



The University of the State of New York

The State Education Department

State Review Officer

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No. 23-128

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

Appearances:

The Law Firm of Tamara Roff, PC, attorneys for petitioners, by Tuneria R. Taylor, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Brian Davenport, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioners (the parents) appeal from the decision of an impartial hearing officer (IHO) which determined that respondent (the district) offered the student a free appropriate public education (FAPE) and denied their request to be reimbursed for their daughter's tuition costs at the ICHUD Mosdos Hachinuch School (ICHUD) for the 2021-22 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 parties' familiarity with this matter is presumed and, therefore, the detailed facts and procedural history of the case and the IHO's decision will not be recited here.¹ Briefly, the CSE convened on January 12, 2021, to formulate the student's IEP for the 10-month portion of the 2021-22 school year beginning in September 2021 (see generally Dist. Ex. 1). Finding the student eligible for special education programming as a student with autism, the January 2021 CSE recommended ten periods per week of both English language arts (ELA) and math instruction in a

¹ Any additional facts necessary to the disposition of the parties' arguments are set forth below to resolve the issues presented in this appeal.

12:1+1 special class placement and five periods per week of both social studies and sciences instruction in a 12:1+1 special class placement, all in a district non-specialized community school (Dist. Ex. 1 at pp. 19-20, 26). The CSE also recommended that the student receive the following related services: three 30-minute sessions per week of individual occupational therapy (OT), two 30-minute sessions per week of individual speech-language therapy, one 30-minute session per week of individual counseling services, one 30-minute session per week of group counseling services and four 60-minute sessions per year of parent counseling and training (*id.* at p. 20).

On August 10, 2021, the district sent a prior written notice summarizing the recommendations from the January 2021 CSE, and a school location letter identifying the particular public school site to which the district assigned the student to attend for 2021-22 school year (Dist. Ex. 7).

On August 18, 2021 and September 21, 2021, the parents notified the district of their intent to unilaterally enroll the student at ICHUD for the 2021-22 school year and pursue public funding for that placement (Parent Exs. D; E).

On August 23, 2021, the parents executed an enrollment contract with ICHUD for the 2021-22 school year (Parent Ex. L at p. 1). On September 3, 2021, the parents signed an addendum to their enrollment contract with ICHUD in which they agreed to pay for the student's speech-language therapy and OT (*id.* at p. 2). On December 27, 2021, the parents again signed an addendum to their enrollment contract with ICHUD in which, in addition to the previously contracted speech-language therapy and OT, they agreed to pay for counseling services (*id.* at p. 3).²

In a due process complaint notice dated May 10, 2022, the parents summarized the student's educational history and alleged that the district failed to offer the student a FAPE for the 2021-22 school year, that ICHUD was an appropriate unilateral placement, and that equitable considerations favored the parents for full tuition reimbursement (*see* Parent Ex. A). The due process complaint notice included allegations related to the sufficiency of the district evaluations, consideration of private evaluative information, the composition of the CSE, predetermination of the CSE's recommendations and a lack of parent participation in the decision-making process, the adequacy of the present levels of performance, the lack of a behavioral intervention plan (BIP) to address the student's social/emotional needs, inadequate services to address the student's anxiety, inappropriate annual goals, the use of standardized assessments, a lack of sufficient 1:1 instruction in the recommended 12:1+1 special class placement, that a special class was not recommended for the full school day, and further allegations related to the assigned public school site (*id.*). The

² On December 27, 2022, the parents signed an addendum to their enrollment contract with ICHUD in which, in addition to the previously contracted speech-language therapy and OT, they agreed to pay for counseling services (Parent Ex. L at p. 3). According to the December addendum to the 2021-22 enrollment contract, the parent signed the addendum on December 27, 2022, which would have been during the 2022-23 school year. The parents' attorney makes note of the discrepancy in her closing brief, arguing that it was undisputed that ICHUD provided the student counseling services during the 2021-22 school year, which proves the parties' mutual intent to contract with each other for such service during the 2021-22 school year (IHO Ex. II at p. 23 at fn. 5).

parents requested district funding or reimbursement for the costs of the student's placement at ICHUD for the 2021-22 school year (*id.* at p. 4).

An impartial hearing convened on January 11, 2023 and concluded on February 14, 2023 after three days of proceedings (Tr. pp. 47-260).³ In a decision dated May 19, 2023, the IHO addressed the parents' arguments related to the sufficiency of the evaluative information—including the lack of a functional behavioral assessment (FBA), consideration of a private psychological evaluation, and the 12:1+1 special class recommendation—including the alleged failure to recommend 1:1 or small group instruction and develop a BIP for the student, and the IHO determined that the district offered the student a FAPE for the 2021-22 school year, thus denying the parents' request for tuition reimbursement for the student's enrollment at ICHUD for the 2021-22 school year (IHO Decision at pp. 9-18).

IV. Appeal for State-Level Review

The parties' familiarity with the particular issues for review on appeal in the parents' request for review and the district's answer thereto is also presumed and, therefore, the allegations and arguments will not be recited here in detail. The following issues presented on appeal must be resolved in order to render a decision in this case:

1. whether the IHO erred in determining that the evaluative information available to the January 2021 CSE was sufficient to develop an appropriate IEP for the student;
2. whether the IHO erred in determining that the student did not require an FBA or a BIP;
3. whether the IHO erred in determining that the January 2021 CSE's recommendation of a 12:1+1 special class placement without a specific recommendation for 1:1 instruction was appropriate to meet the student's needs; and
4. whether the IHO erred in determining that the student did not require the applied behavior analysis (ABA) methodology recommended in the February 2018 psychological evaluation to receive a FAPE.

