



# **The University of the State of New York**

## **The State Education Department**

**State Review Officer**

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**No. 23-063**

**Application of a STUDENT WITH A DISABILITY, by his 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:**

Gulkowitz Berger LLP, attorneys for petitioner, by Shaya M. Berger, Esq.

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

## **DECISION**

### **I. Introduction**

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioners (the parents) appeal from a decision of an impartial hearing officer (IHO) which denied their request for reimbursement for the student's tuition costs at Ha'or – The Beacon School (Beacon) for the 2020-21 school year. This 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]-[j]).

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

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

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

The student has been found eligible for special education as a student with a learning disability (Dist. Exs. 2 at p. 1; 9 at p. 1). For first grade (2018-19 school year) the student attended a general education setting where he received special education teacher support services (SETSS) along with related services of speech-language therapy, occupational therapy (OT), and counseling (Dist. Ex. 9 at p. 1). In September 2019 (second grade), the student began attending Beacon (Parent Ex. K at ¶ 20).

On January 21, 2020, a CSE convened and, upon finding that the student continued to be eligible for special education as a student with a learning disability, developed an IEP with a

projected implementation date of March 13, 2020 (Dist. Ex. 2 at pp. 1, 36).<sup>1</sup> The January 2020 CSE recommended that the student attend a 12:1+1 special class for English language arts (ELA), mathematics, social studies, and science (id. at p. 30). In addition, the CSE recommended that the student receive related services including one 30-minute session per week of individual counseling, one 30-minute session per week of counseling in a group of three, two 30-minute sessions per week of individual occupational therapy (OT), one 30-minute session per week of individual speech-language therapy, and two 30-minute sessions per week of speech-language therapy in a group of three (id. at p. 31).

In prior written notice and school location letters, both dated August 11, 2020, the district summarized the January 2020 CSE's recommendations and notified the parent of the particular public school site to which it assigned the student to attend for the 2020-21 school year (Parent Ex. D; Dist. Ex. 4).<sup>2</sup>

Via letter dated August 18, 2020, the parent notified the district that she had "only recently" received notice of an assigned public site and, thus far, had received no answer when attempting to reach the school to arrange for a visit (Parent Ex. E at p. 2). Given her inability to assess the appropriateness of the assigned public school site, the parent stated her intent to unilaterally place the student at Beacon for the 2020-21 school year and seek tuition funding from the district (id.). On September 1, 2020, the parent signed an enrollment contract with Beacon for the student's attendance during the 2020-21 school year (Parent Ex. I).

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

By due process complaint notice dated June 18, 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. A at p. 1). In particular, the parent asserted that the district failed to offer the student an appropriate IEP or an appropriate and timely assigned public school site for the 2020-21 school year (id.).

Regarding the January 2020 IEP, the parent alleged that the recommended special class was too large, lacked a high student-to-staff ratio to address the student's academic, social/emotional, and life skills needs, and failed to provide for transportation (Parent Ex. A at p. 1). Regarding the assigned public school site, the parent alleged that she was unable to visit the school because of the district's delay in providing her with the school location letter and COVID-19 restrictions (id.). The parent alleged that Beacon was an appropriate unilateral placement for the student in that it provided a full-time special class along with related services and transportation (id. at pp. 1-2). As relief, the parent requested a declaratory finding that the district did not offer a FAPE for the 2020-21 school year, a finding that the student's placement at Beacon was appropriate, an order directing the district to fund tuition, including related services and

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<sup>1</sup> The student's eligibility for special education as a student with a learning disability is not in dispute (see 34 CFR 300.8[c][10]; 8 NYCRR 200.1[zz][6]).

<sup>2</sup> The hearing record contains duplicative exhibits (compare Parent Exs. A, and D, with Dist. Exs. 1, and 8). For purposes of this decision, only parent exhibits are cited in instances where both a parent and district exhibit are identical in content.

transportation costs, for Beacon, and an award to the parent for reimbursement of transportation costs paid during the 2020-21 school year (id. at p. 2).

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

Following six prehearing and status conferences held between December 30, 2021 and August 18, 2022, the parties convened for the evidentiary phase of the impartial hearing, which took place over four hearing dates between September 28, 2022, and January 4, 2023 (Tr. pp. 1-145).

