



The University of the State of New York

The State Education Department

State Review Officer

www.sro.nysed.gov

No. 24-605

Application of a STUDENT WITH A DISABILITY, by his parents, for review of a determination of a hearing officer relating to the provision of educational services by the Board of Education of the Massapequa Union Free School District

Appearances:

Thivierge & Rothberg, PC, attorneys for petitioners, by Christina D. Thivierge, Esq.

Guercio & Guercio, LLP, attorneys for respondent, by Gregory A. Gillen, 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 denied their request to be reimbursed for the costs of their son's tuition at the ELIJA School (ELIJA) for the 2022-23 school year. The appeal must be dismissed.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; *see* 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[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[a]). 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 in this case—eligible to receive special education as a student with autism—began attending a district public school for kindergarten during the 2020-21 school year in an ungraded, 8:1+4 special class placement with related services consisting of speech-language therapy, occupational therapy (OT), physical therapy (PT), parent counseling and training, home-based and community-based family training and counseling, and home-based behavior

intervention services (see Parent Ex. I at p. 1).^{1, 2} During the 2020-21 school year, the district completed the student's mandatory three-year reevaluation (see, e.g., Dist. Ex. 13 at p. 1).³ More specifically, the district's reevaluation of the student included a September 2020 OT evaluation report, a November 2020 speech-language evaluation report, a November 2020 psychological evaluation report, and a November 2020 educational evaluation report (see Dist. Exs. 12 at p. 1; 13 at p. 1; 14 at p. 1; 77 at p. 1).

In January and February 2021, the district completed a functional behavioral assessment (FBA) of the student "due to an increase in physical and verbal outbursts that include[d] crying, yelling, physically inappropriate behaviors, and verbal threats (i.e., 'I want to give an ouchie')" (Parent Ex. I at p. 1; see Dist. Ex. 42). The district thereafter developed a behavior intervention plan (BIP) for the student (see generally Dist. Ex. 60).

Evidence in the hearing record reflects that, for the 2021-22 school year, the student continued to attend a special education program at a district public school. According to the student's March 2021 IEP, the CSE recommended 12-month programming, which, for summer 2021, consisted of the following: a daily 8:1+4 special class placement; one 30-minute session per week of speech-language therapy in a small group and two 30-minute sessions per week of individual speech-language therapy; two 30-minute sessions per week of individual OT; one 30-minute session per week of PT in a small group; two 60-minute sessions per week of individual, home-based behavior intervention services; and two 60-minute sessions per month of individual, home-based parent counseling and training services (see Parent Ex. B at pp. 1, 12).

For the remaining 10-month portion of the 2021-22 school year from September 2021 through June 2022, the March 2021 CSE recommended the following: an 8:1+4 special class placement, two 75-minute sessions per week of an extended school day in an 8:1+4 special class placement, and related services consisting of three 30-minute sessions per week of individual speech-language therapy and one 30-minute session per week of speech-language therapy in a small group, two 30-minute sessions per week of individual OT, two 30-minute sessions per week of PT in a small group, one 60-minute session per month of school-based parent counseling and training, four 60-minute sessions per month of home-based family training and counseling (individual), one 60-minute session per month of community-based family counseling and training (individual), two 60-minute sessions per week of home-based behavior intervention services (individual), and one 30-minute session per week of counseling in a small group (id. at p. 11). As supplementary aids and services, program modifications, and accommodations, the March 2021 IEP included the use of a behavior modification plan throughout the school day, and, as supports

¹ The hearing record contains multiple duplicative exhibits. For purposes of this decision, only parent exhibits are cited in instances where both a parent and district exhibit are identical in content. The IHO is reminded that it is her responsibility to exclude evidence that she determines to be irrelevant, immaterial, unreliable, or unduly repetitious (8 NYCRR 200.5[j][3][xii][c]).

² The student's eligibility for special education as a student with autism is not in dispute (see 34 CFR 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

³ Evidence in the hearing record reveals that, during the 2020-21 school year—which was "in the middle of COVID"—the student, as well as a majority of his entire classroom, wore masks; within a "couple of months," all of the students wore masks (Tr. pp. 573-74).

for school personnel on behalf of the student, the IEP included two 30-minute sessions per month of behavior consultant services (id.).

According to the district special education supervisor (supervisor) the student's BIP was reviewed at the student's annual review in March 2021; however, the parents informed the district that they did not want the BIP implemented because "they were applying for a [summer program for students with disabilities]," and "they were concerned that [the student] would not be accepted . . . if he had a BIP in place" (Tr. pp. 2030, 2060-61; see Tr. pp. 4185-86).^{4, 5} In addition, the supervisor indicated that the parents had requested that the BIP "be assigned to a different name," and thus, it was "changed to a behavior strategy plan" (Tr. p. 2061; see Tr. pp. 4185-86).

