope of the

required to consider special factors in the development of a student's IEP. Among the special factors in the case of a student whose behavior impedes his or her learning or that of others, the CSE shall consider positive behavioral interventions and supports, and other strategies, to address that behavior (20 U.S.C. § 1414[d][3][B][i]; 34 CFR 300.324[a][2][i]; see 8 NYCRR 200.4[d][3][i]; see also E.H. v. Bd. of Educ. of Shenendehowa Cent. Sch. Dist., 361 Fed. App'x 156, 160 [2d Cir. Oct. 16, 2009]; A.C., 553 F.3d at 172). State procedures for considering the special factor of a student's behavior that impedes his or her learning or that of others may also require that the CSE consider developing a BIP for a student that is based upon an FBA (8 NYCRR 200.4[d][3][i], 200.22[a]-[b]). Additionally, a district is required to conduct an FBA in an initial evaluation for students who engage in behaviors that impede their learning or that of other students (8 NYCRR 200.4[b][1][v]). State regulation defines an FBA as "the process of determining why a student engages in behaviors that impede learning and how the student's behavior relates to the environment" and includes, but is not limited to:

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

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

The Second Circuit has indicated that, when required, "[t]he failure to conduct an adequate FBA is a serious procedural violation because it may prevent the CSE from obtaining necessary information about the student's behaviors, leading to their being addressed in the IEP inadequately or not at all" (R.E., 694 F.3d at 190; see L.O. v. New York City Dep't of Educ., 822 F.3d 95, 113 [2d Cir. 2016]). The Court also noted that "[t]he failure to conduct an FBA will not always rise to the level of a denial of a FAPE," but that in such instances particular care must be taken to determine whether the IEP addresses the student's problem behaviors (R.E., 694 F.3d at 190).

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

> (i) the student exhibits persistent behaviors that impede his or her learning or that of others, despite consistently implemented general school-wide or classroom-wide interventions; (ii) the student's behavior places the student or others at risk of harm or injury; (iii)

impartial hearing, and I will address the parent's arguments on appeal concerning the May 2020 CSE's failure to address the student's behavioral needs.

> the CSE or CPSE is considering more restrictive programs or placements as a result of the student's behavior; and/or (iv) as required pursuant to 8 NYCRR 201.3

(8 NYCRR 200.22[b][1]).

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

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

The parent argues that the IHO erred in finding that the May 2020 IEP was appropriate, alleging that the student experienced intensive social and behavioral challenges which were not properly addressed. In its answer, the district argues that the student's behaviors, as described by the parent, were "exaggerated" (Answer ¶ 6). However, the district failed to present the documents on which the CSE relied and, therefore, cannot demonstrate that, based on the information available to the CSE, the student's behaviors were not so intensive as to warrant positive behavioral interventions or a BIP.

That is, the district should have offered into evidence all documentation that the May 2020 CSE relied on in developing the IEP; having failed in this regard, to a degree, I am left to speculate as to what information the CSE used to develop the IEP (see L.O., 822 F.3d at 110-11 [discussing the consequences of a CSE's failure to adequately document evaluative data, including that reviewing authorities might be left to speculate as to how the CSE formulated the student's IEP]). Here, the May 2020 prior written notice indicated that the CSE considered the following: a May 2020 OT progress report, a May 2020 PT progress report, a review of the student's portfolio, a May 2020 ABA report with an FBA and BIP, and a May 2020 parent report (Dist. Ex. 4 at p. 1). Additionally, the school psychologist who chaired the May 2020 CSE meeting testified that the IEP was based on "parent reports, teacher report, documentation," as well as a progress report provided by the ABA therapist (Tr. pp. 135, 137). None of the referenced written reports were included in the hearing record.

Without the documents the May 2020 CSE relied on in evidence, I am left to review the information about the student's needs that the CSE included in the May 2020 IEP. Here, the IEP describes the student's behavioral needs in a manner that tends to indicate that the behaviors impeded his learning or that of others (see Parent Ex. 2 at pp. 2-4). The May 2020 IEP present

levels of academic performance indicated that the student required constant redirection and one-to-one support to follow along with classroom demands and routines and specifically noted that the student's non-compliance and tantrums "call[ed] for a need for one on one supervision" (id. at p. 2). Additionally, the IEP stated that the student's speech was "very garbled" and that, even though she would repeat herself multiple times until she was understood, she could become frustrated, and engage in tantrum behaviors (id.). Further, when she experienced a problem, she engaged in crying until an adult provided assistance (id.).