In a final decision dated March 8, 2023, the IHO found that the district met its burden to prove that it offered the student a FAPE for the 2020-21 school year (IHO Decision at p. 8). Specifically, the IHO held that the January 2020 CSE was "duly constituted" and that the parent "actively participated in the meeting" (id. at p. 6). The IHO further determined that the CSE reviewed "sufficient information" while creating the IEP, including "a psychoeducational evaluation, a counseling progress report, an occupational therapy progress report, and a speech and language progress report" (id.). The IHO noted that the school psychologist met with the student in person to conduct the student's psychoeducational evaluation and appropriately determined that the student was eligible for special education as a student with a learning disability (id.). The IHO found that the district's use of the Weschler Individual Achievement Test, Third Edition (WIAT-III), the Wechsler Intelligence Scale for Children-Fifth Edition (WISC-V), the Behavior Assessment System for Children-Third Edition (BASC-3) parent rating scale, the parent interview, the student interview, and the student's figure drawing were appropriate evaluation tools utilized by the district (id.).

Turning to the IEP, the IHO summarized the CSE's recommendations for a 10-month 12:1+1 special class placement and related services of counseling, OT, and speech-language therapy and noted that the district members of the CSE found the recommendations appropriate for the student and the parent did not object (IHO Decision at p. 6). The IHO noted the district's witness's testimony that the student "did not require a behavioral intervention plan"(BIP), "did not exhibit behavior that [wa]s typically exhibited by students placed in an 8:1:1 setting," "showed himself to be cooperative and motivated academically," and needed to have access to nondisabled peers in the community school setting (id. at p. 7). Regarding the student's behavioral needs, the IHO weighed the testimony of the district school psychologist, which summarized the views expressed by Beacon staff at the January 2020 CSE meeting, and found this description of the student's needs more credible than that expressed by the parent's witness, the principal of Beacon (Beacon principal), who testified that the student "require[d] feedback 'once, sometimes multiple times a minute to every two minutes'" and whose "description of the [s]tudent did not reflect any of the issues noted by the Beacon teacher who attended the IEP meeting" (id. at p. 8).

As to the parent's ability to visit the assigned public school site, the IHO noted that the parents received the prior written notice and school location letter after the CSE meeting and that the district provided proof that there was an open seat available in a 12:1+1 special class at the assigned public school site (IHO Decision at p. 8).

Overall, the IHO found that the district presented "a cogent and responsive explanation, for the CSE's program and placement recommendations" and held that the student was offered a FAPE

for the 2020-21 school year (IHO Decision at p. 8). Having found that the district met its burden to prove that it offered the student a FAPE, the IHO found it unnecessary to make determinations regarding the appropriateness of the unilateral placement or equitable considerations (id.).

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

The parent appeals, alleging that the IHO erred in determining that the district offered the student a FAPE for the 2020-21 school year. The parent asserts that the district failed to offer the student a program and placement that would properly address the student's significant behavioral needs of which the district was aware. In addition, the parent alleges that the recommended 12:1+1 special class was too large for the student and that the IEP recommended that classes other than ELA, math, social studies, and sciences were to be in a general education classroom or environment, which would have denied the student an appropriate education given his behavioral needs. The parent argues that the IHO's reasons for determining that the district offered the student a FAPE for the 2020-21 school year were "factually incorrect, [and] not supported by the law." Specifically, the parent alleges that the IHO incorrectly determined that she did not object to the CSE's recommendations and only relied on evidence describing the student's good behaviors, ignoring evidence of his struggles. In addition, the parent argues that the IHO erred in discrediting the testimony of the Beacon principal whose testimony was not exaggerated or in conflict with the views of the Beacon teacher who participated in the January 2020 CSE.

As for the assigned public school site, the parent asserts that the IHO failed to thoroughly analyze whether the district offered the student a classroom that had an appropriate behavioral plan that would address the student's specific needs. The parent argues that the district failed to offer any evidence that it had a specific class available for the student, had any behavioral management techniques in place to address the student's significant behavioral issues, or that the district employed any teachers that were ready to implement techniques that would address the student's behavioral and education needs. The parent argues that the district's witness who testified regarding the student's proposed placement was not credible and that the district witness presented no information that the district had a class available to implement the student's IEP.