On November 15, 2021, the student's special education classroom teacher (classroom teacher or teacher) sent an email to the parents to inform them that the student had been "having a tough time in school lately," noting that he had been having "more frequent and consistent outbursts" and, on that specific day, had "started having some physical behaviors (hitting and 'squishing' others)" (Parent Ex. AA at p. 1).⁶ The classroom teacher scheduled a time later that week to discuss the student's behaviors with the parents (id. at pp. 1-2).

On December 1, 2021, the parents privately obtained a psychiatric evaluation (December 2021 psychiatric summary) of the student (see Parent Ex. J at p. 1). As a result of the evaluation process, the psychiatrist's diagnostic impression included the following: an autism spectrum disorder with an impairment in speech and intellect (level 3 requiring substantial intervention); an attention deficit hyperactivity disorder (ADHD), combined type; and an anxiety disorder (id. at p. 3).⁷ The psychiatrist identified several symptoms to target, including the student's "[p]oor relatedness, sensory defensiveness, impaired speech, fine and gross motor skills"; "[i]mpulsivity, restlessness, distractibility"; "[a]nxiety, obsessiveness, avoidance"; and "[i]rritab[ility], [and] reactive[ity]" (id.). Additionally, the psychiatrist recommended that the student receive "academic and therapeutic services provided in a specialized program that c[ould] provide full-time intensive

⁴ The district special education supervisor also acted as the CSE chairperson at the April, June, and August 2022 CSE meetings (see Tr. pp. 2030, 2045; Parent Exs. C at pp. 1-2; F at pp. 1-2; G at pp. 1-2).

⁵ At the impartial hearing, the parent testified that the district BCBA informed her that the student would not be accepted into the summer program if he had a BIP in place and recommended changing the name of the BIP to a behavior modification plan (see Tr. pp. 4184-86). The parent also testified that the student "wound up not going" to the summer program (see Tr. p. 4185). She further testified, however, that the student's behaviors "began to get better" and "stopped" (Tr. p. 4186).

⁶ Evidence in the hearing record reflects that the student had the same special education classroom teacher for both the 2020-21 and 2021-22 school years when he was attending the 8:1+4 special class placements (see Tr. pp. 544-45, 556, 569).

⁷ A review of the December 2021 psychiatric summary indicates that the psychiatrist did not administer any assessments or evaluations to the student, but instead reflects that the psychiatrist reviewed and summarized previously conducted evaluations of the student, as well as her own observations of the student and information reported by the parent, who accompanied the student throughout the evaluation (see generally Parent Ex. J at pp. 1-3).

1:1 [applied behavior analysis (ABA)] with a qualified [board certified behavior analyst (BCBA)] professional with additional extended day ABA of 15 hours per week" (id.).⁸

Shortly after the psychiatric evaluation, the parents privately obtained an auditory processing evaluation of the student on December 9, 2021 (December 2021 auditory processing evaluation) (see Parent Ex. K at p. 1). The speech-language pathologist who conducted the evaluation noted in the report that, while accompanied by his father to the session, both parents had served as informants in a previously scheduled "zoom session" on December 7, 2021 (id.).⁹ The purpose of the evaluation was to "determine if [the student] ha[d] hypersensitive hearing (hyperacusis) and an auditory processing disorder that [we]re contributing to his listening, language and learning challenges and to learn of any strategies or programs available to help him academically as well as communicatively" (id. at p. 2). As a result of the evaluation process, the speech-language pathologist diagnosed the student as having an auditory processing disorder in the areas of "discrimination and figure-ground listening with temporal processing (rate of speech)" (id. at p. 5). The December 2021 auditory processing evaluation report included, but was not limited to, the following as recommendations: "classroom and testing accommodations," such as "preferential seating, up front close to the teacher, away from distractions; extended time for testing, given in a quiet area, preteaching, study notes and guides ahead of lessons"; "[r]epetition, explanation and clarification"; breaking down lengthy information with "adequate pacing and pause time for processing"; and the provision of "[v]isual supports"; an "FM System" or "low gain noise reducing hearing aids"; "[a]uditory [i]ntegration [t]raining"; speech-language therapy services (two sessions per week individual and two sessions per week in a group) to work on "improving figure-ground listening, timing, receptive and expressive language, following directions, and reducing sound sensitivity"; and reading instruction delivered through a "multisensory, multi-modality, phonological awareness program (i.e., Lindamood Bell, Wilson, Orton Gillingham) by a trained provider" (id. at p. 6).

