



The University of the State of New York

The State Education Department

State Review Officer

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No. 23-011

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

Appearances:

Okin Barney, P.C., attorneys for petitioners, by Jaclyn Okin Barney, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Sarah M. Pourhosseini, of counsel

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioners (the parents) appeal from the decision of an impartial hearing officer (IHO) which denied their request to be reimbursed for their son's tuition costs at the Mother Franciska Elementary School (MFES) for the 2022-23 school year. The appeal must be dismissed.

II. Overview—Administrative Procedures

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

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

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

A party aggrieved by the decision of an IHO may subsequently appeal to a State Review Officer (SRO) (Educ. Law § 4404[2]; see 20 U.S.C. § 1415[g][1]; 34 CFR 300.514[b][1]; 8 NYCRR 200.5[k]). The appealing party or parties must identify the findings, conclusions, and orders of the IHO with which they disagree and indicate the relief that they would like the SRO to grant (8 NYCRR 279.4). 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 attended a private school placement with the Seton Foundation for Learning from pre-school through the 2018-19 school year, which was funded by the district as the result of a prior due process proceeding (Parent Ex. B at pp. 4-5).

Turning to the student's medical history, the student has a diagnosis of tuberous sclerosis, a genetic disorder, as well as a diagnosed seizure disorder (Parent Ex. D at p. 1). The student is non-verbal and non-ambulatory (id. at p. 5).

On April 11, 2022, a CSE convened for the student's annual review and developed an IEP for the 2022-23 school year with an implementation date of July 1, 2022 (Parent Ex. D at p. 1).¹ The IEP indicated that, at the time of the meeting, the student was attending MFES (id.).² The CSE found the student eligible for special education as a student with multiple disabilities and recommended placement in a twelve month 12:1+(3:1) special class (id. at pp. 1, 33).³ Additionally, the CSE recommended five 30-minute sessions of individual speech-language therapy per week, five 30-minute sessions of individual occupational therapy (OT) per week, five 45-minute sessions of individual physical therapy (PT) per week, along with full-time 1:1 school nurse services (id. at pp. 32-33).⁴

In a prior written notice, dated June 10, 2022, the district notified the parent of the April 2022 CSE's recommendations (Dist. Ex. 5 at p. 1). The prior written notice also indicated that the CSE had also considered an 8:1+1 special class, but found that it was not sufficient to meet the student's medical, developmental, or academic needs (id. at p. 2). The school location letter, also dated June 10, 2022, identified the school that the student was assigned to receive the services identified in the April 2022 IEP and provided the parents with a person to contact for assistance in arranging a visit to the school (Parent Ex. E).⁵

By letter dated June 17, 2022, the parents' attorney notified the district of the parents' intent to unilaterally place the student at MFES for the 2022-23 school year and requested that the district continue to provide the student with related services and transportation services (Parent Ex. K at p. 1). The parents indicated that they disagreed with the class placement asserting that a 12:1+(3:1) special class had too many students in it, which would cause the student to have a hard time focusing, that the student would not receive the academic skills he was capable of learning as that

¹ The April 11, 2022 IEP was also admitted into the hearing record as a district exhibit (see Dist. Ex. 2). For the sake of clarity, for the remainder of this decision, only the parents' exhibit is cited (Parent Ex. D).

² MFES is part of the Seton Foundation for Learning (Parent Exs. B at p. 4; F at p. 1; see also Parent Ex. G).

³ The April 2022 IEP and a June 2022 prior written notice specified the student's special class as 12:1+(3:1) in accordance with the State regulation that "[i]n addition to the teacher, the staff/student ratio shall be one staff person to three students" (see Parent Ex. D at p. 32; Dist. Ex. 5 at p. 1; see also 8 NYCRR 200.6[h][4][iii]). For purposes of the decision, although the parties at times referred to the class as a 12:1+4 special class, the special class program for the student will be referred to in this decision as a 12:1+(3:1) special class.

⁴ The IEP indicated that the related services of OT, PT, and speech-language therapy were each to be provided as three sessions per week in a "separate location across all school locations" and two sessions per week in a "separate location with provider" (Parent Ex. D at pp. 32-33).

⁵ The school location letter was also admitted into the hearing record as a district exhibit (see Dist. Ex. 5 at p. 5). For the sake of clarity, for the remainder of this decision, only the parents' exhibit is cited (Parent Ex. E).

type of class was primarily for habilitation and treatment, that the IEP did not address the student's behavioral needs, and that the IEP did not identify the student would interact with typically developing peers (id. at pp. 1-2).

In an email dated June 30, 2022, the parent contacted the parent coordinator at the assigned district school to set up a tour to determine the appropriateness of the placement (Parent Exs. L; N at ¶16).

A. Due Process Complaint Notice

By due process complaint notice dated July 5, 2022, the parents asserted that the student was denied a free appropriate public education (FAPE) for the 2022-23 school year and requested district funding for the costs of the student's tuition at MFES for that school year (Parent Ex. A at pp. 1-2).⁶

The parents argued that April 2022 IEP was inappropriate because the 12:1+(3:1) special class recommendation was too large for the student as he was highly social and distracted by others and would have a hard time focusing in such a large class (Parent Ex. A at p. 3). The parents contended that they lacked participation in the CSE's placement decision as they clearly stated their concerns that the student be placed in a small class where he could complete his work; however, the CSE ignored this concern in recommending a 12:1+(3:1) special class (id.). Moreover, the parents alleged that the April 2022 IEP lacked appropriate behavioral interventions because although the IEP noted that the student would "yell, kick or be resistant when frustrated or having a bad day," it "d[id] not acknowledge [the student's] need for a behavioral plan to combat [his] behaviors nor [we]re there goals" to help address his behaviors (id.). The parents further asserted that the April 2022 IEP failed to state any specific ways in which the student would be able to interact with non-disabled peers (id.). Finally, the parents argued that they had previously visited the assigned school on several occasions and found it inappropriate for the student and that they reached out to the district to visit the assigned school again but the district did not respond to their outreach (id. at pp. 3-4).

The parents asserted that the unilateral placement of the student at MFES was appropriate for the student and that equitable considerations favored awarding the requested relief (Parent Ex. A at p. 4).⁷ In addition to the request for direct funding for the costs of the student's tuition at

⁶ The district also entered the due process complaint notice with its exhibits (see Dist. Ex. 1). The district exhibit included a "Due Process Complaint Cover Sheet" and an unsigned "Pendency Implementation Form" (see Dist. Ex. 1 at pp. 7-8, 9-10).