Finally, the parent asserts that she presented detailed and credible evidence that Beacon was an appropriate unilateral placement for the student as it had developed a program tailored to meet the student's needs. The parent argues that she acted equitably in providing the district with timely and appropriate notice that she was rejecting the January 2020 IEP and would be placing the student at Beacon and seeking tuition reimbursement. Accordingly, the parent requests an order reversing the IHO's determination that the district offered the student a FAPE for the 2020-21 school year, a reversal of the IHO's decision to dismiss the parent's due process complaint, a determination that Beacon is an appropriate placement for the student, and an award of tuition reimbursement and direct funding for the student's placement at Beacon for the 2020-21 school year.

In an answer, the district responds to the parent's material allegations and asserts that the IHO's decision should be affirmed in its entirety.

## 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]).<sup>3</sup>

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

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

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<sup>3</sup> The Supreme Court has stated that even if it is unreasonable to expect a student to attend a regular education setting and achieve on grade level, the educational program set forth in the student's IEP "must be appropriately ambitious in light of his [or her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives" (Endrew F., 580 U.S. at 402).

## VI. Discussion

### A. January 2020 IEP

#### 1. Student Needs

The parent does not directly challenge the statement of the student's present levels of performance included in the January 2020 IEP. Instead, on appeal, the parent points to the statement of the student's needs in the IEP to show that the district was aware of the student's behavioral needs but failed to address them with an appropriate placement recommendation.<sup>4</sup> Accordingly, although not at issue, a review of the student's needs as set forth in the IEP, particularly the information regarding the student's behavioral needs, will help to facilitate the discussion of the issues to be resolved—namely the appropriateness of the recommendation for a 12:1+1 special class.

The district school psychologist testified that as part of her psychoeducational evaluation of the student she conducted a parent interview, interviewed the student, and administered his psychoeducational testing (Tr. pp. 47-52; Dist. Ex. 9 at pp. 1-5). She testified that she and the other members of the January 2020 committee reviewed the "student's progress report . . . the teacher's progress report, the counseling progress report, the OT progress report, speech progress report . . . the school's progress reports" (Tr. p. 81; see Parent Ex. D at p. 2; Dist. Ex. 7). The school psychologist described the student's behavior during his evaluation as "cooperative," and "engaging" and stated that "[h]e performed to the best of his potential and ability" (Tr. p. 50).

As noted above, the January 2020 CSE determined that the student was eligible for special education as a student with a learning disability (Dist. Ex. 2 at p. 1). With respect to the student's intellectual functioning, the January 2020 IEP stated that the student's general intellectual ability, as measured by the WISC-V, was in the average range but that the student demonstrated significant weakness on a subtest measuring processing speed (id. at pp. 1-2). Based on the student's performance on the WIAT-III, the IEP noted that the student demonstrated strong early reading skills, age appropriate numerical operation and math problem solving skills, sight word vocabulary and decoding skills that fell within the lower limit of the average range, and delayed reading comprehension and sentence building skills (id. at pp. 1, 2, 7). The IEP indicated that the student's mother was concerned that the student performed below grade level academically (id. at p. 3). The IEP further noted that the educational director at Beacon reported that the student required "a lot of redirection" but also that he advanced "nicely when focused" (id.).

The IEP indicated that, with respect to speech and language needs, the student presented with difficulties in several areas of language development including relating information in a clear

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<sup>4</sup> The parent argues that , despite being aware of the student's behavioral needs, the district offered no evidence of the proposed classroom or assigned teacher and did not present evidence of classroom rules, techniques, or monitoring programs to address behaviors. As discussed further below, these allegations are directed at the assigned public school site and not at the appropriateness of the recommendations set forth in the January 2020 IEP. Accordingly, they will not be discussed further in the IEP analysis.



and cohesive manner, determining the appropriate behavior in a given scenario, and allowing for turn taking and topic variations in conversations (Dist. Ex. 2 at pp. 3, 7).

With respect to social development, the IEP included information from several sources that were not altogether in agreement regarding the student's social/emotional abilities or needs. First, the IEP reflected the narrative of the district school psychologist who conducted the November 2019 psychoeducational evaluation who indicated that, based on clinical observation and interview, the student impressed as "a cooperative, charming, and socially well-regulated [student]" who "displayed a good sense of humor," demonstrated adequate attention and motivation during testing, and "exhibited age-appropriate social interests" (Dist. Ex. 2 at p. 3). As noted in the IEP, the student expressed an interest in watching videos and playing games, reportedly had weekly play dates with friends, stated he was getting to know students in his new school, reported his favorite part of the school day was recess, and that he wished to return to his previous school (id. at pp. 3-4).