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]).

³ The parties convened for a pre-hearing conference on June 24, 2022 and four status conferences beginning on August 23, 2022 and concluding on November 17, 2022 (Tr. pp. 1-46).

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]).⁴

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. Sufficiency of Evaluative Information

Turning to the first issue on appeal, the parents argue that the IHO erred by finding that the evaluative information the January 2021 CSE relied on was sufficient to support the recommendations contained in the student's January 2021 IEP and that the district had evaluated the student in all areas of suspected disability. The IHO considered the fact that the January 2021 CSE meeting took place during the COVID-19 pandemic and determined that the New York State Department of Education COVID-19 guidelines for reevaluations must be applied (IHO Decision at p. 13). In this matter, the IHO improperly relied on the COVID-19 guidelines when considering

⁴ 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).

the district's obligation to reevaluate the student; however, after an independent review of the hearing record, the ultimate determination made by the IHO is supported albeit on different grounds.⁵

A district must conduct an evaluation of a student where the educational or related services needs of a student warrant a reevaluation or if the student's parent or teacher requests a reevaluation (34 CFR 300.303[a][2]; 8 NYCRR 200.4[b][4]); however, a district need not conduct a reevaluation more frequently than once per year unless the parent and the district otherwise agree and at least once every three years unless the district and the parent agree in writing that such a reevaluation is unnecessary (8 NYCRR 200.4[b][4]; see 34 CFR 300.303[b][1]-[2]). A CSE may direct that additional evaluations or assessments be conducted in order to appropriately assess the student in all areas related to the suspected disabilities (8 NYCRR 200.4[b][3]). Any evaluation of a student with a disability must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parent, that may assist in determining, among other things the content of the student's IEP (20 U.S.C. § 1414[b][2][A]; 34 CFR 300.304[b][1][ii]; see *Letter to Clarke*, 48 IDELR 77 [OSEP 2007]). In particular, a district must rely on technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors (20 U.S.C. § 1414[b][2][C]; 34 CFR 300.304[b][3]; 8 NYCRR 200.4[b][6][x]). A district must ensure that a student is appropriately assessed in all areas related to the suspected disability, including, where appropriate, social and emotional status (20 U.S.C. § 1414[b][3][B]; 34 CFR 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]). An evaluation of a student must be sufficiently comprehensive to identify all of the student's special education and related services needs, whether or not commonly linked to the disability category in which the student has been classified (34 CFR 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]). School districts shall ensure that assessments and other evaluation materials used to assess a student under an initial evaluation or a reevaluation ". . . include those tailored to assess specific areas of educational need and not

⁵ According to State guidance issued March 27, 2020 regarding evaluations during the COVID-19 pandemic, any evaluation that did not require face-to-face assessments or observation may take place while schools are closed if the parent consents ("Provision of Services to Students with Disabilities During Statewide School Closures Due to Novel Coronavirus (COVID-19) Outbreak in New York State," at p. 6, Off. Of Spec. Educ. Policy Memo [March 27, 2020], available at <http://www.p12.nysed.gov/specialed/publications/2020-memos/nysed-covid-19-provision-of-services-to-swd-during-statewide-school-closure-3-27-20.pdf>). Further, the guidelines indicate that a reevaluation may be conducted by reviewing existing evaluation data and such review may occur without a meeting and without obtaining parental consent, unless it is determined that additional assessments are needed (*id.*). However, later State guidelines encouraged school districts to work with parents to reach mutually agreeable extensions of time; to consider ways to use technology to meet timelines by conducting reevaluations remotely; and to appropriately document any delay in meeting timelines which must be communicated to parents in their preferred language or mode of communication ("Supplement #1 - Provision of Services to Students with Disabilities During Statewide School Closures Due to Novel Coronavirus (COVID-19) Outbreak in New York State – Additional Questions and Answers," at pp. 4-5, Office of Special Educ. Mem. [Apr. 2020], available at <http://www.p12.nysed.gov/specialed/publications/2020-memos/special-education-supplement-1-covid-qa-memo-4-27-2020.pdf>). There is no indication that the district attempted to delay any reevaluations due to the COVID-19 pandemic nor did the district raise such argument during the impartial hearing. As such, I find that the IHO improperly considered the State guidance regarding the conduct of evaluations during the COVID-19 pandemic when considering whether the January 2021 CSE had sufficient evaluative information before it to make an appropriate recommendation.

merely those which are designed to provide a general intelligence quotient" (8 NYCRR §200.4[b][6][iii]; see 34 CFR 300.304[c][2]).

While State regulations define that certain assessments must be performed as part of an initial evaluation of a student to determine a student's initial eligibility (8 NYCRR 200.4[b][i]-[v]), it is left to the collaborative process of the CSE (with or without a meeting) to determine what additional data is needed during a reevaluation of a student (8 NYCRR 200.4[b][5]). State regulations require that, as part of a reevaluation, the CSE, with input from the student's parents should "review existing evaluation data" and, on the basis of that review, identify what additional data is needed to determine continuing eligibility for special education programs and services and present levels of academic performance and the related developmental needs of the student, and should administer tests and other evaluative materials to gather the data needed (8 NYCRR 200.4[b][4], [5][i]-[iii]). If additional data is not needed, the district must notify the parents of the determination additional data is unnecessary, the reasons for the determination, and the parents' right to request an assessment of the student to determine the student's special education needs (8 NYCRR 200.4[b][5][iv]).