On December 20, 2021, the psychiatrist who previously met with the student earlier in the month provided an addendum to the initial psychiatric summary, noting that she recommended starting medication treatment, and to consider medication treatment to address, among other

⁸ It was noted within the December 2021 psychiatric summary that the student had previously received ABA services in a preschool program until age four (see Parent Ex. J at p. 1). It was further noted that, at the time of the evaluation, the student was "below grade level" in writing and mathematics, but was "closer to grade level" in reading (id.). At the impartial hearing, the psychiatrist testified that the recommendation for a 1:1 ABA program "with intensive intervention" for the student was based on her "experience with children like this and what they really need[ed] in order to thrive and progress" (Tr. p. 4034). The psychiatrist also testified that her "only experience" with "one-to-one ABA schools" was from having patients with "severe behavioral problems and autism spectrum disorders" who were "not thriving in their school environment," noting further that "these ABA programs d[id] the job" and that the students "who [we]re not functioning and not thriving in one environment when the environment changes and they [we]re able to provide the kind of direct one-to-one services, the children evolve[d]" (Tr. pp. 4068-69). Additionally, the psychiatrist testified that she had never visited any of the 1:1 ABA schools to observe how they operated, she had never taken coursework in ABA, and her clinical experience did not involve ABA (see Tr. pp. 4068-70). She further testified that she recommended the 1:1 ABA program for the student without having spoken to any of the student's then-current providers (see Tr. p. 4071).

⁹ The evaluator indicated that the student had been referred to her for an auditory processing evaluation by an "educational specialist who ha[d] been guiding and advising the family" (Parent Ex. K at p. 1).

things, the student's "mood reactivity," his "anxiety," and his "ADHD symptoms" (Parent Ex. J at p. 3).

Over the course of three days in late-January through mid-February 2022, the parents privately obtained a neuropsychological evaluation of the student (March 2022 neuropsychological evaluation) (see Parent Ex. L at p. 1).¹⁰ The evaluation report indicated that the "present evaluation was sought in response to concerns regarding [the student's] behavior at school and to inform appropriate educational and therapeutic interventions" (id.).¹¹ As part of the evaluation process, the following measures were administered to the student: the Adaptive Behavior Assessment System—Third Edition (ABAS-3) (parent and teacher forms); the Behavior Assessment System for Children—Third Edition (BASC-3) (parent and teacher reports); selected subtests from the Clinical Evaluation of Language Fundamentals—Fifth Edition (CELF-5); selected subtests from the Kaufman Test of Educational Achievement—Third Edition (KTEA-3); selected subtests from the NEPSY: A Developmental Neuropsychological Assessment Test—Second Edition (NEPSY-II); the Peabody Picture Vocabulary Test—Fifth Edition (PPVT-5); the Social Responsiveness Scale—Second Edition (SRS-2) (parent report); and selected subtests from the Stanford-Binet Intelligence Scale—Fifth Edition (SB-5); and the Wide Range Assessment of Visual-Motor Abilities (WRAVMA) (id. at pp. 5-10). In addition, the evaluating psychologist conducted a classroom observation of the student and reviewed previously completed district evaluations of the student, the December 2021 auditory processing evaluation, and the December 2021 psychiatric summary (id. at pp. 3-4, 10-11).

Within the March 2022 neuropsychological evaluation report, the psychologist noted that the student "continue[d] to manifest numerous features of [autism spectrum disorder], including poor eye contact, scripted communication, echolalia, hypersensitivity to sensory input (e.g., loud sounds, tactile sensations), and stereotyped movements (e.g., clenching fist into chin)" (Parent Ex. L at p. 1). The psychologist further noted that the student demonstrated "enduring fine and gross motor delays, which impact[ed] activities of daily living, including written expression" (id.). Based on the student's testing results, the psychologist recommended the following: "intensive 1:1 teaching using the principles of applied behavior analysis (ABA; e.g., discrete trial learning) implemented by highly trained instructors supervised by qualified [BCBA] level therapists" (id. at p. 13).¹² The psychologist also recommended that the student continue to "build his increased

¹⁰ The neuropsychological evaluation process included a "Feedback Session" with the parents on March 3, 2022" (Parent Ex. L at p. 1).

¹¹ Notwithstanding the psychiatrist's recommendation to consider medication treatment to address the student's mood reactivity, anxiety, and ADHD symptoms, at the time of the neuropsychological evaluation, the student was reportedly "not tak[ing] any prescription or over-the-counter medication," other than a "nutritional supplement, (l-methyl folate)" (Parent Ex. L at p. 2; see Parent Ex. J at p. 3).

¹² At the impartial hearing, the psychologist testified that, during his classroom observation of the student, he saw attempts to praise the student, but did not see evidence of the "bedrock ABA principles of . . . discrete trial learning and . . . differential reinforcement of other behaviors and things that form[ed] the foundation of . . . active data recording in ways that [we]re visible and evident" (Tr. p. 2713). The psychologist testified that he would not have characterized the student's 8:1+4 special class placement as an ABA classroom "based on [his] understanding of ABA and based on . . . having observed children in other ABA settings" (Tr. pp. 2713-14). He further testified that, while he had "some familiarity with ABA" from his background in neuropsychology and from visiting one-to-one ABA schools, he did not have any professional training in ABA and did not follow

social motivation and social play skills . . . [as] a focus of [the student's] programming" (*id.* at p. 14). The psychologist noted that the student's "[s]tructured social skills interventions . . . should focus on work in dyads (adult:child) and groups with same-aged peers (child:child:adult) that promote[d] increasing eye gaze, interactive play, and shared enjoyment with others" (*id.*).