According to the May 2020 IEP present level of social development, a school progress report indicated that when the student experienced a "hard time completing a task" she sometimes broke down into "noisy tears" (Parent Ex. 2 at p. 3). Additionally, based on the progress report, the IEP reflected that the student had a difficult time transitioning from the classroom to therapy sessions and noted that she tended to be defiant and refused to go, and at times "deteriorate[ed] into tantrum behavior" (id.). Furthermore, the May 2020 IEP indicated that the student had difficulty expressing herself and articulating her thoughts to peers which caused some frustration, leading to tantrums when she was repeatedly misunderstood (id.). Regarding maladaptive behaviors, the May 2020 IEP included information from an ABA therapist's report that, even though the student's tantrum behaviors (described as kicking her feet and crying) had decreased, she still engaged in such behaviors (id.). The IEP further reflected, from the ABA report, that the student continued to engage in echolalia; would often engage in tantrum behavior when told to do a non-preferred task or a task that was too difficult; would act silly by making silly noises and faces or by shaking her hand; and had a hard time verbally expressing her needs or emotions, which resulted in outbursts when not understood (id. at p. 4).

Additionally, the May 2020 IEP included information presented during the CSE meeting by a Board Certified Behavior Analyst (BCBA), who reported that the student was very impulsive, and that at times when upset she would "elope from the situation" (Parent Ex. 2 at p. 4). The BCBA reported that, because of the amount of adult supervision provided in her then-current classroom, the student had not eloped from the school building; however, the BCBA noted that there had been incidents when the student had "eloped from the class and they had to chase her" (id.). The BCBA further reported that the student had no danger awareness (id.). According to the May 2020 IEP, the parent was advised that "if this ever becomes a dangerous situation, she should keep anecdotes and approach the school based support team so that they can do observations" (id.).

The May 2020 CSE recommended the student attend a 12:1+1 special class in a community school with the following related services: one 30-minute session weekly of individual counseling and one 30 minute session weekly of counseling in a small group, three 30 minute session weekly of individual of OT, two 30-minute sessions weekly of individual PT, two 30-minute sessions weekly of individual speech-language therapy, one 30-minute session weekly of speech-language therapy in a small group, and four 60-minute sessions of parent counseling and training per year (Parent Ex. 2 at pp. 1, 16-17, 21). Furthermore, the May 2020 IEP contained several annual goals and short-term objectives designed to improve the student's skills in early reading, early math, early writing, early concepts, receptive and expressive language, language concepts, fine and gross motor performance and sensory skills, social/emotional skills, and conversational skills (id. at pp. 7-15). The May 2020 IEP also contained annual goals designed to improve the parent's understanding and use of strategies to assist in coping with the student's disability and to carry

over gains from school to the home environment (id. at p. 16). To further support the student, the May 2020 IEP identified the following strategies/resources needed to address her management needs: multimodal/multi-sensory approach to teaching, sentence repetition, combining and completion of activities to help build fluency, visual cues and scaffolding, simplification of direction, teacher modeling, directions repeated/reworded in simple language, use of manipulatives, teacher check-ins, positive reinforcement and encouragement, and preferential seating (id. at p. 7). With regard to special factors, the May 2020 IEP reflects the CSE's determination that the student did not require strategies including positive behavioral interventions, supports and other strategies to address behaviors that impeded the student's learning or that of others, or a BIP (id. at pp. 6, 22).

The hearing record contains conflicting reports regarding information discussed at the May 2020 CSE meeting. According to the preschool director at Bais Freida (director) who attended the May 2020 CSE meeting, the student had a BIP, which was submitted to the May 2020 CSE (Tr. pp. 67-68; Parent Ex. 2 at p. 23). She further testified that "not only [did the student] utilize one, but she desperately need[ed] one, and she could not function without one" (Tr. p. 68). Additionally, the director indicated that the May 2020 CSE "spent most of the IEP meeting discussing the [student's] behaviors," and opined that the May 2020 IEP was inappropriate because it did not have clear behavioral supports attached to the IEP which she stated were provided and discussed at the CSE meeting (Tr. pp. 68-70). The district school psychologist, who chaired the May 2020 CSE meeting, testified that the May 2020 CSE had updated progress reports and an ABA progress report, but she did not recall if there was a behavioral plan (Tr. p. 135; see Tr. p. 130-31). The school psychologist further testified that the May 2020 CSE did not create a BIP because "the school never provided us with any anecdotals prior to the meeting" and "[w]e were not aware of any kind of significant behaviors at the time of the meeting" (Tr. pp. 135-36). While the district school psychologist could not recall if the CSE considered a BIP, as noted, the prior written notice lists an ABA report, including an FBA and a BIP, as having been considered by the CSE (Dist. Ex. 4 at p. 1; see also Tr. p. 68). Further, the IEP reflects the CSE's awareness of the student's tantrums and tendency to elope (Parent Ex. 2 at pp. 2-4). The district cannot rely on the lack of information about the student's behaviors from the private school staff to overcome information contained in the IEP itself or to detract from the district's own failure to either conduct its own evaluations of the student or offer into evidence the information relied on by the CSE to conclude that the student did not present with interfering behaviors.