While the parents are correct that the hearing record does not show that the district conducted recent evaluations of the student (see Tr. pp. 107-08), despite this procedural violation the parents' assertion on appeal that the January 2021 CSE lacked sufficient evaluative information about the student in order to develop her IEP is not supported by a review of the evidence. As noted above, 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, 550 U.S. at 525-26; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245).

The CSE convened on January 12, 2021 to conduct an annual review and develop the student's IEP for the 10-month 2021-22 school year (Dist. Exs. 1; 7). The hearing record indicated that the CSE reviewed, considered, and relied on information from a February 2018 psychological evaluation, then-current progress reports from the student's third grade teacher and related service providers, and input provided by a district special education teacher, the parent, and the student's teacher at the meeting (Tr. pp. 70-72; Dist. Exs. 1 at pp. 1-6, 27; 7 at pp. 1-2).⁶

The parents sought a private psychological evaluation in February 2018, as they were "becoming increasingly concerned about [the student's] behavior, peer socialization, and daily living skills" (Dist. Ex. 6 at p. 1). During the evaluation, the psychologist observed that the student "tended to touch many of the objects around her" during the assessment, had difficulty remaining

⁶ In this matter, two school psychologists testified as district witnesses (see Tr. pp. 65-120, 153-157). The first school psychologist who testified was the school psychologist who also served as the district representative at the January 2021 CSE meeting and will be referred to in this decision as "the school psychologist" (see Dist. Ex. 1 at p. 27). The second school psychologist who testified was the school psychologist at the student's proposed assigned public school for the 2021-22 school year and, as such, will be referred to in the decision as "the assigned school psychologist" (Tr. pp. 153-54).

seated, and exhibited "[p]rofound difficulty with engaging and relating to the psychologist "in a meaningful, genuine manner" (id. at p. 2). The February 2018 psychological evaluation report included results from administration of the Wechsler Preschool and Primary Scale of Intelligence-Fourth Edition (WPPSI-IV) to the student, which yielded a full-scale IQ of 77 (borderline range of intellectual functioning) (id. at p. 3). In addition, administration of the Childhood Autism Rating Scale, Second Edition (CARS-2) yielded a score of 31, indicative of mild to moderate symptoms of autism spectrum disorder (id. at p. 6). Further, administration of the Vineland Adaptive Behavior Scale-Second Edition (Vineland-II) to the student yielded an adaptive behavior composite score in the low range (id. at pp. 4-5).

In a January 2021 progress report, the student's third grade teacher reported that the student's math skills were at a late first grade level and that she was becoming more fluent in basic subtraction skills, and learning money skills and various strategies to assist her in solving math word problems (Dist. Ex. 2 at p. 1). The teacher indicated that the student had difficulty "solving and comprehending math word problems," learned math in a group setting, and relied on teacher prompts and assistance to complete independent work (id.). According to the teacher, the student's reading skills were at a first grade level and she could read a first grade level passage with 95 percent accuracy (id.). Further, the teacher indicated that when a beginning second grade level book was read aloud, the student comprehended the story, gave answers about it, retold the story, and made predictions (id.). However, while reading, the student demonstrated a slow rate of decoding and made mistakes, needed encouragement to continue reading, and frequently lost her place due to distractions (id.). When writing, the student wrote neatly, had learned to keep the letters within the lines, and was able to generate "good ideas" but sometimes was "caught up on small details and g[ot] carried away with them" (id.). The teacher also reported that the student needed reminders to stay on the topic she was writing about and to use appropriate capitalization and punctuation (id. at p. 2). Regarding language skills, the teacher indicated that the student had difficulty "following basic oral directions," exhibited frustration when asked to repeat the directions, and required prompts and cues to complete a task (id.).

In a January 2021 progress report, the speech-language pathologist described the student as having a "sweet and pleasant disposition" and that "she [was] always very cooperative" (Dist. Ex. 4). The speech-language pathologist stated that the student's receptive, expressive, and pragmatic language and vocabulary skills were delayed and that she presented with poor social skills (id.). In addition, she noted that the student had difficulty following multi-step directions, often required repetition, and presented with "gaps in standard information which she would be expected to know" (id.). According to the speech-language pathologist, the student had adequate conversational skills, presented with atypical intonation, and her rate of speech was "often slower than average" (id.). The speech-language pathologist indicated that the student enjoyed listening to stories and could answer simple questions about the story but had difficulty with more complex questions that required "higher level thinking, inferencing and abstraction" skills (id.). In the 2021 progress report, the speech-language pathologist included recommendations to continue improving the student's language and speech skills, and indicated that the student was "showing some improvement in all areas," as "her vocabulary [was] increasing as [was] her ability to follow

multistep directives. Her ability to answer questions [was] improving as [was] her sentence structure. Her intonation and rate of speech improve[d] with prompting" (*id.*).