⁷ Additionally, the parents requested pendency based on an unappealed August 12, 2019 IHO decision which found that MFES was an appropriate placement for the student and ordered the district to pay the costs of the student's tuition at MFES for the 2018-19 school year (Parent Ex. A at p. 5; see Parent Ex. B). The parents contended that pendency would be inclusive of a "nurse all day long and, on the bus, as well as his transportation services and accommodations" (Parent Ex. A at p. 5). The parents asserted that pendency also included related services, consisting of five 30-minute sessions of individual OT per week, five 45-minute sessions of individual

MFES, the parents also requested a continuation of related services for the 2022-23 school year through related services authorizations (RSAs) (id. at pp. 1, 5).

B. Facts Subsequent to the Due Process Complaint Notice

On July 25, 2022, the parents signed a contract for the student's enrollment in MFES for the 2022-23 12-month school year starting July 1, 2022 and ending June 30, 2023 (see Parent Ex. J).⁸ The enrollment contract for MFES indicated that the school would provide related services through RSA vouchers that were issued and paid for by the district; and that any parent who did not use RSAs, would be financially responsible for the costs of related services (id. at p. 1).

On July 29, 2022, the parent sent an email following up on their request for a tour of the assigned public school (Parent Ex. M).

C. Impartial Hearing Officer Decision

After a prehearing conference was held on August 17, 2022, the parties proceeded to an impartial hearing on September 14, 2022, which concluded on October 6, 2022 after two days of hearings (Tr. pp. 1-119). At the September 14, 2022 hearing, the parents' attorney indicated that the issue of pendency had been resolved prior to the hearing (Tr. pp. 31-32).

In a decision dated December 17, 2022, the IHO found that the district offered the student a FAPE for 2022-23 school year and denied all relief requested by the parents (IHO Decision at pp. 7-8).

The IHO held that the district met its burden and that the "record show[ed] no procedural violations in the development of the IEP that amounted to a deprivation of FAPE" (IHO Decision at p. 7). The IHO also determined that the district "developed an IEP that was reasonably calculated to confer a substantial benefit" to the student (id.). Regarding the parents' assertion that the recommended class size was too large, the IHO found that the student would have "likely receive[d] significant attention and supervision despite being in a larger group overall" and the IHO noted that the district school psychologist explained that the recommended program was for students like the student in question, who had multiple disabilities and medical needs (id.).

In addressing the parents' allegations that the district did not provide a behavioral intervention plan (BIP), the IHO referred to the district school psychologist's testimony that the student was not exhibiting severe behavioral issues on a "consistent enough basis to warrant a BIP" (IHO Decision at p. 7). The IHO also noted that "the systematic prompting, reinforcement, and paraprofessionals described in the IEP would likely have served to address behavioral issues" (id.).

PT per week, five 30-minute sessions of speech-language therapy per week, and supplemental aids in the form of assistive technology (id.).

⁸ The MFES school executive signed the enrollment contract on July 29, 2022 (Parent Ex. J at p. 4).

As to the parents' concerns the student would not have the opportunity to interact with non-disabled peers, the IHO noted that the IEP addressed this concern by "stating that the Student will participate in non academic activities with typically developing peers if deemed appropriate" (IHO Decision at p. 7). The IHO credited the school psychologist's explanation "that the Student's class can be co-located and that may facilitate interaction with typically developing peers" (*id.* at pp. 7-8). Lastly, the IHO acknowledged that "it would have been better if the IEP was more specific and detailed on this issue," but held that the lack of detail did not rise to the level of deprivation of FAPE, "especially given that the overall [district] plan was well-considered and tailored to the Student's needs" (*id.* at p. 8).

IV. Appeal for State-Level Review

The parents appeal and argue that the IHO erred in finding the program recommended in the April 2022 IEP was appropriate for the student. The parents contend that the IHO failed to consider the student's high level of distractibility when making a finding regarding the recommended class size. The parents assert that they presented significant uncontested evidence that the student required a small classroom environment in order to limit distractions and enable the student to learn. Moreover, according to the parents, the hearing record demonstrates that in a larger class, the student would get distracted, could get easily frustrated, and on occasion would attempt to hit or kick nearby students. The parents contend that the district failed to meet its burden of proving that the class size recommendation could meet the student's "distractibility and educational needs." The parents allege the district did not present any evidence to contest the student's level of distractibility in the classroom as the only evidence that the class was appropriate was testimony by a witness who had not seen the student in four years. According to the parents, the witness "simply stated" that a 12:1+(3:1) special class was geared for students with multiple disabilities who were medically fragile. The parents assert that the district put forth no evidence to show how the student's distractibility would have been addressed in a class that large, nor did the district present evidence to show how the class size recommendation was appropriate for the student in light of State regulations which consider a 12:1+(3:1) special class "as an environment providing students with habilitation and treatment." The parents argue there was no evidence that significant attention and supervision on its own could replace the student's need for an environment with limited distractions. In fact, the parents contend that the hearing record demonstrated the opposite, as their witness testified that when the student "[wa]s in an environment without sound or visual barriers he w[ould] not attend to the task at hand, even with 1:1 support."

Next, the parents argue that their right to meaningfully participate in the school selection process and obtain information to assess the appropriateness of the assigned public school was denied and the IHO "totally ignore[d]" that the district failed to respond to their inquiries until after the 12-month school year had begun.

The parents assert that the IHO's finding regarding the student's ability to interact with nondisabled peers in the recommended program relied on impermissible speculation. According to the parents, the district failed to state specific ways that the student would interact with nondisabled peers and that the IEP as written "[wa]s far too discretionary stating only that [the student] 'should have the opportunity for social interaction with his typically developing peers.'"

The parents contend that the IHO incorrectly relied on the speculative testimony of the district's witness indicating that the recommended special class could be co-located to facilitate interactions with nondisabled peers. The parents assert that the student has the right to interact with nondisabled peers and that he benefits from these interactions.

The parents request that the IHO decision be reversed, and a finding be made that the district failed to offer the student a FAPE for the 2022-23 school year. The parents also request the unilateral placement be found appropriate and a finding that equitable considerations favor their request for relief. The parents request direct payment for the costs of the student's tuition at MFES and continuation of the district providing nursing services and related services through RSAs.

In its answer, the district counters that the IHO correctly found that it offered the student a FAPE for the 2022-23 school year. Initially, the district notes that the parents did not appeal from the IHO's finding that a BIP was not required for the student and contends that the IHO's decision on that issue is now final and binding.