However, the January 2020 IEP also included the results of the parent rating scale from the BASC-3 which suggested that the student's behavior was in the "Clinically Significant" range with regard to hyperactivity, aggression, conduct problems, the behavioral symptoms index, adaptability, anger control, and bullying (Dist. Ex. 2 at p. 4).<sup>5</sup> The IEP indicated that "given this profile, possible diagnostic considerations might include attention-deficit/hyperactivity disorder (ADHD), oppositional defiant disorder (ODD), and conduct disorder (CD)" (id.). The IEP indicated, in addition to identifying clinically significant behaviors, the parent's responses on the BASC-3 also identified "at-risk" concerns, described as "the potential of a problem that needs careful monitoring," that included depression, somatization, internalizing problems, attention problems, social skills, activities of daily living, adaptive skills, developmental social disorder, emotional control, executive functioning, negative emotionality, and resiliency (id.).

Next, the January 2020 IEP indicated that, according to a May 2019 counseling progress report, the student could be personable and charming, but that he had difficulty responding to and listening to authority figures, that it was challenging for him to follow school rules, and that he was often disruptive during class (Dist. Ex. 2 at p. 4).<sup>6</sup> As noted in the IEP, the counseling report indicated that "therapy was focused on [the student] improving his oppositional behaviors as well as improving his peer interaction skills," and stated that, "reportedly, [the student] tend[ed] to use his hands with others when he was upset," and "continued to be encouraged to use his words and to express his feelings of anger in a more appropriate way" (id.). In addition, the IEP noted that a report from the parent and previous counseling provider suggested that the student's "emotional dysregulation [and] oppositional disposition, coupled with his difficulty with sustaining attention and concentration, [could] interfere with his academic functioning and performance in school" (id.).

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<sup>5</sup> This BASC-3 parent rating scale was administered as part of the district's November 2019 psychoeducational evaluation (Dist. Exs. 2 at p. 4; 9 at p. 4).

<sup>6</sup> When the May 2019 counseling progress report was developed during the 2018-19 school year, the student had been parentally placed in a general education school and receiving SETSS and related services through an individualized education services program (Dist. Ex. 9 at p. 1).

The January 2020 IEP also reflected the content of November 2019 teacher and counselor reports from Beacon. According to the IEP, the student's then-current Beacon classroom teacher described the student as "a mature boy who [wa]s well liked by his teachers and peers" and "eager and excited to learn new things" and noted that he knew to raise his hand in class although he often needed prompting to do so (Dist. Ex. 2 at p. 4; see Dist. Ex. 7 at p. 8). The IEP noted that the student was "well behaved and complie[d] with teacher's commands" but that at times the student "c[ould] be defiant, such as when the class [wa]s doing an activity that he d[id] not want to do" (Dist. Ex. 2 at p. 4). The student "often perform[ed] negative behaviors for attention or as an escape from classwork," and, "during a group lesson, [the student] needed prompting to remain focused on the lesson and to be an active participant" (id. at pp. 4-5). In addition, the IEP noted that the student "joined class games independently, . . . usually interacted appropriately with his peers," at times teasing them, and "work[ed] on ignoring negative behaviors of peers" (id. at p. 5).

Similarly, the IEP noted that the November 2019 Beacon counseling progress report indicated that the student was "a smart and friendly boy who [wa]s eager to please and enjoyed learning," and, although he was new to the school, "he appear[ed] to be comfortable with his peers and he participate[d] well in class" (Dist. Ex. 2 at p. 5; see Dist. Ex. 7 at p. 11). As recorded in the IEP, the counseling report stated that the student demonstrated "difficulty focusing in the classroom," sometimes behaved impulsively, and became "easily frustrated when circumstances [we]re not the way he want[ed] them to be" (Dist. Ex. 2 at p. 5). Socially, the student initiated "conversation and activities with his peers both in the classroom and during recess," participated in social skills groups daily, and was "learning fundamental social vocabulary and concepts" (id.).