Regarding the student's social/emotional skills and needs, a January 2021 counseling progress report noted that the student struggled with "perspective taking" and "understanding and interpreting nonverbal cues" (Dist. Ex. 3 at p. 1). According to the report, at times the student's responses were "inappropriate and off topic," and she also struggled with age appropriate play skills including initiating a game, taking turns, and resolving conflicts (*id.*). The counselor indicated that the student's conversational skills were not age-appropriate and while she enjoyed talking to peers, her conversations were not reciprocal (*id.*). The counselor also noted that the student required teaching and practice with each skill, and "significant support to generalize" (*id.* at p. 2). The counseling report indicated that counseling sessions focused on improving the student's perspective taking, conversational, and play skills, and that the student's "improved self-awareness [would] lead to a better understanding of others' experiences as well" (*id.*). According to her teacher's January 2021 progress report, the student participated in games and class discussions and enjoyed recess but sometimes required prompting to use learned social strategies such as turn taking skills at recess (Dist. Ex. 2 at p. 2).

In a December 2020 progress report, the occupational therapist indicated that the student was receiving two individual OT sessions per week (Dist. Ex. 5 at p. 9). According to the occupational therapist, the student "demonstrate[d] developmental delays in various areas including retention of primitive reflexes, sensory integration deficits, motor planning and coordination deficits, deficits in dynamic balance, deficits in laterality and directionality, body awareness, fine motor coordination, visual motor integration, visual motor memory, handwriting and graphomotor skills, ocular motor delays, visual processing and visual perceptual skills, executive functioning, task completion, following directions and auditory processing" (*id.* at p. 1). The occupational therapist identified further concerns such as "[activities of daily living] ADL skills including hygiene and grooming as well as social communication and social participation skills" (*id.*). Additionally, the occupational therapist reported that the student often became distracted in class due to her difficulty interpreting and integrating incoming sensory information, which caused her to lose attention or focus and have difficulty following directions (*id.* at p. 3). Regarding formal assessments, the OT progress report indicated that administration of a visual motor skills assessment to the student yielded a below average score, and she "scored below average" on a measure of auditory processing skills (*id.* at pp. 7, 8).

In developing the recommendations for a student's IEP, the CSE must consider the results of the initial or most recent evaluation; the student's strengths; the concerns of the parents for enhancing the education of their child; the academic, developmental, and functional needs of the student, including, as appropriate, the student's performance on any general State or district-wide assessments as well as any special factors as set forth in federal and State regulations (34 CFR 300.324[a]; 8 NYCRR 200.4[d][2]). A CSE must consider independent educational evaluations whether obtained at public or private expense, provided that such evaluations meet the district's criteria, in any decision made with respect to the provision of a FAPE to a student (34 CFR 300.502[c]; 8 NYCRR 200.5[g][1][vi]). However, consideration does not require substantive discussion, or that every member of the CSE read the document, or that the CSE accord the private

evaluation any particular weight or adopt their recommendations (Mr. P. v. W. Hartford Bd. of Educ., 885 F.3d 735, 753 [2d Cir. 2018], citing T.S. v. Ridgefield Bd. of Educ., 10 F.3d 87, 89-90 [2d Cir. 1993]; Watson v. Kingston City Sch. Dist., 325 F. Supp. 2d 141, 145 [N.D.N.Y. 2004] [noting that even if a district relies on a privately obtained evaluation to determine a student's levels of functional performance, it need not adopt wholesale the ultimate recommendations made by the private evaluator], aff'd, 142 Fed. App'x 9 [2d Cir. July 25, 2005]; see Michael P. v. Dep't of Educ., State of Hawaii, 656 F.3d 1057, 1066 n.9 [9th Cir. 2011]; K.E. v. Indep. Sch. Dist. No. 15, 647 F.3d 795, 805-06 [8th Cir. 2011]; Evans v. Dist. No. 17, 841 F.2d 824, 830 [8th Cir. 1988]; James D. v. Bd. of Educ. of Aptakisic-Tripp Community Consol. Sch. Dist. No. 102, 642 F. Supp. 2d 804, 818 [N.D. Ill. 2009]).

The school psychologist testified that during the course of the January 2021 CSE meeting the CSE reviewed the documents described above (Tr. pp. 69-70; see Dist. Exs. 1 at p. 1; 2-6). Additionally, the school psychologist testified that the student's teacher participated during the meeting and discussed how the student was performing in the class, including her academic strengths and weaknesses (Tr. pp. 71-72). The parents also provided information about the student and discussed concerns with the recommended program (Tr. pp. 72-74; see Dist. Ex. 1 at pp. 3, 4, 5, 6). The school psychologist stated that based on her review of the documentation and conversations during the CSE meeting, she did not require "any additional information or data before making a recommendation" for the student (Tr. p. 74). Review of the January 2021 IEP shows that the CSE incorporated evaluative information from the February 2018 psychological report, which was not yet three years old at the time of the CSE meeting, into the January 2021 IEP, together with the then-current information from the student's teacher and related service providers described above (compare Dist. Ex. 1 at pp. 1-6, with, Dist. Exs. 2; 3; 4; 5; 6).

Based on the above, the January 2021 CSE had sufficient evaluative information available from a variety of sources to develop the student's special education program. With the foregoing information about the student's needs in mind, I now turn to address the parents' arguments regarding special factors.

B. Special Factors—Interfering Behaviors

Turning now to the second issue on appeal, the parents assert that the IHO erred in determining that the district was not required to conduct an FBA of the student, and in determining that the student did not require a BIP because the January 2021 IEP included management needs, goals and additional supports that were sufficient to address the student's behavior needs.