While the student participated in the neuropsychological evaluation process, the student's classroom teacher sent an email, dated February 11, 2022, to the parents to inform them that the student had had a "very tough week, with today being the toughest" (Parent Ex. AA at p. 3). According to the classroom teacher, the student was "very emotional, and had a difficult time regulating himself, even with 1:1 adult support" (*id.*). The classroom teacher further noted that the student was "trying to hit people (adults and kids) when he was frustrated," but that the "behavior was more easily redirected and stopped"; in addition, staff was able to "redirect" the student's crying and his attempts to "make himself gag/throw up" (*id.*). The parent responded to the email, thanking the classroom teacher for the information and notified her that the student would not be in school for two days the following week (*id.*).¹³

The hearing record included a "Progress Report for IEP Goals" for the 2021-22 school year reflecting evaluative criteria for his annual goals for the first and second marking periods (Dist. Ex. 29 at pp. 1-6). According to the progress report, by the end of the second marking period, the student had achieved several annual goals and was either gradually or satisfactorily making progress on other annual goals (*id.*). Approximately three annual goals were reported as "SC," or "See Comments" with respect to the student's progress (*id.*).

On April 5, 2022, a CSE convened to conduct the student's annual review and developed an IEP for the student for the 2022-23 school year (*see* Parent Ex. C at p. 1; *see generally* Dist. Exs. 53; 88).¹⁴ Finding that the student remained eligible to receive special education as a student with autism, the April 2022 CSE recommended 12-month programming, which, for July and August 2022, consisted of the following: a daily 8:1+4 special class placement; one 30-minute session per week of speech-language therapy in a small group and two 30-minute sessions per week of individual speech-language therapy; two 30-minute sessions per week of individual OT; one 30-minute session per week of PT in a small group; four 60-minute sessions per week of individual, home-based behavior intervention services; and four 60-minute sessions per month of individual, home-based parent counseling and training services (*see* Parent Ex. C at pp. 1, 17-18). For the remaining 10-month portion of the 2022-23 school year from September 2022 through June 2023, the April 2022 CSE recommended the following: an 8:1+4 special class placement, two 75-minute sessions per week of an extended school day in an 8:1+4 special class placement, and related services consisting of two 30-minute sessions per week of individual speech-language therapy per week and two 30-minute sessions per week of speech-language therapy in a small group, two 30-minute sessions per week of individual OT, two 30-minute sessions per week of PT

ongoing research in the field of ABA (Tr. pp. 4129, 4131).

¹³ For clarity, use of the term "parent" in the decision refers solely to the student's mother.

¹⁴ Given the student's date of birth, as well as evidence in the hearing record, it appears that he would have been considered, chronologically, as a second grade student during the 2022-23 school year (*see, e.g.*, Dist. Ex. 12 at p. 1).

in a small group, one 60-minute session per month of school-based parent counseling and training, four 60-minute sessions per month of home-based family training and counseling (individual), one 60-minute session per month of community-based family counseling and training (individual), four 60-minute sessions per week of home-based behavior intervention services (individual), and one 30-minute session per week of counseling in a small group (id. at p. 16).^{15, 16}

In addition, the April 2022 CSE recommended supplementary aides and services, program modifications, and accommodations, including a behavior modification plan; the services of a full-time, individual teaching assistant throughout the day; breaks after tasks; directions repeated; refocusing and redirection; and the use of visual aids (see Parent Ex. C at pp. 16-17). The CSE also recommended assistive technology devices and services in the form of access to an FM assistive listening device (id. at p. 17). The April 2022 CSE further recommended supports for school personnel on behalf of the student, which included two 30-minute sessions per week of behavior consultant services, one 30-minute session per week of behavior consultant services to support implementation of new protocols at school, and two 30-minute sessions per month of psychological consultation services to support generalization of coping skills worked on during counseling (id.).

With respect to strategies to address the student's management needs, the April 2022 CSE identified, within the IEP, that the student needed a "small teacher-to-student ratio program with minimal distractions due to below grade levels skills and executive functions" and the student benefitted from the following: "visual supports and schedules to follow through with instructional tasks to increase independence"; "breaks between tasks due to his low stamina and inattention"; "verbal and non-verbal prompts, and redirection strategies due to increased distractibility"; "visual support and modeling of coping strategies to support emotional regulation"; "assignments broken down into smaller parts with multiple exposures to academic topics due to below grade level

¹⁵ In describing the student's anticipated participation with students without disabilities, the April 2022 IEP noted that the student would "not participate in general education program and require[d] special instruction in an environment with a smaller student-to-teacher ratio and minimal distractions in order to progress in achieving the learning standards" (Parent Ex. C at p. 19). However, the April 2022 IEP also noted that the student would "have access to general education students during the Extended School Day Program" (id.). The April 2022 IEP included a recommendation for special transportation, which included curb-to-curb services for the extended school day program (id.).