The district further argues that the IHO correctly determined that the 12:1+(3:1) special class was appropriate for the student. The district asserts that the parents do not appeal the specific findings of the IHO regarding the class size, but only appeal that the IHO failed to consider the student's high level of distractibility. The district contends that the April 2022 IEP addressed the student's needs for limited distractions in the management needs section and included an annual goal for the student to improve his ability to focus on tasks. The district argues that the parents' allegations amount to a claim for how the district would have implemented the IEP and given the speculative nature of the parents' claims "the district's burden to present testimony about the capacity of its proposed assigned school site to implement every aspect of the [April 2022] IEP was never triggered." According to the district, the student did not attend the recommended placement and thus the parents claims that the 12:1+(3:1) special class would have been too noisy was impermissibly speculative. The district argues that "there is no basis in the record to conclude that the Student's program would not have been implemented in accordance with the IEP's management needs and Parents were not entitled to a finding by the IHO regarding their speculative implementation claim."

Next, the district asserts that the parents did not raise the issue of not being able to visit the proposed placement in the due process complaint notice. The district contends that the parents only asserted that their right to participate was violated by failing to consider their request for a smaller classroom. The district acknowledges that the parents mentioned an inability to visit the proposed school, but that they did not allege a violation of FAPE as of result of not being able to visit or obtain information about the school. In the alternative, the district argues that the parents do not have a "general entitlement" to observe the assigned school. According to the district, it was undisputed that the parents had previously visited the proposed school and that the district did respond to the parents' inquiry in a timely manner; however, the district argues that since the parents had prior opportunities to visit the proposed school, any failure to provide information or arrange for a visit to the school did not amount to a denial of FAPE.

Regarding the parents' arguments that the IHO erred in finding the IEP was sufficient with respect to providing the student with opportunities to interact with nondisabled peers, the district contends that the claim is impermissibly speculative. The district asserts that the school psychologist testified regarding how this portion of the IEP could have been implemented. According to the district, the parents' allegation that the IEP was "too discretionary" is an impermissibly speculative claim as the parents did not allege that the recommended school could not implement the IEP. The district requests that the parents' request for review be dismissed and the parents' requested relief denied in full.

The parents filed a reply to the district's answer. In their reply, the parents contend that the district misrepresented their arguments in the answer. The parents assert their arguments have nothing to do with the assigned school and "everything to do with the IEP itself." According to the parents, the 12:1+(3:1) special class recommendation was inappropriate because there would have been up to 18 individuals in the classroom, which would have prevented the student from learning as the student required a quiet location free from distraction to learn. The parents contend that they are arguing the special class recommendation, "in and of itself, is incapable of providing [the student] with a distraction free environment." Overall, the parents assert that they rejected the IEP based on the language of the IEP and that they did not engage in speculation.

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. 386, 399 [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., 580 U.S. at 404). 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., 580 U.S. at 403 [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]).⁹

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. Scope of Review

Initially, it is noted that the parents did not appeal from the IHO's decision regarding behavioral interventions. In the due process complaint notice, the parents asserted that the CSE failed to acknowledge the student's need for a behavioral plan (Parent Ex. A at p. 3). The IHO found that the student "was not exhibiting severe behavioral issues on a consistent enough basis to warrant a BIP" and that the "systematic prompting, reinforcement, and paraprofessional described in the IEP would likely have served to address behavioral issues" (IHO Decision at p. 7). As the parents did not appeal from the IHO's findings on this issue, that finding is final and binding on the parties and will not be further discussed (34 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. April 2022 IEP

Regarding the district's argument that the parents did not appeal from the specific findings made by the IHO that the 12:1+(3:1) special class would have provided significant attention and supervision and was designed for students with multiple disabilities, this assertion is

⁹ 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., 580 U.S. at 402).

unsubstantiated. In the request for review, the parents indicate that the "IHO improperly ruled in favor of the appropriateness of a [12:1+(3:1)] classroom for [the student] because according to the IHO in this classroom [the student] 'would likely receive significant attention and supervision'" and argue that this decision from the IHO "completely ignore[d] that [the student's] high level of distractibility w[ould] only be heightened with eighteen individuals entering or leaving the classroom or creating extraneous noises" (Req. for Rev. ¶ 31). On appeal, the parents raise three objections to the IHO's finding that a 12:1+(3:1) special class placement was appropriate for the student. Specifically, the parents assert that they presented evidence showing that the student required a classroom with limited distractions in order to learn, that the only witness presented by the district to prove the appropriateness of the class recommendation did not explain how the student's distractibility would have been addressed or how a 12:1+(3:1) class could have provided an environment with limited distractions as required by the student's IEP, and that there was no evidence in the hearing record to support the IHO's finding that significant attention and supervision could replace the student's need for an environment with limited distractions. The district argues that the parents' contentions regarding the 12:1+(3:1) special class are impermissibly speculative as they pertain to how the student's management needs would have been implemented at the assigned school (Answer ¶ 8). However, a full reading of the parents' argument demonstrates that they are asserting a 12:1+(3:1) class, in and of itself, is too large to meet the student's needs. As such, these issues will be addressed.

1. Student's Needs

Although the present levels of performance of the April 2022 IEP are not in contention on appeal, a discussion of the student's needs is necessary to determine whether the April 2022 CSE's recommendations would have provided the student with an appropriate educational program for the 2022-23 school year.

A CSE convened on April 11, 2022 for an annual review and to recommend a program for the student for the 2022-23 school year (Parent Ex. D at pp. 1, 38). In addition to the district school psychologist, the CSE consisted of the district special education teacher who also served as the district representative, the student's classroom teacher, and the student's parent (*id.* at p. 41). According to the June 2022 prior written notice, the CSE considered evaluative information, including a March 2018 psychoeducational assessment, a January 2020 OT progress report, a January 2020 speech-language progress report, an April 2022 PT progress report, and an April 2022 teacher report (Dist. Ex. 5 at p. 2; *see* Dist. Ex. 3).¹⁰ The district school psychologist testified that creating an IEP consisting of the student's present levels, needs and goals was a "team effort" with conferences usually "lasting up to two hours...as we work through the information" and emphasized that for this student, in addition to herself, the collaboration included the student's parent, the student's private school classroom teacher, and the district special education teacher (Tr. pp. 43-44; Dist. Ex. 5 at p. 2).

¹⁰ Only the April 2022 PT progress report and the April 2022 teacher progress report were included as a part of the hearing record (Dist. Exs. 3; 4).