With regard to eloping, the district school psychologist testified that the behaviors discussed during the CSE meeting included that the student could be very impulsive and had the "capability of eloping from the school, from a situation or eloping"; however, she continued that the student's providers indicated that the student had never eloped (Tr. pp. 134-35, 138-39). She then reported that she advised the parent that the following year, when the student attended the public school, if eloping became an issue or concern, she should bring it up with the school-based support team, and "let them see whether or not they needed to do anything more" (Tr. p. 139). Moreover, the psychologist testified that, based on the reports, eloping "didn't seem to be a significant issue at that time, since they were only thinking that she can elope, that she may elope, but she's never done it before because she was . . . under proper supervision" and opined that the 12:1+1 class would provide the appropriate supervision so she would not elope (Tr. pp. 138-39, 144-45). She further opined that, if the student was under supervision in the special education classroom, she should not be at risk for eloping (Tr. p. 145). Finally, she indicated that the school

"never gave us anecdotals showing that, you know, she was a danger to herself or others" (id.). However, as summarized above, the May 2020 IEP itself referenced the student's tendency to elope, noted that the student had not attempted to elope from the school, but included information that the student had demonstrated attempts to elope from situations and from the classroom (Dist. Ex. 2 at p. 4). And, once again, the lack of information provided by the private school staff about the student's eloping or dangerous behaviors does not overcome the district's failure to evaluate the student's behaviors. Rather, an FBA would have been the appropriate vehicle to obtain this information; if the district conducted an FBA and discovered that the behavior was not frequent, then the district would be in a much better position to argue that the student did not require positive behavioral interventions or a BIP to address eloping behavior.

Based on the evidence in the hearing record, as discussed in greater detail above, the May 2020 CSE was aware of the student's behavioral needs, including the student's tantrums and tendency to elope (see Parent Ex. 2 at pp. 2-4). There is no further information in the hearing record regarding the frequency and severity of the student's behaviors; however, the fault for this omission lies with the district. Absent further information about the student's behaviors, the evidence in the hearing record does not support the district's position that the behaviors were not of the severity that they required positive behavioral interventions or a BIP. Based on the foregoing, during the hearing, the district failed to meet its burden of proving that the May 2020 IEP sufficiently addressed the student's behavioral needs. Accordingly, on this basis, the district denied the student a FAPE for the 2020-21 school year.

2. 12-Month Services

The next issue to be addressed on appeal is the parent's position that the May 2020 CSE should have recommended 12-month services for the student. More specifically, the parent asserts that the May 2020 CSE "changed its recommendations to a 12:1+1 class with related services for only a ten-month school year."

State regulations require that students "shall be considered for 12-month special services and/or programs in accordance with their need to prevent substantial regression" (8 NYCRR 200.6[k][1]; see 8 NYCRR 200.1[eee]). "Substantial regression" is defined as "a student's inability to maintain developmental levels due to a loss of skill or knowledge during the months of July and August of such severity as to require an inordinate period of review at the beginning of the school year to reestablish and maintain IEP goals and objectives mastered at the end of the previous school year" (8 NYCRR 200.1[aaa]). State guidance indicates that "an inordinate period of review" is considered to be a period of eight weeks or more ("Questions and Answers Extended School Year 2017," Office of Special Educ. [Feb. 2017], available at http://www.p12.nysed.gov/specialed/applications/ESY/esy-2017/ documents/questions-and-answers-extended-school-year-2017.pdf).[10]

[10] District courts in New York have followed the eight-week standard set forth in guidance when determining whether substantial regression has occurred (D.D-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at *15-*16 [E.D.N.Y. Sept. 2, 2011]; see F.L. v. Bd. of Educ. of Great Neck Union Free Sch. Dist., 274 F. Supp. 2d 94, 125 [E.D.N.Y. 2017]).