¹⁶ At the impartial hearing, the student's special education teacher (classroom teacher or teacher) during the 2021-22 school year testified that the extended day program was a "program offered to all students" in the 8:1+4 special class placements (Tr. p. 679). She described it as an "after-school program twice a week that[wa]s meant for play skills and socialization" (id.). In addition, the teacher testified that the program included a group of fifth grade students, who worked with the students from the 8:1+4 special class placements on "appropriate play and socialization" (Tr. pp. 679-80). According to the teacher, the student had participated in the extended day program—which was also referred to as the "Wolf Pack Club" in tribute to the school's mascot, a wolf—during the 2021-22 school year (Tr. p. 680). Specifically, the fifth grade students pushed-into the 8:1+4 special class from 2:50 p.m. through 3:40 p.m. (Tr. p. 681). All of the fifth grade students participating in the extended day program were regular education students and had been selected as "appropriate role models" for the students (Tr. p. 682). She testified that the student in this matter had participated in this extended day program beginning in kindergarten during the 2020-21 school year; however, due to the COVID-19 pandemic, the program did not include fifth graders for that school year (see Tr. p. 684). The teacher also testified that, during the 2021-22 school year with the fifth grade students, the student "loved extended day" and had a "group of buddies" that would "go right over to" him and hug him (Tr. p. 685).

abilities"; "[r]efocusing and redirection"; "[d]irections repeated"; "a behavior modification plan"; and a "1:1 [t]eaching [a]ssistant" (Parent Ex. C at p. 11).

To describe the effect of the student's needs on his access to and involvement with the general education curriculum, the April 2022 CSE noted that the student had a "significant delay in academic skills, speech skills, language skills, social skills, and attention skills, which interfere[d] with participation in age-appropriate activities" (Parent Ex. C at p. 11). The CSE also noted that, "[d]ue to significant academic and behavioral delays, the student require[d] instruction in a smaller setting with a lower teacher-student ratio across all academic and social areas" (*id.*).

Turning to the consideration of special factors, the April 2022 CSE indicated in the IEP that the student required "strategies, including positive behavioral interventions, supports and other strategies to address behaviors that impede[d] the student's learning or that of others" (Parent Ex. C at p. 11). However, the April 2022 CSE indicated, in the IEP, that the student did not require a behavioral intervention plan (BIP) (*id.*).¹⁷

After the CSE meeting, the district completed an FBA of the student between April 30 and May 6, 2022 (May 2022 FBA) (*see* Parent Ex. M at pp. 1, 5). Prior to finalizing the FBA report on May 11, 2022, the parents executed an "Enrollment & Tuition Contract" on May 8, 2022, for the student's attendance at ELIJA during the 2022-23 school year from July 2022 through June 2023 (*compare* Parent Ex. M at p. 5, *with* Parent Ex. P at pp. 1, 6).

On June 17, 2022, a CSE convened for a program review as a "follow up to the annual review and to review a[n] FBA that was conducted" (Parent Ex. E at p. 1; *see* Parent Ex. F at p. 1; *see generally* Dist. Exs. 54; 89). Overall, the June 2022 IEP essentially mirrored the special education program recommendations as found within the April 2022 IEP, with the exception of recommending increased home-based behavior intervention services, a BIP, and hearing service consultation for the student (*compare* Parent Ex. F at pp. 16-17, *with* Parent Ex. C at pp. 16-17). In addition, the June 2022 CSE noted that the 1:1 teaching assistant would "provide training on [the] BIP and behavioral support strategies prior to school start[ing]" (*compare* Parent Ex. F at p. 17, *with* Parent Ex. C at p. 16).

The hearing record included a "Progress Report for Goals and Objectives," dated June 24, 2022, for the 2021-22 school year (June 2022 progress report) (Dist. Ex. 28 at p. 1). According to the progress report, the student achieved approximately 26 out of a total of 32 annual goals by the conclusion of the 2021-22 school year (*id.* at pp. 2-9). The hearing record also included a copy of the student's final report card from the 2021-22 school year (*see* Parent Ex. O at p. 1).