Under the IDEA, a CSE may be required to consider special factors in the development of a student's IEP. Among the special factors in the case of a student whose behavior impedes his or her learning or that of others, the CSE shall consider positive behavioral interventions and supports, and other strategies, to address that behavior (20 U.S.C. § 1414[d][3][B][i]; 34 CFR 300.324[a][2][i]; see 8 NYCRR 200.4[d][3][i]; see also E.H. v. Bd. of Educ. of Shenendehowa Cent. Sch. Dist., 361 Fed. App'x 156, 160 [2d Cir. Oct. 16, 2009]; A.C., 553 F.3d at 172). State procedures for considering the special factor of a student's behavior that impedes his or her learning or that of others may also require that the CSE consider developing a BIP for a student that is based upon an FBA (8 NYCRR 200.4[d][3][i], 200.22[a]-[b]). Additionally, a district is required to conduct an FBA in an initial evaluation for students who engage in behaviors that impede their

learning or that of other students (8 NYCRR 200.4[b][1][v]). State regulation defines an FBA as "the process of determining why a student engages in behaviors that impede learning and how the student's behavior relates to the environment" and includes, but is not limited to:

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

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

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

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

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

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

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

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

In this matter, the January 2021 academic progress report indicated that the student was "motivated to please her teacher" and "learning how to cope when she g[ot] overwhelmed and upset" (Dist. Ex. 2 at pp. 1, 2). The teacher reported that the student had a "hard time following spoken directions and therefore, she w[ould] usually get anxious and tense," and "show signs of frustration[]" (id. at p. 2). According to the report, the student was rewarded when she followed directions and/or asked for help right away (id.). The report also indicated that the student was "well behaved and trie[d] to speak respectfully and appropriately" to adults (id.). The teacher report stated that the student's classroom had a "behavior modification program in place where the students [had] clear expectations and receive[d] rewards and incentives when they compl[ied] with the class rules" (id.). The teacher reported that the student "respond[ed] well to the behavior system which indicate[d] that she ha[d] a clear understanding of the class rules and requirements" (id.). Further, the report indicated that the student "respond[ed] well to consequences and learne[d] from her mistakes," adding that she "usually d[idn't] repeat a mistake when she underst[ood] the consequence" (id. at pp. 2-3).

The student's related service providers each included a description of the student (see Dist. Exs. 3; 4; 5). The student's counselor described her as "sweet," "cooperative and eager to please," although she often lacked the skills to "assess which behaviors [were] appropriate in a classroom setting" (Dist. Ex. 3 at p. 1). The counselor reported that the student responded well when presented with rules and given clear consistent feedback, and also that she responded to guidance and interventions during sessions (id. at p. 2). The student's speech-language pathologist reported that the student had a "sweet and pleasant disposition" and was "always very cooperative" (Dist. Ex. 4). The student's occupational therapist described the student as "sweet and delightful" and that she generally demonstrated a "happy and pleasant disposition" (Dist. Ex. 5 at p. 1). The occupational therapist also indicated that the student was "generally compliant and cooperative and her rigid behaviors ha[d] significantly decreased from last year" (id.). According to the occupational therapist, the student exhibited difficulty self-regulating "when something unexpected or frustrating happen[ed]," and while this remained a concern, the frequency and intensity of such occurrences had lessened (id.). She also reported that the student "often sa[id] things that [were] inappropriate or out of place" although that occurred "much less often" than previously (id. at p. 9). Additionally, the occupational therapist further described the student as a "pleasant adorable girl with a bubbly personality" who was "eager to please," wanted to do well, was "friendly and outgoing and [was] friendly to her peers," and who had "a positive attitude and view[ed] many activities as exciting which [was] contagious and a tremendous asset to her class" (id.).

Therefore, review of the evaluative information available to the January 2021 CSE supports the IHO's finding that it was not required to conduct an FBA of the student, as that information

did not show that the student engaged in behaviors that impeded her learning or that of other students (see IHO Decision at pp. 13-14).

Turning to the parents' assertion regarding the development of a BIP for the student, having already determined that the student did not engage in behaviors that impeded her learning or that of other students such that an FBA was necessary, the more stringent requirement for developing a BIP was also not met, specifically, the hearing record shows that the student did not exhibit persistent behaviors that impeded her learning or that of others despite consistently implemented general school-wide or classroom-wide interventions. Nevertheless, even if a BIP were considered for the student, the IHO properly determined that the student did not require a BIP because the management needs, in addition to other supports and services included in the January 2021 IEP, were sufficient to address the student's behavioral needs. According to the IEP, a source of frustration for the student was being asked to repeat directions, she complained when work was "too hard," and lacked judgment and perspective on which behaviors were appropriate in the classroom (Dist. Ex. 1 at pp. 3, 4). The management needs included in the IEP were: graphic organizers, peer to peer discussions, brainstorming activities, highlighters/colored pencils, manipulatives, teacher modeling, flash cards, word walls, sight word lists, checks for understanding, repetition of information, frequent positive feedback, hands-on learning activities, and visual/verbal/gestural cues, which were offered to reduce the student's frustration related to her academic and social deficits (id. at p. 6).