Here, the student was eligible for special education through the CPSE during July and August 2020 as State law provides that "[a] child shall be deemed a preschool child through the month of August of the school year in which the child first becomes eligible to attend school" (Educ. Law § 4410[1][i]; see Educ. Law § 3202[1]; 8 NYCRR 200.1[mm][2]). Accordingly, programming for summer 2020 should have been encompassed in a preschool IEP, and, as noted by the parent, the June 2018 CPSE recommended that the student receive 12-month services (Req. for Rev. ¶8; see Parent Ex. 3 at p. 3). The CPSE then failed to develop an IEP for the student for the 2019-20 school year, which failure was the subject of the prior proceeding, and there is no indication that a CPSE convened to develop an IEP for the student for summer 2020 (see Parent Ex. 3 at pp. 14-15).

The district's position on appeal is that there is no evidence in the hearing record that the student required 12-month services. The preschool director from Bais Freida, who attended the May 2020 CSE meeting testified that the student required 12-month services because she took long to develop and retain skills and required 12-month services to prevent regression (Tr. pp. 70-71; see Tr. p. 67). She indicated that "[a]ny time [the student] was out of school for a bit of time" . . . her regression was obvious, both in the social and academic and the cognitive behavioral areas" (Tr. p. 70). She noted that this was the case even when the student was receiving remote instruction due to the COVID-19 pandemic (id.). While the hearing record is not developed with respect to whether the preschool director shared her view of the student's needs in this regard with the CSE, the May 2020 IEP does state that, according to parent report, the student's behavior had been regressing at the time given that, due to the COVID-19 pandemic, she was "home and not in a structured environment" (Parent Ex. 2 at p. 3).

On the other hand, according to the testimony of the district school psychologist who attended the May 2020 CSE meeting, the May 2020 CSE recommended a 10-month program without 12-month services because the student's "early concepts were pretty . . . much on grade level" (Tr. p. 133; see Tr. p. 131; Parent Ex. 2 at p. 23). However, as the parent argues—and as the district concedes—the student's grade level functioning does not speak to the student's ability to maintain that level during the months of July and August (see Req. for Rev. ¶ 23; Answer ¶ 12). Further, given the district's failure to offer into evidence the documents relied on by the May 2020 CSE, it is impossible to determine whether there was information before the CSE which tended to show that the student required 12-month services during summer 2020 in order to prevent substantial regression.[11]

Although there is sufficient support for finding that the student exhibited regression such that 12-month services were required, the parent asserted this issue as a failure of the May 2020 CSE to recommend 12-month services, a service that had been recommended in the student's June 2018 IEP (see Req. for Rev. 8-9, 24-26). As noted above, the May 2020 CSE was responsible for developing the student's programming beginning in September 2020. However, if the parent was

[11] The district argues that there is no evidence demonstrating that the student would have experienced substantial regression over the July to August 2020 time period (Answer ¶ 12). To be sure, it is difficult to prove a negative (i.e., that the student did not need the services); however, as the party bearing the burden of proof (Educ. Law § 4404[1][c]), it was incumbent on the district to enter into evidence all of the documents before the CSE and, only then, could the district effectively argue that the CSE did not have information before it showing that the student required 12-month services.

content with the 12-month services recommended in the student's last preschool IEP, the hearing record is not clear if she could have enrolled the student in a public school to take advantage of the recommendation for 12-month services. Ultimately, having determined that the district failed to offer the student a FAPE for the 2020-21 school year based on its failure to prove that the May 2020 IEP addressed the student's behavioral needs, it is unnecessary to make a determination as to whether the May 2020 CSE's failure to recommend 12-month services contributed to a denial of FAPE given that the CPSE would have been the committee responsible for the recommendation.

C. Assigned Public School Site

Turning next to the parent's claims relating to the assigned public school site, generally, the sufficiency of the program offered by the district must be determined on the basis of the IEP itself (R.E., 694 F.3d at 186-88). The Second Circuit has explained that "[s]peculation that the school district will not adequately adhere to the IEP is not an appropriate basis for unilateral placement" (R.E., 694 F.3d at 195; see E.H. v. New York City Dep't of Educ., 611 Fed. App'x 728, 731 [2d Cir. May 8, 2015]; R.B. v. New York City Dep't of Educ., 603 Fed. App'x 36, 40 [2d Cir. Mar. 19, 2015] ["declining to entertain the parents' speculation that the 'bricks-and-mortar' institution to which their son was assigned would have been unable to implement his IEP"], quoting T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 419 [2d Cir. 2009]; R.B. 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., 746 F.3d at 79 [holding that while parents are entitled to participate in the decision-making process with regard to the type of educational placement their child will attend, the IDEA does not confer rights on parents with regard to the selection of a school site]). The 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 Dept. 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]).