In a letter dated June 24, 2022, the parents notified the district of their intentions to unilaterally place the student at ELIJA for the 2022-23 school year and to seek public funding for the costs of the student's attendance (*see* Parent Ex. Y at pp. 1-2). Within the letter, the parents outlined their concerns with the district's recommendations made at both the April 2022 and the June 2022 CSE meetings, and in addition to seeking reimbursement for the costs of the student's unilateral placement, sought reimbursement or direct funding for the costs of the student's "home

¹⁷ The district sent the parents a prior written notice, dated April 5, 2022, describing the special education program recommendations and summarizing the April 2022 CSE's discussions (*see* Parent Ex. D at pp. 1-6).

services . . . including ABA instruction and supervision, and parent training" (id. at p. 2). The parents also requested special education transportation for the student, or reimbursement for any costs incurred (id.).

On or about June 30, 2022, the district completed a BIP (June 2022 BIP) for the student (see Dist. Ex. 35 at p. 1).

Evidence in the hearing record reflects that the student began attending ELIJA on or about July 11, 2022 for the 2022-23 school year (12-month program) (see Parent Ex. U).

On August 9, 2022, a CSE convened for a program review as a "follow up to the annual review to review the parent correspondence received" on June 24, 2022 (Parent Ex. H at p. 1; see Parent Ex. G at p. 1; see generally Dist. Exs. 55; 90). Evidence in the hearing record reveals that the August 2022 CSE amended the student's June 2022 BIP to correct the dates of baseline data collection (i.e., April 8, 2022 through May 10, 2022) (see Parent Ex. N at p. 5). In addition, it was noted on the BIP that, "in response to parental concern of elopement at dismissal staff w[ould] escort [the student] out of the building and hand him off to his parent ensuring the parent ha[d] secured his other hand" and that this intervention would be "paired with a reinforcer and systematically be faded over time" (id.). Overall, the August 2022 IEP essentially mirrored the special education program recommendations as found within the June 2022 IEP, with the exception of modifying the group size for the student's counseling services (compare Parent Ex. G at p. 1, with Parent Ex. F at p. 1).

A. Due Process Complaint Notice

By due process complaint notice dated October 26, 2022, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2022-23 school year (see Parent Ex. A at p. 1). Generally, the parents asserted that, while attending the district, the student "regressed, did not receive appropriate instruction," and the district failed to deliver "all required related services sessions" (id.). The parents also asserted that, for the 2022-23 school year, the district "predetermined" the student's special education program by recommending the "same inappropriate non-[ABA] classroom that offered inappropriate and regressive instruction" to the student in the previous school year (2021-22) (id.). According to the parents, the district's recommendation was "not justified by evaluations" of the student and "would be highly regressive for him" (id.).

With respect to the 2022-23 school year, and as relevant to the instant appeal, the parents alleged that the 8:1+4 special class placement with a 1:1 teaching assistant was not appropriate, as it was "too loud and noisy, and regressive" for the student; the district failed to recommend a 1:1 ABA placement for the student, despite the recommendation by the "consensus of experts"; the district failed to recommend an ABA program and a program supervised by a BCBA; the district denied the parents meaningful participation in the development of the student's IEP, failed to meaningfully consider the recommendations from the parents' private evaluators, and predetermined the student's special education program for the 2022-23 school year (Parent Ex. A at pp. 6-12). In addition, the parents asserted that the student's proposed BIP was inappropriate and the district failed to develop annual goals to address the student's scripting and echolalia (id. at p. 14). As relief, the parents requested an order, in part, finding that the district failed to offer the student a FAPE for the 2022-23 school year and reimbursing them for the costs of the student's

tuition at ELIJA for the 2022-23 school year, as well as funding the costs of the student's home-based ABA services, parent counseling and training services, and ABA supervision services (id. at pp. 14-15).

B. Impartial Hearing Officer Decision

On December 1 and 13, 2022, the IHO conducted prehearing conferences in this matter; on February 2, 2023, the parties proceeded to the merits of the impartial hearing, which concluded on May 16, 2024, after a total of 26 days of proceedings (see Dec. 1, 2022 Tr. at pp. 1-21; Dec. 13, 2022 Tr. pp. 1-42; Tr. pp. 1-4404).¹⁸ In a decision dated October 29, 2024, the IHO found that the district offered the student a FAPE in the least restrictive environment (LRE) for the 2022-23 school year, that ELIJA was not an appropriate unilateral placement, and that equitable considerations did not weigh in favor of the parents (see IHO Decision at pp. 82-83). However, the IHO ordered the district to calculate the home-based behavior services the student missed during the 2021-22 school year and to provide the same to the student (id. at p. 83).

In a lengthy decision, the IHO initially made findings of fact by presenting a recitation of the student's needs, educational programs, and performance from the 2020-21 school year through the three CSE meetings held in April, June, and August 2022 to develop the student's IEP for the 2022-23 school year; the IHO cited to, and relied on, both parties' testimonial and documentary evidence in making the findings of fact (see IHO Decision at pp. 10-64).