Among other IEP supports for the student, the CSE developed annual goals to further address the student's academic and social needs (Dist. Ex. 1 at pp. 8-13). Specifically, the annual goals were designed to improve the student's writing skills by including relevant details and appropriate sentence structure, punctuation, and capitalization; improve spelling skills; develop writing that stayed on topic; increase the student's ability to read sight words and answer "wh" and critical thinking questions; make predictions after a read aloud; increase comprehension of text; demonstrate ability to change short vowel words to long vowel words; decode one to two syllable words; increase ability to skip count to 100, add two-digit numbers, read a third grade level graph, tell time to the nearest hour and half-hour, and read and carry out addition or subtraction word problems; demonstrate an understanding of place value; improve receptive and expressive vocabulary, intonation, and rate of speech; improve the ability to follow multi-step directions, answer questions, and sentence structure; and improve her play and conversational skills with others, as well as her own emotional awareness by identifying the emotions she experienced and the triggers for those emotions (id.). In addition to the supports available in the special class described in more detail below, the January 2021 CSE recommended one 30-minute session per week of both individual and group counseling services to address the student's social and behavior needs (id. at p. 20).

The school psychologist testified that consideration of special factors, including whether the student needed positive behavior intervention supports or a BIP, was discussed with the parent and teacher at the January 2021 CSE meeting, along with review of the counseling report, the "social information" included in the teacher report, and consideration of whether a behavior program was utilized at the student's school (Tr. pp. 78-79). According to the school psychologist, the January 2021 IEP addressed the student's "behavior concerns" through the management supports such as frequent positive feedback, hands-on learning activities, and peer-to-peer

discussions (Tr. pp. 79-80). Regarding the annual goal to improve the student's emotional awareness, the school psychologist testified that it was "a behavior goal" and a "counseling goal" developed based on the input from the teacher, parent, and information from the ICHUD reports that discussed the student's social awareness and behavior (Tr. p. 83).⁷

As such, the evidence in the hearing record does not support the parents' assertion that the student required a BIP; rather, the hearing record supports the IHO's finding that the January 2021 IEP provided other sufficient supports and services to address the student's behavior needs.

C. 12:1+1 Special Class – 1:1 Instruction

The parents contend that the IHO erroneously found that the 12:1+1 special class placement and management needs included in the January 2021 IEP were appropriate to meet the student's needs. The parents allege that the student required 1:1 and small group instruction with a high student to staff ratio to receive a FAPE. The parents also contend that the IHO improperly relied on retrospective testimony from the school psychologist regarding the provision of 1:1 instruction in a district 12:1+1 special class placement.

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 parents allege that the IHO erroneously determined that they desired an 8:1+1 special class placement for the student and argue that, at the January 2021 CSE meeting, the student's mother was advocating for a program similar to what the student was receiving at that time: a class consisting of 8 to 9 students, 1 lead teacher, 2 full time teaching assistants and 1 part-time rotating assistant, which, as a whole, provided the student with 1:1 and small group instruction (see Parent

⁷ Although it was not information available to the January 2021 CSE, I note that, in an affidavit, the ICHUD principal testified the student "did not require an individual behavioral plan," but did require "the social supports . . . direct social skills instruction, behavioral support from a BCBA, and a classroom behavior plan" (Parent Ex. P ¶¶ 1, 26). Further, the principal testified that she taught the student's class "[a] few times a month" and that even though the student exhibited anxiety where she would "cry and shut down," she was a "compliant student" who did not "exhibit any behaviors that [affected] the classroom," nor did she exhibit self-injurious behavior or behaviors that would present a danger to any students in the classroom (Tr. pp. 193-94). The principal affirmed that "the classroom [was] able to address any of the behavioral concerns" discussed, including crying and anxiety (Tr. p. 194).

Ex. P ¶ 11; Dist. Ex. 1 at p. 2). The school psychologist testified that a 12:1+1 special class placement was an appropriate setting for the student because during the January 2021 CSE meeting the student's teacher indicated that the amount of students in the ICHUD classroom "could go to a maximum of 12 students," and that "there was one teacher and a teacher's assistant" (Tr. p. 92). As the student was making progress at ICHUD, the school psychologist opined that the 12:1+1 special class was "the most comparable recommendation" and would be appropriate for the student (Tr. pp. 92, 94).⁸ The school psychologist testified that the January 2021 CSE considered the student's social ability, her interactions with peers, and her desire to interact with peers in its decision to recommend a district community school (Tr. p. 87; see Dist. Ex. 1 at p. 24). The school psychologist testified that a 12:1+1 special class in a district community school was the LRE for the student as community schools had both special education and general education students and exposed the student to typically developing peers, which was similar to the student's school environment at ICHUD (Tr. pp. 87-88).

Regarding the parents' assertion that the student required 1:1 instruction, the February 2018 psychological evaluation report was the only document available to the January 2021 CSE which contained that recommendation (see Dist. Exs. 2-5; 6 at p. 8). Specifically, the psychologist recommended 1:1 instruction stating the "recommendation [wa]s crucial for [the student] to advance in the core subjects of reading and math. [The student] require[d] individualized instruction in order to acquire the specific reading and math skills. The individualization of these lesson[s] w[ould] help [the student] to advance toward grade level in these core domains" (Dist. Ex. 6 at p. 8). Although the parents contend that the student needed a significant amount of 1:1 instruction, the more current documentation available to the January 2021 CSE did not show that the student was receiving frequent 1:1 instruction at ICHUD (see Dist. Exs. 2-5).⁹ Rather, the January 2021 teacher progress report indicated that along with other classroom supports and strategies, the student needed "lots of small group instruction" and "a small class size" with "individual instruction within a group setting where she [would be] taught on her level with prompts and visual aids" (Dist. Ex. 2 at p. 3). Additionally, the teacher progress report indicated that the student "learn[ed] math in a group setting" (id. at p. 1).