Regarding the parent's allegation that she was unable to tour the assigned public school site, the United States Department of Education's Office of Special Education Programs (OSEP) has opined that the IDEA does not provide a general entitlement to parents of students with disabilities or their professional representatives to observe proposed school placement options for their children (Letter to Mamas, 42 IDELR 10 [OSEP 2004]; see G.J. v. Muscogee County Sch. Dist., 668 F.3d 1258, 1267 [11th Cir. 2012] [noting that rather than forbidding or mandating access for parents, "the process contemplates cooperation between parents and school administrators"]; J.B. v. New York City Dep't of Educ., 242 F. Supp. 3d 186, 195 [E.D.N.Y. 2017] [noting that the IDEA does not afford parents a right to visit an assigned school placement before the recommendation is finalized]; J.C. v New York City Dep't of Educ., 2015 WL 1499389, at *24 n.14 [S.D.N.Y. Mar. 31, 2015] [acknowledging that courts have rejected the argument that parents have a right under the IDEA to visit assigned schools and listing authority], aff'd, 643 Fed. App'x 31; E.A.M. v. New York City Dep't of Educ., 2012 WL 4571794, at *11 [S.D.N.Y. Sept. 29, 2012] [finding that a district has no obligation to allow a parent to visit an assigned school or proposed classroom before the recommendation is finalized or prior to the school year]; S.F. v. New York City Dep't of Educ., 2011 WL 5419847, at *12 [S.D.N.Y. Nov. 9, 2011] [same]). On the other hand, there is district court authority indicating that a parent has a right to obtain information about an assigned public school site (see H.L. v. New York City Dep't of Educ., 2019 WL 181307, at *9 [S.D.N.Y. Jan. 11, 2019] [noting that "[i]n light of M.O., courts have found that parents have the right to obtain timely and relevant information regarding school placement, in order to evaluate whether the IEP can be implemented at the proposed location"]; F.B. v New York City Dep't of Educ., 2015 WL 5564446, at *11-*18 [S.D.N.Y. Sept. 21, 2015] [finding that the parents "had at least a procedural right to inquire whether the proposed school location had the resources set forth in the IEP"]; V.S. v New York City Dep't of Educ., 25 F. Supp. 3d 295, 299-301 [E.D.N.Y. 2014] [finding that the "parent's right to meaningfully participate in the school selection process" should be considered rather than the "parent's right to determine the actual school selection"]; C.U. v. New York City Dep't of Educ., 2014 WL 2207997, at *14-*16 [S.D.N.Y. May 27, 2014] [holding that "parents have the procedural right to evaluate the school assignment" and "acquire relevant information about" it]).

Here, the district provided the parent sufficient opportunity to obtain information about the assigned public school site notwithstanding that the parent could not physically visit the site due to restrictions on visitors related to the COVID-19 pandemic.[12] The school location letter, dated June 11, 2020, identified the assigned public school site and set forth the contact information for individuals that the parent could reach both before and after June 26, 2020 in order to arrange a visit to the school (Dist. Ex. 5 at p. 1). While the parent was not able to visit the school due to restrictions related to the COVID-19 pandemic, she was able to speak to a representative from the school who provided the parent with information about the school, the classroom, and the manner

[12] In making plans to reopen schools after the temporary closure of buildings due to the COVID-19 pandemic, schools and districts were encouraged to limit the number of visitors on school grounds or in school facilities (see "Recovering, Rebuilding, and Renewing: the Spirit of New York's Schools – Reopening Guidance," at p. 19, NYSED [July 2020], available at http://www.nysed.gov/common/nysed/files/programs/reopening-schools/nys-p12-school-reopening-guidance.pdf).

in which the student would have received related services (see Tr. pp. 98-99, 114-16; Parent Ex. 9 at 3).