The IEP stated that the student could be "stubborn and oppositional," "like[d] doing things his way," "struggle[d] with authority and following the rules," and that the Beacon educational director reported that the student sometimes made fun of kids (Dist. Ex. 2 at p. 5). Additionally, the IEP reflected parent and school comments from the CSE meeting that indicated the student exhibited some behavioral concerns but "not at the point of classifying him as having an Emotional Disturbance" or requiring "an FBA/BIP" as he followed the in-class behavior plan (id.; see Dist. Ex. 6 at p. 2). The IEP indicated that the student liked to play games and sports, loved people and his friends, had a lot to say, and liked to be heard (id.). According to the IEP, the parent stated that, socially, the student's awareness was "not very high in certain behaviors," and that he was learning social skills in his unilateral placement (id.).<sup>7</sup>

With respect to physical development, the January 2020 IEP noted that the student demonstrated age-appropriate gross motor skills, was athletic, physically active, and in good health (Dist. Ex. 2 at p. 6). The IEP indicated that, according to a November 2019 OT progress report, the student "[wa]s a sweet and friendly boy" who presented with "weak core strength" as well as below average assessment scores in balance and strength and used a "modified right hand tripod grasp" (id. at pp. 6-7). Further, the IEP stated that the student was found to have "several unintegrated reflexes" and that the "lack of reflex integration, and delayed postural reflex development negatively impact[ed] his attention, emotional regulation and learning" (id. at p. 6). In addition, the IEP noted that "sensory processing delays, specifically in the areas of vestibular

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<sup>7</sup> The IEP noted that the student's social development needs included the need for praise and continued encouragement, prompting and redirection to remain on task, counseling, preferential seating, and consistent and firm limit setting (Dist. Ex. 2 at p. 5).

and proprioception impact[ed] [the student's] body/spatial awareness, balance, and attention" (id. at pp. 6-7). The IEP indicated that, according to the Beacon educational director, the student had nice handwriting because he worked "hard at it" and he was "a perfectionist" (id. at p. 6).

## **2. 12:1+1 Special Class**

The parent contends that the IHO erroneously found that the recommended 12:1+1 special class was appropriate to meet the student's needs. The parents allege that the student requires a small student-to-teacher ratio and that the recommended 12:1+1 special class was too large for the student to learn and that "not being in a small setting the entire day would deny the [s]tudent an appropriate education."

As summarized above, the January 2020 CSE recommended a 10-month 12:1+1 special class placement in a community school and related services for the student (Dist. Ex. 2 at pp. 30, 31, 32, 36). State regulation provides that "the maximum class size for special classes containing students whose management needs interfere with the instructional process, to the extent that an additional adult is needed within the classroom to assist in the instruction of such students, shall not exceed 12 students, with one or more supplementary school personnel assigned to each class during periods of instruction" (8 NYCRR 200.6[h][4][i]; "Continuum of Special Education Services for School-Age Students with Disabilities," at pp. 15-16, Office of Special Educ. [Nov. 2013], available at <http://www.p12.nysed.gov/specialed/publications/policy/continuum-schoolage-revNov13.pdf>). By way of comparison, State regulation also indicates that the maximum class size for special classes containing students whose management needs are determined to be intensive or highly intensive and requiring a significant or high degree of individualized attention and intervention shall not exceed eight or six students, respectively, with one or more supplementary school personnel assigned to each class during periods of instruction"(8 NYCRR 200.6[h][4][ii][a]-[b]).

The parent opines that the January 2020 CSE's recommendations would not address the student's behavioral needs. However, the hearing record demonstrates some variation in the descriptions of the student's behavioral needs. As summarized above, although administration of the BASC-3 parent rating scale resulted in scores falling in the clinically significant and at-risk ranges for several indices relating to attention and behaviors, the school psychologist highlighted that the results were based on the parent's perspective of the student at home and in the community and that it differed from the perspective of the classroom teacher who indicated that the student was not acting out or aggressive (Tr. pp. 60-64). The school psychologist testified that the staff from Beacon reported to the January 2020 CSE that the student was "impulsive" and had "difficulty focusing," but "enjoyed learning" and "was not aggressive" and did not need an FBA or BIP and exhibited behaviors that could "be controlled" (Tr. pp. 62-64). During cross-examination the school psychologist testified that the January 2020 CSE was informed by the educational director at Beacon, who participated in the CSE meeting, that the student "followed the in class behavior plan" and that educational director further informed the CSE that the student "didn't need an FBA" (Tr. p. 73; Dist. Ex. 2 at p. 5). She explained that an in-class behavior plan usually consists of

following basic rules such as "raising your hand before . . . speaking, sitting at your desk, staying at the desk" (Tr. p. 76).<sup>8</sup>