The school psychologist testified that self-contained special education classroom recommendations were for students who needed "a bit more attention" in a smaller environment (Tr. pp. 89-90). The school psychologist explained how the 12:1+1 special class would have provided different opportunities through the course of the school day for individualized instruction

⁸ Contrary to the parents' assertion on appeal, that the CSE misunderstood the supports and services the student was receiving at ICHUD at the time of the January 2021 CSE meeting, the school psychologist noted that the additional adults who were present in the student's classroom at ICHUD were referenced in the January 2021 IEP, and acknowledged that a board certified behavior analyst (BCBA), who the parents indicated to the school psychologist was provided "through private insurance," consulted with the student's classroom teacher (Tr. pp. 105, 113-14; Dist. Ex. 1 at p. 2).

⁹ The ICHUD principal stated, in affidavit testimony, that "[t]hroughout the 2021-2022 school year, [the student] required constant reinforcement, repetition, and one-to-one support to function in the classroom" (Parent Ex. P ¶ 12). However, that opinion was not available to the January 2021 CSE at the time it developed the student's IEP.

(Tr. pp. 90-91).¹⁰ Specifically, the school psychologist testified that the 12:1+1 classroom had two adults present, which provided opportunities for students to complete group work while other students could receive individual attention when necessary, either from the teacher or the teacher's assistant (Tr. p. 91). Moreover, the CSE recommended individual sessions of speech-language therapy, OT, and counseling, which the school psychologist testified also provided an opportunity for 1:1 instruction (Tr. p. 99; see Dist. Ex. 1 at p. 20).

Next, the parents argue that the January 2021 CSE's failure to consider a more restrictive staffing ratio than the recommended 12:1+1 special class placement amounted to predetermination by the CSE. The school psychologist testified that prior to the January 2021 CSE meeting she did not know what her recommendation would be for the student because all of the information provided, including new information presented at the meeting, needed to be discussed before making a final determination (Tr. pp. 105-06). The school psychologist testified the January 2021 CSE considered a 12:1 special class but rejected that placement because it was unable to provide the level of support the student needed, specifically, that the student would "really benefit, based on everything we heard, from the addition of two adults . . . a teacher and a teacher's assistant in the room to make sure that the management needs and the one-to-one . . . attention[], when necessary, could be delivered" (Tr. p. 93). In addition, the CSE considered a 12:1+1 special class in a specialized school but also rejected such placement as being too restrictive for the student (Dist. Ex. 1 at pp. 26-27).¹¹ When asked if the CSE considered a smaller classroom setting that had less than a maximum of 12 students, the school psychologist replied that type of setting was

¹⁰ The parents argue that the school psychologist's testimony was retrospective and that the IHO improperly relied on it. The parents cite to R.E. v. New York City Dept. of Educ. (694 F.3d at 186-87) to argue that a district cannot introduce evidence that modifies the staffing ratio recommended in the student's IEP, such as testimony that the student would have received extensive 1:1 instruction (Parent Memo. of Law at pp. 13-14). Although the Second Circuit has held that a district cannot rely on after-the fact testimony in order to "rehabilitate a deficient IEP," testimony that "explains or justifies the services listed in the IEP" is permissible and may be considered (R.E., 694 F.3d at 186-88; see also E.M. v. New York City Dep't of Educ., 758 F.3d 442, 462 [2d Cir. 2014] [explaining that "[b]y way of example, we explained that 'testimony may be received that explains or justifies the services listed in the IEP,' but the district 'may not introduce testimony that a different teaching method, not mentioned in the IEP, would have been used'"] [internal citations omitted]; P.C. v. Rye City Sch. Dist., 232 F. Supp. 3d 394, 416 [S.D.N.Y. 2017] [noting that the "few additional details" about the CSE's recommendations described in testimony did not materially alter the written plan or prevent the parents from making an informed decision]). Review of the school psychologist's testimony shows that it describes how a 12:1+1 special class placement functions and the roles of the two adults in the classroom. To the extent that the testimony indicates the student would have received some 1:1 instruction, it does not appear to show a modification to the 12:1+1 staffing ratio or evidence of extensive 1:1 instruction, which the Second Circuit found would be retrospective. Additionally, although the parent testified that the assigned school psychologist told him that the class in the assigned public school building would not have provided 1:1 instruction to the student, the assigned school psychologist testified that the 12:1+1 special classes in the community school provided opportunities for individual and small group instruction (Tr. pp. 154-551; Parent Ex. O ¶ 13).

¹¹ According to the school psychologist, district "specialized school[s]" were buildings with only special education classes and no general education classes (Tr. pp. 93-94). She testified that the CSE determined that a specialized school placement was not appropriate for the student "socially to have her amongst only special education students" (Tr. p. 93).

not considered, as the student was making progress in the setting she was currently in and a smaller setting "would[have] been more restrictive" (Tr. p. 94).