The parent's allegations relating to the school's ability to provide in-person instruction, do not form the basis for a cognizable claim that the school did not have the capacity to implement the student's IEP. The parent alleges that the school "could not guarantee that in-person instruction would be provided to the Student throughout the 2020-2021 school year" and, further that, the school "did not offer in-person instruction for (at least) the two month period" during the 2020-21 school year (Req. for Rev. ¶ 28). The parent testified that, during her phone conversation with the representative from the assigned school, she was informed that the school "would have to do remote a lot of the time" due to circumstances surrounding the COVID-19 pandemic and that the remote option would consist of only "three hours of Zoom," which the parent opined was not "realistic for a child with . . . special needs" (Tr. p. 98; see Parent Ex. 9 at p. 4). During the impartial hearing, the assistant principal of the assigned school testified that the school opened for in-person instruction on September 8, 2020, but "went to remote" on or around October 6, 2020, when the school was "in a red zone," until on or around December 5, 2020 (Tr. pp. 112-13). The assistant principal testified that during that period, students in the 12:1+1 special class received remote instruction using "Zoom and Google Classroom" (Tr. p. 113).

During the 2020-21 school year, State and local officials were tasked with making decisions regarding the delivery of instruction to all students, taking into account the safety of the local school community, and one of the options for safely delivering instruction, including special education and related services, was remote/distance instruction (see, e.g., "Questions and Answers on Implementation of IDEA Part B Provision of Services," at p. 1, OSEP QA 20-01 [Sept. 2020], available at https://sites.ed.gov/idea/files/qa-provision-of-services-idea-part-b-09-28-2020.pdf). Accordingly, absent a more specific allegation about the remote instruction options available at the assigned public school site given the student's needs, the school's ability to provide remote/distance instruction during school building closures related to the COVID-19 pandemic is sufficient to show that it had the capacity to implement the student's IEP during the 2020-21 school year. While the parent's concern that the student would regress as a result of the remote delivery of instruction is understandable, both federal and State guidance contemplate this possibility and provide that, under such circumstances, when school resumes, a CSE should convene and "make individualized decisions about each child's present levels of academic achievement and functional performance and determine whether, and to what extent, compensatory services may be necessary to mitigate the impact of the COVID-19 pandemic on the child's receipt of appropriate services" ("Return To School Roadmap: Development and Implementation of Individualized Education Programs in the Least Restrictive Environment under the Individuals with Disabilities Education Act," 79 IDELR 232 [OSERS 2021]; "Compensatory Services for Students with Disabilities as a Result of the COVID-19 Pandemic," at pp. 1, 3, Office of Special Educ. Mem. [June 2021], available at http://www.p12.nysed.gov/specialed/publications/2020-memos/documents/compensatory-services-for-students-with-disabilities-result-covid-19-pandemic.pdf; see also Letter to Wolfram & Mandlawitz, 122 LRP 7821 [OSEP 2022]; "Supplemental Fact Sheet Addressing the Risk of COVID-19 in Preschool, Elementary and Secondary Schools While Serving Children with Disabilities," 76 IDELR 104 [OCR & OSERS 2020]; "Questions and Answers on Providing Services to Children with Disabilities During the Coronavirus Disease 2019 Outbreak," 76 IDELR 77 [OCR & OSERS 2020]; "Supplement #2 - Provision of Services to Students with Disabilities during Statewide School Closures Due to Novel Coronavirus (Covid-

19) Outbreak in New York State," at pp. 2-5, Office of Special Educ. Mem. [June 2020], available at http://www.p12.nysed.gov/specialed/publications/2020-memos/special-education-supplement-2-covid-qa-memo-6-20-2020.pdf).

Finally, the parent's challenges to the assigned public school site's capacity to deliver instruction using ABA methodology or to address the student's social and behavioral needs are really issues relating to the IEP (see N.K., 2016 WL 590234, at *6 [noting that "[t]o be a cognizable claim, i.e., one that triggers the school district's burden of proof, the 'problem' with the placement cannot be a disguised attack on the IEP"]). In other words, since the IEP did not mandate ABA methodology or reflect the student's need for a BIP or specific interventions or strategies to address the student's behavioral needs (see Parent Ex. 2), an allegation that the assigned public school did not have the capacity to implement these aspects is not tethered to the IEP (see Y.F., 659 Fed. App'x at 5). However, as discussed above, to the extent the parent's claims about the student's behavioral needs related to the sufficiency of the IEP, the district did not meet its burden to prove that the May 2020 IEP offered the student a FAPE for the 2020-21 school year.

Based on the foregoing, the parent has not articulated a cognizable challenge to the assigned public school's capacity to implement the student's IEP and, therefore, the parent's claims in this regard do not contribute to a finding that the district denied the student a FAPE for the 2020-21 school year.