The April 2022 IEP indicated that, at that time, the student was 13 years of age, attended a private placement in a 6:1+1 classroom with an assigned 1:1 nurse and had a diagnosis of tuberous sclerosis (Parent Ex. D at p. 1). The IEP reported that the student attended school remotely during the previous 2020-21 school year (id.).

With respect to academics, the April 2022 IEP included information from the MFES student annual progress summary, which indicated that the student was working on identifying numbers 13 through 20, identifying "where" an animal belonged given a choice of two locations (e.g., zoo or farm), and discriminating between objects when named by a teacher provided in a field of two by "touch[ing] the specific object with gestural prompts" (Parent Ex. D at p. 1; see Dist. Ex. 4). The IEP noted that the student was working on identifying coins, identifying a named emotion by identifying a matching picture, and matching an animal sound with the correct animal picture (Parent Ex. D at pp. 1, 2). The IEP reported the student had mastered identifying emotions "happy, sad, mad, and animal sounds related to dog, cat, cow and chicken" (id. at p. 2). In the area of academics, the IEP noted that the student identified numbers one to twelve, upper and lowercase letters, colors, shapes, the concept "big," which group had "more," and could match community signs (id. at p. 1).

In the area of speech-language development, the April 2022 IEP indicated that "an updated [s]peech [p]rogress [r]eport was not submitted and as a result, previous goals have not reported to be mastered" (Parent Ex. D at p. 2). The IEP noted that the student's goals would remain in place until mastered and indicated that they were appropriate to the student's needs (id.). The present levels of performance reflected the student's speech-language needs from a "[p]revious [s]peech [r]eport" which noted that the student's speech services had been on a "medical hold" (id.).¹¹ The April 2022 IEP indicated that the student was non-verbal, had an augmentative and alternative communication (AAC) device but was not fluent in its use; he preferred to use hand signals, gestures and body language paired with vocalizations (id. at p. 3). According to the IEP, the student was inconsistent in using his AAC device to communicate his wants and needs or to comment, and benefitted from minimal to moderate verbal and gestural prompts to use his device (id.). The student generally communicated with peers and staff through unintelligible grunts, and gestures such as approximations of American Sign Language (ASL) (id.). The IEP indicated that the student had decreased range of motion of his articulators and produced sound and word approximations including "ha" for "hi," and "buh" for "bye" with productions that were inconsistent, and intelligibility judged to be poor across familiar and unfamiliar listeners (id.).

In the area of receptive language, the April 2022 IEP noted that the student identified nouns including colors, numbers, shapes, people, and food items, as well as verbs (e.g., running, jumping, eating) when presented with items and asked "show me + object" (Parent Ex. D at p. 2). The student required verbal and gestural prompting to increase identification of objects by function,

¹¹ With regard to related services, the April 2022 IEP indicated that the student had not been receiving speech-language therapy or OT services during the 2021-22 school year (Parent Ex. D at p. 40). Per parent report, the student was ill at the beginning of the school year and by the time he returned, speech and OT providers did not have availability to provide services (id. at pp. 40-41). The parent stated that she did not have a lot of support at home and it was difficult for her to bring the student back and forth to a provider (id. at p. 41).

respond to yes/no and "wh" questions, and label familiar nouns and verbs using his AAC device (id. at pp. 2-3). The IEP reported that the student consistently followed simple one to two step directions presented verbally related to familiar and learned vocabulary such as "put, take, throw," and special concepts "in/on" but required moderate tactile hand-over-hand support to complete commands, due to motoric restrictions (id. at p. 3). The IEP stated that the student was inconsistent in using his AAC device to label familiar nouns and verbs when presented with images and prompted "who/what is this?" and needed moderate verbal, visual, and gestural prompts to correctly respond; however, he was consistent in navigating two to three cells on his AAC device to identify his name, age, school, and familiar people, as well as request objects/actions, e.g. "I +want+object/action + please" (id. at pp. 2-3).

With respect to pragmatic language, the IEP indicated that the student "consistently demonstrated joint attention" during speech related tasks and engaged in greeting peers and school staff members independently using gestures, or by smiling, waving, or sometimes giving a hug (Parent Ex. D at p. 3). The IEP noted that when presented with non-preferred tasks/activities, the student "occasionally" would have noncompliant instances and needed "verbal redirection" to attend back to task (id.).

Turning to the student's social development, the IEP included information from the April 2022 MFES teacher report, that the student was "extremely happy," entered school with a "smile on his face daily" and "s[a]t with his peer during group work activities" (compare Parent Ex. D at p. 4 with Dist. Ex. 3 at p. 2). The IEP and report indicated that the student raised his arms when his name was called for attendance during morning meeting/daily news group activities he and smiled, laughed, and interacted with peers (Parent Ex. D at p. 4; Dist. Ex. 3 at p. 2). Additionally, the student enjoyed being around his peers, listening to music, and exercising during gym and recess activities (Parent Ex. D at p. 4; Dist. Ex. 3 at p. 2). The student reportedly smiled when he wanted to do an activity or moved his head to the side when not wanting an activity, provided a choice of two things (Parent Ex. D at p. 4; Dist. Ex. 3 at p. 2). Likewise, the April 2022 IEP indicated that the student "love[d] verbal praise" as a reinforcer and would smile and throw his hands up when he got an answer correct (Parent Ex. D at p. 4). The IEP also noted the student's preferred reinforcer was an iPad; however, the student was noted to yell, be resistant or sometimes kick when iPad time was over or when having a difficult day (id.). The April 2022 IEP stated that per teacher report, this behavior "rarely happen[ed] at school" and the student was "easily redirected with verbal prompts and praise" (id.).

In the physical development section, the April 2022 IEP reported the student had a history of tuberous sclerosis, dystonia, a seizure disorder, and was non-ambulatory (Parent Ex. D at p. 4). The IEP indicated that the student was unable to stand or walk without support and the student had muscle tightness in the upper and lower extremities that impacted his voluntary movement (id.). The IEP stated that as the student could have a dystonic episode/drop seizure at any time, he required a 1:1 nurse at all times; moreover, the IEP indicated the student would return to the hospital in 2022 for updated monitoring of seizure activity and an updated magnetic resonance imaging (MRI) (id. at pp. 4-5).

Per teacher report, the April 2022 IEP stated that the student was wheelchair bound, sat in an adaptive chair, and required a gait trainer and a stander (Parent Ex. D at p. 5). As the student was not toilet trained, he was on a schedule to be changed (id.). Additionally, he required assistance when eating and was provided 1:1 assistance and close monitoring from his nurse during feeding (id.). During feeding, he also needed assistance applying pressure when wiping his mouth with a napkin (id.).