Additionally, the hearing record shows that both parents participated in the January 2021 CSE meeting by telephone, the student's progress reports and annual goals were discussed, and the parents agreed with the annual goals (Tr. p. 242; Dist. Ex. 1 at p. 1). The goals recommended in the student's ICHUD counseling, speech-language, and OT progress reports were incorporated into the January 2021 IEP (compare Dist. Ex. 1 at pp. 13-19, with Dist. Exs. 3 at p. 2; 4 at p. 1; 5 at pp. 2-7). Further, the school psychologist stated that the IEP annual goals were drafted as part of the January 2021 CSE meeting and were not drafted prior to that time (Tr. p. 84). The school psychologist testified that the IEP management needs were based on the discussion with the student's teacher at ICHUD, including that the January 2021 CSE discussed what management needs were then-currently being used in the student's classroom to determine if any other management needs were required (Tr. p. 77). As such, the evidence in the hearing record does not support a finding that the January 2021 CSE otherwise predetermined the student's programming recommendations.

Based on the above, the evidence in the hearing record does not provide a basis to disturb the IHO's determination that the 12:1+1 special class placement with the recommended supports identified in the January 2021 IEP were appropriate to address the student's needs. It is understandable that the parents might have wanted more support for the student in the classroom; however, 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).

D. ABA Methodology

The parents allege that the IHO improperly determined that the student did not require instruction using ABA methodology in order to receive a FAPE.

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

However, when the use of a specific methodology is required for a student to receive an educational benefit, the student's IEP should so indicate (see, e.g., R.E., 694 F.3d at 194 [finding an IEP substantively inadequate where there was "clear consensus" that a student required a particular methodology, but where the "plan proposed in [the student's] IEP" offered "no

guarantee" of the use of this methodology]). If the evaluative materials before the CSE recommend a particular methodology, there are no other evaluative materials before the CSE that suggest otherwise, and the school district does not conduct any evaluations "to call into question the opinions and recommendations contained in the evaluative materials," then, according to the Second Circuit, there is a "clear consensus" that requires that the methodology be placed on the IEP notwithstanding the testimonial opinion of a school district's CSE member (i.e. school psychologist) to rely on a broader approach by leaving the methodological question to the discretion of the teacher implementing the IEP (A.M. v. New York City Dep't of Educ., 845 F.3d 523, 544-45 [2d Cir. 2017]). The fact that some reports or evaluative materials do not mention a specific teaching methodology does not negate the "clear consensus" (R.E., 694 F.3d at 194).

As described above, the January 2021 CSE had several sources of evaluative information available to develop the student's IEP, including the February 2018 psychological evaluation report and current teacher and related service progress reports (Dist. Exs. 2-6). A review of the evaluative information available to the January 2021 CSE reflects that the February 2018 psychological evaluation report was the only document that recommended instruction using ABA, stating, "ABA services [were] critical to help teach [the student the] adaptive social skills that she lack[ed]" and that the student "require[d] these interventions in order to bridge her significant delays within the social domain" (Dist. Ex. 6 at p. 8). This recommendation was the first and last time ABA services were mentioned in the February 2018 psychological evaluation and the psychologist did not indicate that at the time of the evaluation the student was receiving ABA services and benefitting from them, or otherwise explain how ABA methodology would benefit the student (see generally Dist. Ex. 6).

According to the principal of ICHUD, some students required ABA-based instruction and a BCBA provided consultation and ABA training to the school's teaching assistants, helped develop goals that were shared with the assistants, implemented behavioral strategies and plans, and monitored student progress (Tr. pp. 185-86; Parent Ex. P ¶¶ 1, 6). The principal of ICHUD stated that one of the teaching assistants in the student's special class had "received ABA based training from the BCBA" (Parent Ex. P ¶ 11). She testified that the BCBA worked with the student at least once per week and that the student was the only student in the classroom who worked with the BCBA (Tr. p. 188). However, review of the principal's testimony did not otherwise indicate how ABA instruction was provided to the student, or how the student responded to such ABA instruction (see generally Tr. pp. 185-234; Parent Ex. P).

During the impartial hearing, the school psychologist testified that the January 2021 CSE discussed that the student received ABA services provided by a BCBA through private insurance (Tr. pp. 105, 114). The school psychologist stated that based on the conversation during the January 2021 CSE meeting, the BCBA provided consultation to the student's teacher about "what would be beneficial for [the student] throughout the day," but as far as "whether the teacher was actually incorporating that information" and the strategies from the BCBA and what was being implemented daily, she "would not know that" (Tr. pp. 114-16; see Dist. Ex. 1 at p. 4). As discussed above, there was no evidence presented explaining how ABA instruction was required for the student to make progress, and although the January 2021 IEP did not include ABA as a methodology, it did include a number of strategies, supports, and services to address the student's needs, including the student's social needs (Dist. Ex. 1 at pp. 6, 20-21).

While the parents are correct that the January 2021 IEP did not include ABA instruction as recommended in the February 2018 psychological evaluation report, the evidence in the hearing record shows that the totality of the program offered in the January 2021 IEP appropriately addressed the student's special education needs and ABA instruction was not required in order to offer the student a FAPE.

VII. Conclusion

Having determined that the evidence in the hearing record supports the IHO's determination that the district offered the student a FAPE for the 2021-22 school year, the necessary inquiry is at an end and there is no need to reach the issues of whether ICHUD was an appropriate unilateral placement or whether equitable considerations weighed in favor of the parents' request for relief.

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

THE APPEAL IS DISMISSED.

**Dated: Albany, New York
September 5, 2023**

**CAROL H. HAUGE
STATE REVIEW OFFICER**