D. Unilateral Placement - Bais Frieda

Having determined that the district failed to offer the student a FAPE for the 2020-21 school year the next issue to be discussed is whether Bais Frieda was an appropriate placement for the student. Having found that the district's IEP offered the student a FAPE, the IHO did not make a determination regarding the appropriateness of Bais Frieda. In its answer, the district appears to concede that Bais Frieda was appropriate to meet the student's individualized needs.

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

["evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]). A private placement is appropriate if it provides instruction specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; Educ. Law § 4401[1]; 34 CFR 300.39[a][1]; 8 NYCRR 200.1[ww]; Hardison v. Bd. of Educ. of the Oneonta City Sch. Dist., 773 F.3d 372, 386 [2d Cir. 2014]; C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 836 [2d Cir. 2014]; Gagliardo, 489 F.3d at 114-15; Frank G., 459 F.3d at 365).

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

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

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

According to the preschool director, Bais Frieda is a 12-month program with five classrooms, two of which are special education classrooms that are aligned with ABA methodology as well as with the general education curriculum (Tr. pp. 47-49, 86). The director explained that the student attended a Bais Frieda preschool classroom during the 2020-21 school year in a class of eight students with one teacher and two assistants who were also registered behavior technicians (Tr. pp. 50-51). She further reported that the student received OT, speech-language therapy, PT, and behavioral services from a BCBA (Tr. p. 81). Additionally, the student received individual services from a special education teacher for approximately three hours per week after school (Tr. p. 87).

The director described the student's behavioral challenges as "really intense" and opined that she "heavily required" a structured approach where all materials, people, locations, directions, and feedback were fully planned out with a reinforcement system "for each and every step of the day so that we can maintain her behaviors and mitigate those behavior challenges" (Tr. pp. 58-59). She further explained that in order for the student to consistently respond she required reinforcers and described the need for them as "immediate, intense and consistent" and explained that when the student did not get sufficient support and reinforcers, "her inability to sustain throughout an activity, or noncompliance, was really intense" (Tr. p. 60). The director further explained that the student's challenges impacted her across all domains, specifically stating that "her challenges were

so intense that she needed every kind of lesson to be carefully thought about, identified as to what she knew and what she did not know prior to the lesson being initiated" (Tr. pp. 52-55). She noted that they had to make abstract material concrete for the student and provide instruction and reinforcement in short duration so that the student could sustain attention (Tr. p. 55).

The director indicated that the student began the 2020-21 school year with an FBA conducted by the team of people who worked with her (Tr. pp. 71-72; Parent Ex. 10 at pp. 1-7). The team then created a BIP which identified the supports that would be given to the student along with modifications, accommodations, and interventions, followed by a treatment plan that began with the identification of the student's areas of struggle (Tr. pp. 72-75; Parent Ex. 10 at pp. 7-15). Review of the September 2020 FBA (updated December 2020 and June 2021) showed that it contained the following information: the staff who participated in the FBA team process, the targeted problem behaviors, the direct and indirect sources used to identify and support the functional hypothesis, influencing factors, antecedents, consequences, function of behaviors, skills or performance deficits related to the problem behaviors, baseline data, the functional hypothesis, behavioral supports and interventions previously attempted and those currently in place, the student's interests and possible reinforcers, and replacement behaviors and strategies for teaching new behaviors (Parent Ex. 10 at pp. 1-7). The student's September 2020 treatment plan (updated December 2020, and June 2021) provided: bio-psychological information; identified current problem areas including communication, socialization and play skills, maladaptive behavior, attention and cognitive skills; outlined academic progress or delays; and highlighted progress since the student's last IEP (id. at pp. 7-10). The plan included an assessment of the student's then-current adaptive functioning using the Vineland-3 (id. at p.11). Furthermore, the BIP contained a chart that detailed the antecedent, behavior, behavioral definition, and hypothesized function of the target behaviors, as well as baseline data from September 2020, updated data from December 2020 and June 2021 and the replacement behavior and techniques to be used (id. at p. 12). Additionally, the BIP explained each behavior along with the baseline and current progress, the antecedent strategy, instructional plan for alternative behavior or replacement, the consequence intervention, and data collection strategy (id. at pp. 13-16). The BIP indicated that the targeted behaviors included: tantrum, defiance, latency to respond, avoidance, rigid and obsessive behavior, and elopement (id. at pp. 12-16). Finally, the BIP contained a plan for including behavior intervention in the student's curriculum, commented on parent involvement and parent goals, and reflected data on goals related to socialization and academic and classroom readiness skills (id. at pp. 16-19).