The parent points to the testimony of the Beacon principal to show that the student's needs were more intensive and argues that the IHO erred in discrediting the principal's testimony. The Beacon principal testified regarding the student's progress during the 2020-21 school year and indicated that the student needed intense, constant feedback (Parent Ex. K ¶¶ 24, 31). The Beacon principal stated that the student "really required a behavior program that involved a tremendous amount of feedback," that "[t]he amount of feedback in the class that he required was at the ratio of one feedback per minute, two minutes at a maximum," and that "[i]n a 12:1:1, [he] d[id] not believe that level of feedback and support could be given" (Tr. p. 120; Parent Ex. K ¶¶ 31, 37). In her decision, the IHO noted that the Beacon principal's testimony "was not credible as compared with" the view of the student's needs shared by Beacon staff with the CSE and that the Beacon principal's "testimony throughout the transcript seemed exaggerated . . . and his description of the [s]tudent did not reflect any of the issues noted by the Beacon teacher who attended the IEP meeting" (IHO Decision at p. 8). However, ultimately the Beacon principal's testimony focused on the student's behaviors and needs during the 2020-21 school year, well after the creation of the January 2020 IEP (see Parent Ex. K). As the Beacon principal's observations were unavailable to the CSE in January 2020 when the IEP was created, his testimony could not be relied upon to 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]). Accordingly, it is unnecessary to review the IHO's finding about the Beacon's principal's credibility, as his testimony was retrospective and could not, in any event, be relied upon to challenge the appropriateness of the IEP.

The school psychologist stated that the results of her evaluation showed that the student was of average intellectual ability and, in the one-to-one testing setting, he was cooperative, and further, he was motivated academically and demonstrated "on par" math skills but was delayed in terms of his reading comprehension skills, as well as his writing skills (Tr. p. 52). The school psychologist testified that, even though the student had a learning disability, he had "a lot of potential" and "you could certainly see [him] being in a mainstream setting" but that, instead, the CSE decided to recommend "a small classroom setting of 12 students, a teacher, and an assistant in a class to support him" (Tr. p. 83). She explained that the 12:1+1 special class with the related services would offer the student "support in a class" along with strategies to address management needs "like prompting, redirection, focusing, to help him" make progress (*id.*). When questioned about the existence of behavioral factors that might be leading to the student's academic delays, the school psychologist noted that "there were concerns about him being impulsive and

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<sup>8</sup> The parent has not argued in this matter that the January 2020 IEP was inappropriate for failing to recommend a BIP but instead argues that the district did not offer evidence about the classroom behavior plan for the proposed classroom at the assigned public school site. However, as discussed below, the parent did not make any nonspeculative allegation that the assigned public school site did not have the capacity to implement the January 2020 IEP, including by delivering a classroom behavior management plan.

distractible" and that the IEP addressed these concerns with a recommendation that the student receive preferential seating in the classroom, and prompting and positive reinforcement to guide him within the classroom setting (Tr. p. 59).

In particular, as supports for the student's management needs, the January 2020 CSE recommended a multi-sensory approach to learning, work broken down into smaller increments, graphic organizers, use of drill and repetition, use of various learning modalities, practice and review of learned skills and new concepts to address the student's educational needs (Dist. Ex. 2 at p. 7). Further, to address the student's behavioral needs the IEP stated that class rules should be clearly explained, implemented, and monitored in order to increase age appropriate social skills and that in an effort to increase the student's attention span and minimize his level of distractibility and impulsivity he should be provided with preferential seating where unnecessary auditory and visual stimulation were reduced (id.). In addition, the IEP indicated that the student would benefit from prompting, encouragement and positive reinforcements to facilitate learning, as well as promote age appropriate social skills and on task behavior (id. at pp. 4, 7).

The CSE also developed annual goals to target behavior as well as educational needs such as complying with teacher's commands right away, hand raising, ignoring negative peer behaviors, and refraining from teasing peers (Dist. Ex. 2 at pp. 17-22). Additional annual goals targeted social interactive skills, emotional regulation skills, demonstrating compliant classroom behavior, and knowledge of social thinking terms, as well as academic weaknesses (id. at pp. 9-22). The school psychologist testified how the annual goals addressed the student's behaviors including emotional regulation skills and explained that the student would learn to self-calm when overwhelmed or frustrated by practicing tools such as deep breathing, and "speaking cool thoughts" with his therapist during counseling (Tr. pp. 83-85). The school psychologist testified that counseling was recommended by the CSE "to help [the student] deal with some of the behavior issues he" had, and "OT could help with the self-regulation issues" (Tr. p. 83).