With respect to the April 2022 CSE meeting, the IHO found that the CSE included several members, such as the district supervisor (acting as CSE chairperson), a district school psychologist, the student's special education teacher, related services providers (PT, OT, and speech-language therapy), three district BCBAs, a regular education teacher, both parents, the parents' education consultant (consultant), and private evaluators who conducted independent evaluations of the student (psychiatrist, speech-language pathologist/audiologist, and psychologist) (see IHO Decision at p. 38). The IHO noted that the private psychologist had "presented his findings and recommendations" at the April 2022 CSE meeting, and the IHO then described the private psychiatrist's testimony concerning the March 2022 neuropsychological evaluation testing results, as well as his classroom observation of the student (id. at pp. 38-41). The IHO indicated that, based on his testimony, the private psychologist "did not believe the [s]tudent was in an environment that could manage his behavioral or emotional or development needs satisfactorily to facilitate his academic work or his social interactions" (id. at p. 41). The IHO pointed to the private psychologist's testimony with regard to the 8:1+4 special class placement in which he opined that it was not an "ABA classroom" and that it was an "incompatible setting that was not fostering any meaningful opportunities to learn or engage with peers" (id.). The IHO noted that the private psychologist testified that the student's "overall abilities declined" since his previous testing in 2020, "showing a shift in his intellectual abilities which could [have] be[en] for varying reasons, including shifts in development or differences in instrumentation" (id.).

¹⁸ Transcripts of all of the proceedings that took place on February 2, 2023 through May 16, 2024 are consecutively paginated with each other (see Tr. pp. 1-4404); however, the transcripts of the proceeding that took place on December 1, 2022 and December 13, 2022 are separately paginated and, therefore, citations to both December 2022 transcripts will be preceded by the date (see Dec. 1, 2022 Tr. pp. 1-21; Dec. 13, 2022 Tr. pp. 1-42).

According to the IHO, the private psychologist testified that the student's testing revealed a "drop in his computational abilities, adaptive abilities, delays in his academic performance with skills decline in math, and his behavior challenges were widening" (*id.*). The IHO found that, based on his evaluation results, the private psychologist recommended a "1:1 intensive program centered on ABA principles that incorporate[d] discrete trial learning by a BCBA, with an extended school year and extended school day of extensive teaching at home with ABA" (*id.*). According to the IHO, the private psychologist also recommended a "consult model for speech and [OT] with ABA woven into those related services, and parent training" (*id.*). The IHO noted that the private psychologist "explained that he did not envision ABA as being one teacher and one student in isolation but taught in a wider social context and opportunities to interact with others" (*id.* at pp. 41-42). The IHO further noted that the private psychologist made additional recommendations, and testified that he had stated, at the April 2022 CSE meeting, that the 8:1+4 special class placement was not appropriate and "advocated for a 1:1 intensive ABA model" (*id.* at p. 42).

Next, the IHO noted that the district supervisor explained that the private psychologist had given his "recommendations prior to hearing from the providers in school who had not shared the [s]tudent's current level of performance or his functioning during the school year" (IHO Decision at p. 42). The IHO noted that the supervisor also testified that she attended the classroom observation with the private psychologist, and clarified that the student's special education teacher—while acknowledging that the student's "dysregulation at that time was an accurate depiction" of him—also stated that there were "other times that the [s]tudent was very engaged and capable" (*id.*).

The IHO then summarized the private psychiatrist's testimony at the impartial hearing, and her recommendations for the student, which included, among other things, an "intensive 1:1 ABA program both in school and at home" and "the possibility of mood stabilizers to address anxiety and impulsivity" (IHO Decision at p. 42-43). The IHO also noted that the private psychiatrist attended the April 2022 CSE meeting, where she "reviewed her report, findings and recommendations and then left" (*id.* at p. 43). The IHO then noted that, according to the district supervisor, the private psychiatrist had—similar to the private psychologist—provided her recommendation for a 1:1 ABA setting "without hearing from the other school providers" (*id.*).

With respect to the parents' consultant, the IHO indicated that she began working with the student in "November 2021" (IHO Decision at p. 43). According to the IHO, the consultant testified that the parents contacted her due to the student's behaviors at home, his intolerance of a sibling, and because "they were having a lot of issues" (*id.*). The IHO noted that the consultant "reviewed" the student's "records" and "observed him at home" (*id.*). Following her home observations of the student, the consultant recommended that the parents "seek out medical interventions" (*id.* at p. 44). The IHO also noted that the consultant observed the student at school, and testified that the student was dysregulated and that the classroom was "set up in centers, which . . . was not an ABA technique but a TEACCH methodology" (*id.*). The IHO also noted that the consultant testified that she did not observe "anyone taking data on the behaviors or his goals" and, based on her observation, the consultant testified that the student was not "benefiting" from attending the 8:1+4 special class placement, "which used an "eclectic approach using TEACCH modalities and some behavior management strategies but not ABA" (*id.*). The IHO indicated that, at the April 2022 CSE meeting, the consultant "shared her observations" and noted that she disagreed with the CSE's position that the student's classroom had "ABA supports" and that the

student had made progress (id.). The IHO contrasted the consultant's classroom observations with the district special education teacher's testimony, which indicated that, during the consultant's observation, she was reading a book to the student and he was "doing well"; however, the consultant "claimed he only did well" because it was a familiar story and "she did not find the work to be productive" (id. at pp. 44-45). The IHO then noted that the special education teacher "disagreed" with the consultant's opinion (id. at p. 45). Similarly, the IHO noted that a district BCBA disagreed with the consultant's opinion that the student had not made progress, and she testified that "she had observed the [s]tudent make progress in areas of cognition, social emotional and behaviors, and saw the data" (id.).