With regard to PT, the April 2022 IEP indicated that the student was unable to stand or walk without support (Parent Ex. D at p. 5). The student presented with "right sided hemiparesis with delays in gross motor skills including ambulation, transfers, static and dynamic balance, coordination, and proprioception" (Parent Ex. D at p. 5). According to the IEP, at the time it was developed, the student could ambulate 5-10 steps with moderate to maximum assistance and was able to ambulate further distances using a gait trainer; however, he fatigued after 5-7 minutes (id.). The IEP indicated that the student was able to tolerate 10 minutes of static standing (id.) He was able to pull to stand from the floor using a half kneeling position and negotiate the therapy room independently via tall kneeling ambulation (id. at pp. 5-6). In addition, the student was able to crawl through a tunnel and throw a bean bag with his left upper extremity (id. at p. 6). The IEP noted the CSE's recommendation that the student continue to receive PT to address gait training and weight bearing activities in a gait trainer and provide the student with a standing program to help him achieve adequate hip health, decrease overall tone, and improve his flexibility and strength, increase bone mineral density, and address hamstring contracture (id. at p. 6).

In terms of OT, the April 2022 IEP identified the student's needs as they related to delays in gross and fine motor skills, bilateral coordination, visual motor skills, visual perceptual skills, self-help, activities of daily living (ADL), and work behaviors (Parent Ex. D at p. 6).¹² According to the IEP, the student presented with "generalized weakness and increased tone in his bilateral upper and lower extremities, more markedly on his right side" (id.). The IEP noted that the student's left hand served as his dominant hand and that he could pick up objects with his left hand "most of the time[.]using a [left] palmar grasp in conjunction with raking the objects" (id. at p. 7). The student lacked in-hand manipulation skills (id.). The IEP indicated that therapy addressed the student's use of different grasp patterns to pick up foods, use of an appropriate grasp on a fork or spoon, and physical assistance and verbal cues to coordinate the movements to bring food to his mouth (id. at p. 7). The IEP stated the student enjoyed therapy in the form of play but avoided activities such as coloring, creating only two-to-three-line strokes at a time (id.). The IEP indicated that the student was "very self-directed" and required maximal verbal cues and tactile cues to participate in therapist directed activities (id.). The IEP noted that when new activities were introduced, the student required extra time, and "extra praise/animation for participation" (id.).

To address the student's above identified needs, the April 2022 CSE included 23 annual goals with short-term objectives: two reading goals that targeted the student's ability to identify

¹² The April 2022 IEP indicated that an updated OT progress report was not submitted therefore previous goals had not been reported to be mastered (Parent Ex. D at p. 6). The present levels of performance included information from a previous OT report (id.). As memorialized in the IEP, the report indicated that the student's OT was on a medical hold; however, the dates of the hold were not specified (id.).

letters/words and respond to "wh" questions by discriminating objects/pictures within a story; two math goals that targeted the student's ability to attend to small group daily calendar activities with objectives that included counting and identification of days, months, weather, etc. and identifying numbers and concepts such as big/little and tall/short; one writing goal related to pre-writing skills; one nursing goal related to medical procedures and feeding with assistance; two ADL goals, with nurse assistance, related to toileting and feeding; one assistive technology goal that addressed improving the student's communication using an AAC device; and one adaptive physical education goal related to following teacher directions during activities and games and interacting with peers during organized physical education activities (Parent Ex. D at pp. 10-19). Related service goals included two PT goals that addressed balance, coordination, standing, ambulation, and increasing muscle strength and tone (id. at pp. 20-21). The IEP also included five speech-language therapy goals related to use of the student's AAC device to identify objects, follow directions, identify common nouns, identify actions, respond to "who" questions, greet others, and a goal that addressed imitation/approximation of sound (id. at pp. 22-26). In addition, the IEP included OT goals related to improving the student's upper extremity function and bilateral coordination skills, fine motor and grasping patterns, visual perceptual and visual motor skills, ADLs, and work behaviors for increased participation at school (id. at pp. 27-31).

The April 2022 IEP identified strategies for addressing the student's management needs including differentiated 1:1 teaching using applied behavior analysis (ABA) methodology to learn new skills as well as systematic prompting, prompt fading, and reinforcement (Parent Ex. D at p. 8). Further, the IEP indicated that the student required a highly structured and predictable routine, and an environment with limited distractions in order to learn (id.). Also, the management needs section indicated that the student was highly social and curious in nature, he liked to know what was going on around him, and he could become distracted by extraneous noises and others entering or leaving the room (id.).

With respect to the effect of the student's needs on his ability to be involved in and make progress in a general education curriculum, the April 2022 IEP stated that the student's needs and cognitive level of functioning prevented him from learning in a classroom using the common core curriculum; the IEP noted that the student should have the opportunity for social interaction with his typically developing peers (Parent Ex. D at p. 8). The IEP further indicated that the student's needs warranted continuation of his related services, the medical support of nursing services, as well as use of his communication device and adaptive equipment that included his hi/lo chair, stander, gait trainer, and transit stroller for mobility (id.). Due to the student's needs, the CSE recommended the student attend a structured 12:1+(3:1) special class and receive related services, and 1:1 full-time nursing services along with assistive technology consisting of an AAC device to be used daily throughout the school day and at home (id. at pp. 32-33).

2. 12:1+(3:1) Special Class Recommendation

According to State regulation, "[t]he maximum class size for those students with severe multiple disabilities, whose programs consist primarily of habilitation and treatment, shall not exceed 12 students. In addition to the teacher, the staff/student ratio shall be one staff person to

three students. The additional staff may be teachers, supplementary school personnel and/or related service providers." (8 NYCRR 200.6 [h][4][iii]).

With regard to the student's knowledge and learning style, the April 2022 CSE considered the student's needs as discussed above, in detail, reviewing the student's academic needs which were at the pre-kindergarten level in the areas of reading and mathematics, and his language arts instruction that focused on discrimination between two objects when named by the teacher and touching the specified object with gestural prompts (Parent Ex. D at pp. 1, 39). The CSE considered information regarding the student's attention and distractibility needs, the student's need for 1:1 teaching using ABA methodology to learn new skills, and his need for a structured environment with limited distractions to learn as reported by the student's private school teacher and included within the student's IEP (compare Parent Ex. D at p. 8 with Dist. Ex. 3 at p. 1). For OT, the IEP indicated that the student was "very self-directed" and required maximal verbal cues and tactile cues to participate in therapist directed activities and "extra time and extra praise/animation for participation" in new activities (Parent Ex. D at p. 7). The IEP referenced the speech-language report, similar to the OT report, that noted when presented with non-preferred tasks/activities, the student "occasionally would have noncompliant instances and needed "verbal redirection" to attend back to task (id. at pp. 3, 7). Additionally, the IEP indicated that pragmatically the student "consistently demonstrated joint attention" during speech related tasks and engaged in greeting peers and school staff members independently using gestures, and the student consistently followed simple one to two step directions related to familiar vocabulary such as "put, take, throw" but required moderate tactile hand over hand support to complete commands due to motoric restrictions. (id. at pp. 2-3).