The school psychologist testified that the CSE considered an 8:1+1 special class in a specialized school for a 12-month school year but that she was concerned with that alternative because, despite concerns with the student's attention and impulsiveness, the student was "eager to" and had "the potential to learn" (Tr. p. 55). Therefore, she explained that the CSE "felt that [an 8:1+1] setting would be too restrictive" (id.). The school psychologist testified that the student "needed to be around typical developing students" and "needed to be in a community school environment for him to learn, to continue to show growth" (id.). The school psychologist further explained that, compared to an 8:1+1 special class, a 12:1+1 special class would consist of students with less "severe behavior issues" (Tr. p. 56). Consistent with the school psychologist's testimony, the IEP reflects that the January 2020 CSE considered an 8:1+1 special class in a specialized school and rejected it because the evidence it reviewed supported placing the student in a 12:1+1 special class and the recommended setting would give the student "the opportunity to be among typically developing peers" (Dist. Ex. 2 at p. 38).

Overall, taking into account the information available to the CSE, the hearing record supports a finding that the student exhibited management needs that interfered with the instructional process such that recommendation for a 12:1+1 special class reasonably calculated to enable the student to make progress appropriate in light of his circumstances (see 8 NYCRR 200.6[h][4][i]).

As a final matter, one of the parent's concerns with the CSE's recommendation was that the special class was recommended only for ELA (15 times per week), math (5 times per week), social studies (2 times per week), and science (1 times per week) (Dist. Ex. 2 at p. 30). The Beacon principal testified to his view that the student would not "be successful in a full mainstream classroom for other parts of the day, especially . . . for the transitions, the arrival, the dismissal of a lunch, the recess" (Tr. p. 121; see Parent Ex. K at ¶ 37). However, taking into account the special class and the 7 weekly sessions of related services, the recommendations of the CSE accounted for much of the student's schedule (Dist. Ex. 2 at pp. 30-31). Beyond this, the IEP reflected that the student could participate in "all appropriate school activities" (id. at p. 35), and nothing before the CSE highlighted any difficulties the student had experienced during transitions. Given the CSE's obligation to recommend a placement for the student in the LRE, the CSE appropriately recommended a program that addressed the student's needs but also provided for the student's exposure to nondisabled peers (see 20 U.S.C. § 1412[a][5][A]; see also 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).

Given the student's social and behavioral needs as well as his management needs as known to the January 2020 CSE, there is no evidence in the hearing record to support the parent's assertion that the student required a more supportive program or placement in order to receive educational benefit.

## **B. Assigned Public School Site**

Regarding the appropriateness of the assigned public school site, the parent alleges that the district failed to present evidence regarding a classroom available for the student, "any classroom rules, techniques or monitoring program[s] that were required to address [the student's] significant behavior issues" or any teachers available or capable of implementing such rules, techniques, and programs. The parent argues that the district's witness who testified about the availability of an open seat in a special class for the student had no firsthand knowledge of the student roster, the teacher's name, or classroom rules and expectations and, therefore, that the district failed to offer credible evidence that the district was able to implement the IEP with a placement for the student.

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 Dep't of Educ., 2016 WL 5404654, at \*25 [S.D.N.Y. Sept. 27, 2016]; G.S. v. New York City Dep't of Educ., 2016 WL 5107039, at \*15 [S.D.N.Y. Sept. 19, 2016]; M.T. v. New York City Dep't of Educ., 2016 WL 1267794, at \*14 [S.D.N.Y. Mar. 29, 2016]). Such challenges must be based on something more than the parent's speculative "personal belief" that the assigned public school site was not appropriate (K.F. v. New York City Dep't of Educ., 2016 WL 3981370, at \*13 [S.D.N.Y. Mar. 31, 2016]; Q.W.H. v. New York City Dep't of Educ., 2016 WL 916422, at \*9 [S.D.N.Y. Mar. 7, 2016]; N.K. v. New York City Dep't of Educ., 2016 WL 590234, at \*7 [S.D.N.Y. Feb. 11, 2016]).