As discussed above, the district failed to demonstrate that the student did not have interfering behaviors or that the May 2020 IEP sufficiently addressed the student's behaviors. In contrast, the parent offered evidence that the student exhibited interfering behaviors during the 2020-21 school year and that the unilateral placement addressed her behaviors. Further, the hearing record demonstrates that, based on the totality of circumstances, Bais Frieda offered instruction specially designed to meet the student's unique needs, and the district offers no argument to the contrary. Therefore, the parent met her burden to prove that Bais Frieda was an appropriate unilateral placement for the student for the 2020-21 school year.

E. Equitable Considerations

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

Reimbursement may be reduced or denied if parents do not provide notice of the unilateral placement either at the most recent CSE meeting prior to their removal of the student from public school, or by written notice ten business days before such removal, "that they were rejecting the placement proposed by the public agency to provide a [FAPE] to their child, including stating their concerns and their intent to enroll their child in a private school at public expense" (20 U.S.C. § 1412[a][10][C][iii][I]; see 34 CFR 300.148[d][1]). This statutory provision "serves the important purpose of giving the school system an opportunity, before the child is removed, to assemble a team, evaluate the child, devise an appropriate plan, and determine whether a [FAPE] can be provided in the public schools" (Greenland Sch. Dist. v. Amy N., 358 F.3d 150, 160 [1st Cir. 2004]). Although a reduction in reimbursement is discretionary, courts have upheld the denial of reimbursement in cases where it was shown that parents failed to comply with this statutory provision (Greenland, 358 F.3d at 160; Ms. M. v. Portland Sch. Comm., 360 F.3d 267 [1st Cir. 2004]; Berger v. Medina City Sch. Dist., 348 F.3d 513, 523-24 [6th Cir. 2003]; Rafferty v. Cranston Public Sch. Comm., 315 F.3d 21, 27 [1st Cir. 2002]); see Frank G., 459 F.3d at 376; Voluntown, 226 F.3d at 68).

Here, the parent attended the May 2020 CSE meeting, participated during the meeting, provided the district with timely notice of her intent to unilaterally place the student, and thereafter spoke to a representative from the assigned school, and provided the district with further notice of her disagreements with the assigned public school site based on that conversation (see Parent Exs. 2; 8; 9). Moreover, the district appears to concede that no equitable considerations would warrant

a reduction or a denial of an award of tuition reimbursement (see Answer ¶ 23).[13] Accordingly, the parent is entitled to a full award of the costs of the student's tuition at Bais Frieda for the 2020-21 school year.

Finally, direct payment is an appropriate remedy where equitable considerations favor an award of the costs of private school tuition but the parents, although legally obligated to make tuition payments, have not done so due to a lack of financial resources (Mr. and Mrs. A. v. New York City Dep't of Educ., 769 F. Supp. 2d 403, 430 [S.D.N.Y. 2011]). Here, as the parent presented evidence of her contract with Bais Frieda for the student's attendance as well as her inability to pay the costs of the student's tuition (see Tr. p. 100; Parent Ex. 4 at pp. 1-3), it is an appropriate remedy to require the district to directly fund the student's tuition at Bais Frieda.

VII. Conclusion

In summary, the district failed to demonstrate that it offered the student a FAPE for the 2020-21 school year. In addition, the parent established that Bais Frieda was an appropriate unilateral placement for the student for the 2020-21 school year, and equitable considerations support an award of tuition funding.

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision, dated December 16, 2021, is modified by reversing that portion which found that the district offered the student a FAPE for the 2020-21 school year; and

IT IS FURTHER ORDERED that the district shall directly fund the costs of the student's attendance at Bais Frieda for the 2020-21 school year.

Dated: **Albany, New York**
March 24, 2021

STEVEN KROLAK
STATE REVIEW OFFICER

[13] An argument could be made that without finding a denial of FAPE for the summer portion of the 2020-21 school year, 12-month services were not necessary for the student and therefore should not be paid for by the district (see L.K. v. New York City Dept. of Educ., 2016 WL 899321, at *10 [S.D.N.Y. Mar. 1, 2016], aff'd in part, 674 Fed. Appx. 100 [2d Cir. 2017] [under equitable considerations a district is not responsible for "segregable services, whose cost could reasonably be estimated, that exceed the school district's obligations under the IDEA"]); however, the district has not made this argument. Additionally, as noted above, although the parent's allegations did not support finding a denial of FAPE based on a lack of 12-month services in the May 2020 IEP, the hearing record supports finding that 12-month services were appropriate for the student and should have been addressed by the CPSE.