The CSE reported, based on the April 2022 MFES teacher report, that the student happily entered school with a smile on his face, sat with peers during work activities, raised his arms when called on for attendance during morning meeting/daily news group activities, smiled laughed and interacted with peers, enjoyed music and exercise activities with peers, and responded positively to verbal praise as a reinforcer (compare Parent Ex. D at p. 4 with Dist. Ex. 3 at p. 2). As reported above, the student's preferred reinforcer was an iPad, and in rare instances the student became resistant, yelled, or kicked when this preferred activity was over or during a difficult day, but reportedly this "rarely happen[ed] at school" and the student was "easily redirected with verbal prompts and praise" (Parent Ex. D at p. 4).

During the April 2022 CSE meeting, the parent expressed concerns that the 12:1+(3:1) program setting would be too large, over-stimulating, and overwhelming for the student (Tr. pp. 49-50; Parent Ex. D at p. 40). Despite this objection, the team felt that the 12:1+(3:1) special class was "geared specifically toward children like [the student] with multiple disabilities, medically fragile children that have a lot of support" and the student "might benefit from being in that program" (Tr. p. 50).

Based on the student's identified needs, the April 2022 CSE ultimately recommended the student attend a district 12:1+(3:1) special class and receive related services, and 1:1 full-time school nurse services along with assistive technology consisting of an AAC dynamic display speech generating device to be used daily throughout the school day and at home (Parent Ex. D at

pp. 32-33). Additionally, the CSE recommended five 30-minute sessions of individual OT per week, five 45-minute sessions of individual PT per week, and five 30-minute sessions of individual speech-language therapy per week, as well as adapted physical education five times per week (id.).

To further support the student within a 12:1+(3:1) special class, the April 2022 CSE identified and included strategies within the April 2022 IEP, including differentiated 1:1 teaching using ABA methodology to learn new skills as well as systematic prompting, prompt fading, and reinforcement (Parent Ex. D at p. 8). The IEP noted that the student was highly social and curious in nature, he liked to know what was going on around him and could become distracted by extraneous noises and others entering or leaving the room (id.). The IEP indicated that the student required a highly structured and predictable routine, and an environment with limited distractions in order to learn (id.). As previously reported, the IEP further indicated that the student's needs warranted continuation of his related services, the medical support of nursing services, as well as use of his AAC device and adaptive equipment that included his hi/lo chair, stander, gait trainer, and transit stroller for mobility (id.).

The district considered recommending the student attend an 8:1+1 special class but rejected this option as not sufficient to address the student's medical, developmental, and academic needs (Parent Ex. D at p. 41; Dist. Ex. 5 at p. 2). The district school psychologist indicated that the 8:1+1 program was not geared for students with medical disabilities, but rather for students with learning disabilities and intellectual disabilities; and therefore, not the best fit for the student (Tr. p. 51). The school district school psychologist testified that, although the parent voiced the concern that the 12:1+(3:1) special class was "too large for [the student], too much stimulation," the parent did not have objections to the general IEP or annual goals (Tr. p. 50). During the hearing, the district school psychologist testified regarding the student having a goal addressing "attending" as he had trouble focusing due to his medical condition (Tr. p. 59; Parent Ex. D at p. 17). The district school psychologist agreed that the student could get distracted by other people in the room but explained that in a district specialized school there was "differentiated instruction" where "children [we]re sometimes separated and given instruction one-to-one" (Tr. p. 59). Further she stated that this need was documented in the student's IEP for the teacher to follow (id.). The district school psychologist testified that, as indicated on the IEP, the teacher reported that the student was easily redirected with verbal prompts and praise in the rare times when he displayed behaviors such as yelling, kicking, or being resistant (Tr. pp. 63-64; Parent Ex. D at p. 4). Additionally, the district school psychologist testified that the speech-language therapist relayed the same information that the student was redirected with verbal reinforcement and redirection (Tr. p. 64; Parent Ex. D at p. 3).

The district school psychologist testified regarding the student's academic strengths and weaknesses and stated he was "a medical[ly] fragile child who learn[ed] best with [a] multisensory approach" and through "differentiated one-to-one instruction" (Tr. pp. 45-46, 57). The district school psychologist reported the student's strength was that he cooperated when provided with a reward such as play time on the iPad, verbal reinforcement, or redirection (Tr. pp. 45, 47). Moreover, the teachers in the district specialized schools used parts of ABA, such as providing a reward system in teaching the student new skills (Tr. pp. 66-68).

Although, not before the April 2022 CSE, the director of the MFES testified via a September 2022 affidavit (see Parent Ex. O). The director reported that the student was in a classroom with five other students, one main teacher, and a teaching assistant (*id.* ¶ 27). The director testified that she reviewed the student's April 2022 IEP and opined that it was not appropriate as the student would be in a class with up to eleven students (*id.* ¶ 55). The director stated that the student needed to learn new skills, in a quiet 1:1 setting free from distractions (*id.*). The director reported in relation to peers that the student was friendly, and interacted with peers by smiling, laughing, and playing on the floor (*id.* ¶ 20). The director noted that the student made improvements sitting in a small group and waiting for his turn (*id.*). The director also stated that the student was easily distracted and required 1:1 direct instruction with the teacher in "his own space which ha[d] physical barriers separating him from various classroom distractions" or at times in a separate room, although she did not indicate the amount of time that he was receiving 1:1 instruction from the teacher at MFES or what would have been an appropriate amount of 1:1 instruction for the student to receive in the district recommended 12:1+(3:1) special class (*id.* ¶¶ 21-22).