Initially, allegations in the parent's due process complaint notice focused on the sufficiency and timing of the district's notice to the parent of the assigned public school site and the parent's ability to tour the school (see Parent Ex. A at p. 1). On appeal, the parent has not pursued these allegations and, instead, alleges that the district failed to present evidence at the impartial hearing about the assigned school's capacity to implement the IEP. However, the parent did not allege in her due process complaint notice any prospective, non-speculative challenges to the district's capacity to implement the January 2020 IEP (see Parent Ex. A). Moreover, even if the parent's allegations on appeal had been earlier raised, they are based solely on the parent's speculation that the assigned public school site could not implement the IEP and, therefore, are not actionable, and the district did not have the burden to present evidence about the assigned school site's capacity to implement every aspect of the January 2020 IEP (see J.S. v. New York City Dep't of Educ., 2017 WL 744590, at \*4 [S.D.N.Y. Feb. 24, 2017] [finding that a district did not have a burden to produce evidence demonstrating the adequacy of the assigned public school site absent non-speculative allegations about the school's ability to implement the IEP]; 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"]; see also M.B. v New York City Dep't of Educ., 2017 WL 384352, at \*6 [S.D.N.Y. Jan. 25, 2017] [noting that the parent in that matter did "not allege that the placement school did not have the ability to satisfy the IEP" but instead sought "to require the District to prove in advance that it w[ould] properly implement the IEP," which "M.O. does not require"]).

Nonetheless, out of an abundance of caution, I will briefly address the parent's concerns with respect to the assigned public school site. Here, via a school location letter dated August 11, 2020, the district identified the particular public school that it assigned the student to attend for the 2020-21 schoolyear (Dist. Ex. 4). The school location letter set forth the contact information for

individual that the parent could reach in order to arrange a visit to the school (*id.*; see also Dist. Ex. 8 at p. 2). In the parent's 10-day notice to the district, dated August 18, 2020, the parent stated that "when [she] contacted the proposed placement a few times to arrange for visit to determine its appropriateness for [the student], no one answered the call" (Parent Ex. E at p. 2). In her due process complaint, the parent did not indicate that she had difficulty contacting the school to schedule a visit but, instead, alleged that "due to Covid-19 restrictions, the student's parent could not visit the proposed placement to determine its appropriateness" (Parent Ex. A at p. 1).<sup>9</sup> There is no further allegation or information in the hearing record about the parent's efforts to obtain information about the assigned school or any obstacles she encountered.<sup>10</sup>

Moreover, even if the parent had raised nonspeculative allegations, there is sufficient evidence in the hearing record to demonstrate the assigned school had the capacity to implement the student's January 2020 IEP. In particular, the assistant principal of the assigned public school (assistant principal) testified that the proposed school could have implemented the student's January 2020 IEP for the 2020-21 school year (Tr. pp. 89-90). The assistant principal testified that the school had an open seat for the student for the recommended class as of the first day of the 2020-21 school year and that the school could have implemented the number of periods for the classes recommended on the student's IEP (Tr. p. 90). In addition, the assistant principal stated

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<sup>9</sup> 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>).

<sup>10</sup> 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 parent has not alleged that the district refused to provide her information about the school.



that the assigned school had an open seat in the "bridge class" which was a second and third grade combination 12:1+1 self-contained class starting September 1, 2020, that the class was not full at that time, and that a teaching assistant was present in the classroom for the 2020-21 school year (Tr. pp. 93-96). The assistant principal testified that the classroom had a behavior plan and explained that there was a set of rules and conduct that the teacher came up with at the beginning of every year and expectations for behavior (Tr. pp. 96-97).

To the extent the parent challenges the lack of evidence about rules, techniques, or behavior monitoring programs, these sorts of allegations are not tethered to specific requirements in the IEP in that the IEP does not mandate such particularities (see Y.F., 659 Fed. App'x at 5). The parent's remaining arguments on appeal regarding the proposed school are speculative in that they are challenging the proposed placement's ability to provide the services recommended in the IEP but fail to allege how the proposed placement was factually incapable of implementing the January 2020 IEP. Based on the foregoing, the parent's challenges to the district's evidence pertaining to assigned public school must fail.

## **VII. Conclusion**

As discussed above, the IHO correctly determined that the district met its burden to prove that it offered the student a FAPE for the 2020-21 school year. Accordingly, the necessary inquiry is at an end and there is no need to reach the issue of whether Beacon was an appropriate unilateral placement for the student or whether equitable considerations support an award of tuition reimbursement (Burlington, 471 U.S. at 370).

**THE APPEAL IS DISMISSED.**

**Dated: Albany, New York  
June 7, 2023**

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**SARAH L. HARRINGTON  
STATE REVIEW OFFICER**