Based on the above, while the parent's preference for the 6:1+1 special class ratio that the student was in at MFES during the 2021-22 school year is understandable, the hearing record reflects that the 12:1+(3:1) special class recommended by the April 2022 CSE was reasonably calculated to address the student's medical, developmental, and academic needs for the 2022-23 school year. As indicated above, the April 2022 CSE addressed the student's need for 1:1 instruction and included management needs directed at systematic prompting, prompt fading, and reinforcement. As noted in the April 2022 IEP, the student would have received 1:1 differentiated instruction using ABA in the recommended 12:1+(3:1) special class; additionally, the student was recommended for a total of 8.75 hours per week of individual related services (OT, PT, and speech-language therapy), as well as five periods per week of adapted physical education, and full-time 1:1 school nurse services (Parent Ex. D at pp. 8, 33-34). Considering the information available to the April 2022 CSE regarding the student's needs, the April 2022 CSE recommended a special education program that was reasonably calculated to provide the student with an educational benefit.

Finally, although the director of MFES testified that the student would not have been successful in the recommended 12:1+(3:1) special class due to the number of people in the class and the student's distraction and need for physical barriers separating him from various classroom distractions, based on the information that was available to the April 2022 CSE, the program developed for the student would have addressed the student's level of distractibility as known to the CSE at the time the IEP was developed. Information not available to a CSE may not be relied upon to rehabilitate a defective IEP or invalidate a substantively appropriate IEP (C.L.K. v. Arlington Sch. Dist., 2013 WL 6818376, at *13 [S.D.N.Y. Dec. 23, 2013]; see J.M. v New York City Dep't of Educ., 2013 WL 5951436, at *18-*19 [S.D.N.Y. Nov. 7, 2013] [holding that a progress report created subsequent to the CSE meeting may not be used to challenge the appropriateness of the IEP]; F.O. v New York City Dep't of Educ., 976 F.Supp.2d 499, 513 [S.D.N.Y. 2013] [refusing to consider subsequent year's IEP as additional evidence because it was not in existence at time IEP in question was developed]).

3. LRE

The parents assert that the IHO erred in finding that the lack of specificity in the IEP regarding the student's interaction with nondisabled peers did not rise to the denial of FAPE. According to the parents, the IHO relied on speculative testimony and the IEP was far too discretionary as the student has a right to interact with nondisabled peers and benefits from such interactions (Req. for Rev. ¶¶ 33-35). The district counters the parents' claim as being impermissibly speculative because the IEP makes a recommendation for access to nondisabled peers and the parents are questioning how it would be implemented, not the recommendation itself (Answer ¶¶ 11-12).

The IDEA requires that a student's recommended program must be provided in the LRE (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.107, 300.114[a][2][i], 300.116[a][2], 300.117; 8 NYCRR 200.1[cc], 200.6[a][1]; see T.M., 752 F.3d at 161-67; Newington, 546 F.3d at 111; Gagliardo, 489 F.3d at 105; Walczak, 142 F.3d at 132; Patskin v. Bd. of Educ. of Webster Cent. Sch. Dist., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]). In determining an appropriate placement in the LRE, the IDEA requires that students with disabilities be educated to the maximum extent appropriate with students who are not disabled and that special classes, separate schooling, or other removal of students with disabilities from the general educational environment may occur only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily (20 U.S.C. § 1412[a][5][A]; see 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.6[a][1]; Newington, 546 F.3d at 112, 120-21; Oberti v. Bd. of Educ. of Borough of Clementon Sch. Dist., 995 F.2d 1204, 1215 [3d Cir. 1993]; J.S. v. N. Colonie Cent. Sch. Dist., 586 F. Supp. 2d 74, 82 [N.D.N.Y. 2008]; Patskin, 583 F. Supp. 2d at 430; Watson v. Kingston City Sch. Dist., 325 F. Supp. 2d 141, 144 [N.D.N.Y. 2004]; Mavis v. Sobol, 839 F. Supp. 968, 982 [N.D.N.Y. 1993]). The placement of an individual student in the LRE shall "(1) provide the special education needed by the student; (2) provide for education of the student to the maximum extent appropriate to the needs of the student with other students who do not have disabilities; and (3) be as close as possible to the student's home" (8 NYCRR 200.1[cc]; 8 NYCRR 200.4[d][4][ii][b]; see 34 CFR 300.116). Consideration is also given to any potential harmful effect on students or on the quality of services that they need (34 CFR 300.116[d]; 8 NYCRR 200.4[d][4][ii][c]). Federal and State regulations also require that school districts ensure that a continuum of alternative placements be available to meet the needs of students with disabilities for special education and related services (34 CFR 300.115; 8 NYCRR 200.6). The continuum of alternative placements includes instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions; the continuum also makes provision for supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement (34 CFR 300.115[b]).

To apply the principles described above, the Second Circuit adopted a two-pronged test for determining whether an IEP places a student in the LRE, considering (1) whether education in the general classroom, with the use of supplemental aids and services, can be achieved satisfactorily for a given student, and, if not, (2) whether the school has mainstreamed the student to the maximum extent appropriate (T.M., 752 F.3d at 161-67 [applying Newington two-prong test]; Newington, 546 F.3d at 119-20; see N. Colonie, 586 F. Supp. 2d at 82; Patskin, 583 F. Supp. 2d

at 430; see also Oberti, 995 F.2d at 1217-18; Daniel R.R. v. State Bd. of Educ., 874 F.2d 1036, 1048-50 [5th Cir. 1989]). A determination regarding the first prong, (whether a student with a disability can be educated satisfactorily in a general education class with supplemental aids and services), is made through an examination of a non-exhaustive list of factors, including, but not limited to:

- (1) whether the school district has made reasonable efforts to the child in a regular classroom;
- (2) the educational benefits available to the child in a regular class, with appropriate supplementary aids and services, as compared to the benefits provided in a special education class; and
- (3) the possible negative effects of the inclusion of the child on the education of the other students in the class.

(Newington, 546 F.3d at 120; see N. Colonie, 586 F. Supp. 2d at 82; Patskin, 583 F. Supp. 2d at 430; see also Oberti, 995 F.2d at 1217-18; Daniel R.R., 874 F.2d at 1048-50). The Court recognized the tension that occurs at times between the objective of having a district provide an education suited to a student's particular needs and the objective of educating that student with non-disabled peers as much as circumstances allow (Newington, 546 F.3d at 119, citing Daniel R.R., 874 F.2d at 1044). The Court explained that the inquiry is individualized and fact specific, taking into account the nature of the student's condition and the school's particular efforts to accommodate it (Newington, 546 F.3d at 120).

If, after examining the factors under the first prong, it is determined that the district was justified in removing the student from the general education classroom and placing the student in a special class, the second prong requires consideration of whether the district has included the student in school programs with nondisabled students to the maximum extent appropriate (Newington, 546 F.3d at 120).

In this matter, both parties agree that the student's level of cognitive functioning and medical needs prevented him from being able to learn in a general education classroom setting (see Parent Exs. A at p. 4; D at p. 8). Accordingly, an analysis of whether the student's program was in the LRE turns on whether the district included the student in school programs with nondisabled students to the maximum extent appropriate.

According to the district school psychologist, at the student's nonpublic school, regular education students visited the students in the program during lunch, art, or music, but that did not happen during remote instruction (Tr. p. 64). The director of the student's private school testified that the nonpublic school had to suspend its socialization programs due to the COVID-19 pandemic (Parent Ex. O ¶ 58). According to the director, the nonpublic school included a socialization program where the student and his class could "walk next door" to a general education school and have lunch with regular education students (Parent Ex. O ¶ 58). During that time, the nonpublic school staff stayed with the students and worked on socialization, and developing language and communication skills (id.). As of the date of the hearing, the nonpublic school had not yet resumed the lunch program; however, the director testified that instead of the lunch

program, students from the general education school came into the special education classrooms to have a smaller group socialization (Tr. pp. 102-04).

With respect to participation with students without disabilities, the State IEP form prompts districts to "[e]xplain the extent, if any, to which the student will not participate in regular class, extracurricular and other nonacademic activities" (Parent Ex. D at p. 37). According to State guidance, this may be done "by identifying the percent of the school day or by identifying particular activities that the student will not participate in with his/her nondisabled peers" ("Questions and Answers on Individualized Education Program (IEP) Development, The State's Model IEP Form and Related Documents," at p. 45, Office of Special Educ. [Oct. 2010], available at <http://www.p12.nysed.gov/specialed/formsnotices/IEP/training/QA-411.pdf>).

The April 2022 IEP noted that the student would be educated full-time in a special education class and further noted that the student "may participate in non academic activities with typically developing peers if deemed appropriate by school staff" (Parent Ex. D at p. 37). The IEP also indicated that although the student was unable to learn in a general education classroom, he should have the opportunity for social interaction with his typically developing peers (*id.* at p. 8). The district school psychologist testified that the student's special class in the district public school could have been collocated with a general education class so that the students in the special class could have participated with regular education students for lunch or playground time (Tr. pp. 64-65). As determined by the IHO, "it would have been better if the IEP was more specific and detailed on this issue"; however, in this instance, the lack of details does not rise to a level that requires finding the district did not offer the student a program in the student's LRE (IHO Decision at p. 8).

C. Assigned School

Here, the district contends that the parent did not raise this issue in the due process complaint notice as a claim for denial of FAPE. However, upon review of the due process complaint notice, although the parents did not specifically state that they were arguing a denial of FAPE on these grounds, it can be implied from the due process complaint notice that it was being raised as an issue. Particularly, the parents outlined in the due process complaint notice how they reached out to the proposed placement and did not obtain a response and, therefore, enrolled the student at the unilateral placement (Parent Ex. A at pp. 3-4). Moreover, during the opening statement, the parents' attorney again noted the issue concerning the parents' ability to visit the proposed school (Tr. p. 28). Accordingly, the district was on notice that this claim should have been addressed during the hearing and it will be reviewed on its merits on appeal.

The Supreme Court and the Second Circuit have continually reminded litigants that "[t]he IEP is 'the centerpiece of the [IDEA's] education delivery system for disabled children (Endrew F., 137 S. Ct. 988, 994 [2017]; see D.S. v. Trumbull Bd. of Educ., 975 F.3d 152, 157 [2d Cir. 2020]). 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" (*id.* at 195; see E.H. v. New York City Dep't of Educ., 611 Fed.

App'x 728, 731 [2d Cir. May 8, 2015]; R.B. v. New York City Dep't of Educ., 603 Fed. App'x 36, 40 [2d Cir. Mar. 19, 2015] ["declining to entertain the parents' speculation that the 'bricks-and-mortar' institution to which their son was assigned would have been unable to implement his IEP"], quoting T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 419 [2d Cir. 2009]; R.B., 589 Fed. App'x at 576).¹³ 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 parents' allegation that they were 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"]);

¹³ The district is required to implement the IEP and parents are well within their rights to compel a non-compliant district to adhere to the terms of the written plan (20 U.S.C. §§ 1401[9][D]; 1414[d][2]; 34 CFR 300.17[d]; 300.323; 8 NYCRR 200.4[e]).

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]).

In this instance, the district notified the parents of the school that the student was assigned to attend and receive the services identified in the April 2022 IEP by letter dated June 10, 2022 (Parent Ex. E). That letter included the name of a person to contact for assistance in arranging a visit to the school (id.). There is no indication in the hearing record that the parent attempted to contact the person identified in the June 2022 letter; rather, the parent testified that she contacted another individual who she identified as the parent coordinator at the assigned school (Parent Ex. N at ¶16). Additionally, the parent sent emails to the parent coordinator dated June 30, 2022 and July 29, 2022 asking to tour the assigned school (Parent Exs. L; M). According to the parent, the parent coordinator emailed the parent on July 29, 2022; however, the parent did not see the email until prior to September and, in response, the parent called and emailed the parent coordinator on September 7, 8, and 9 but did not hear back (Parent Ex. N at ¶ 17). The parent testified that she emailed the parent coordinator again on September 15, 2022 (id.).

Certainly, it would have been better practice for the district to have responded within a reasonable time to the parents' requests as the parents reached out to the assigned school and were unable to visit the assigned school for a tour as requested. However, according to the parent, she was "familiar with the school as [her] son was previously assigned to it and [she] had previously visited it" (Parent Ex. N at ¶15). In the due process complaint notice, the parents acknowledge that they visited the school several times in the past but found it inappropriate for the student (Parent Ex. A at p. 3). The parents expressed interest in seeing the current program at the assigned school; however, the parents have not indicated what specifically they were looking to learn about the assigned school, that they did not already know from a prior visit. Accordingly, in this instance,

the district's failure to respond was not a procedural violation that rises to the level of a denial of FAPE.

VII. Conclusion

The hearing record supports a finding that the parents are not entitled to relief for the 2022-23 school year as the student was offered a FAPE for that school year. Therefore, the necessary inquiry is at an end and there is no need to reach the issues of whether MFES was an appropriate unilateral placement or whether equitable considerations weighed in favor of the parent's request for relief.

THE APPEAL IS DISMISSED.

**Dated: Albany, New York
March 15, 2023**

STEVEN KROLAK