In addition, the IHO noted that the supervisor disagreed with the consultant's observations, and specifically disagreed with the consultant's opinions that the classroom used "eclectic strategies," data was not being taken, the student was "dysregulated and not engaged," and "inappropriate teaching strategies were being applied" (IHO Decision at p. 45). For example, the IHO indicated that, according to the supervisor's testimony, even though the student made errors, he remained engaged and sitting, and the classroom teacher helped the student use his coping strategies and "visuals on the wall" when he became dysregulated (id.). The IHO further noted that district staff disagreed with the consultant's opinion that the student had regressed behaviorally, and instead, noted observing that "some behaviors had been extinguished, some had leveled off, some had reoccurred, and some changed, but [district staff] made adjustments to the plan, and they did not see regression" (id.).

Next, the IHO summarized the information the private speech-language pathologist provided to the April 2022 CSE, which included reviewing her evaluation report and the recommendations for services therein (see IHO Decision at pp. 45-46).

The IHO turned, next, to the testimony elicited from a district BCBA who attended the April 2022 CSE meeting (see IHO Decision at p. 46). Here, the IHO indicated that the BCBA reported on "her observation and the [home-based behavior intervention services]" at the meeting (id.). The IHO found that, according to the witness, the home-based behavior intervention services were "additional service[s] being provided to the [s]tudent to foster generalization and maintenance of skills," and they also worked on "additional goals at the parent's request such as sibling interaction" (id.). She indicated that the student received two hours per week of home-based behavior intervention services during the 2021-22 school year (id.). The IHO noted that the BCBA disagreed with the consultant's opinion that the student's 8:1+4 special class placement was an "eclectic style of teaching" and not ABA based and the BCBA explained in her testimony "how it was an ABA style classroom" (id.). In addition, the IHO found that the BCBA testified about the student's home-based services, his behaviors and how the behaviors were addressed (id. at pp. 46-47). The IHO indicated that "[t]here was also a discussion regarding the use of discrete trials in the home," however, the BCBA testified that the student "did not necessarily need it because he was already making progress in school," but acknowledged that "it could not hurt so she said it could be implemented in the classroom" (id. at p. 47). The IHO determined that the April 2022 CSE ultimately recommended additional home-based behavior intervention services for the student for the 2022-23 school year (four hours per week), and the BCBA testified that the parents had "not raised the issue of missed [behavior intervention services] in the home" (id.).

Following the summary of the BCBA's testimony, the IHO turned to the testimony of the district special education teacher who attended the April 2022 CSE meeting (see IHO Decision at pp. 47-49). The IHO indicated that the special education teacher "shared her Annual Education report and work" with the student at the CSE meeting (id. at p. 47). The IHO also indicated that the special education teacher had reviewed the student's March 2022 neuropsychological evaluation report and disagreed with the psychologist's "finding that the [s]tudent had immature comprehension skills and was performing below same aged peers" (id.). More specifically, the IHO found that the special education teacher testified that the student "should not be compared to typical general education peers, because he was below them, which [wa]s why he was in her classroom" and moreover, upon review, the student had made progress academically (id.). The IHO noted that, based on the teacher's testimony, the student had not needed to use "earphones in the classroom after his kindergarten year" and she disagreed with the psychologist's opinion that the student required "abundant support to manage" his activities of daily living skills (id.). She testified that the student could "manipulate utensils, wash his hands, use the bathroom appropriately and did not need assistance in those areas" (id.).

Next, the IHO indicated that the special education teacher was present during the classroom observation performed by the private psychologist (see IHO Decision at p. 47). The IHO noted the teacher testified that, although she agreed that the student was "dysregulated in her classroom at the time of his observations," the student's behaviors had increased, but "they added strategies and materials to address those behaviors such as dividers to separate the centers to help the [s]tudent focus, which for the most part, helped" (id. at pp. 47-48). According to the IHO, the teacher also testified that the psychologist incorrectly noted that no data was being taken during the classroom observation, adding that "data had been taken by another person in the classroom, just not by the person sitting with him at the time" (id. at p. 48). The IHO found that the special education teacher disagreed "that there were safety concerns in the classroom," and explained that the psychologist's observation was a "snapshot of his day and she could see why he wrote what he did"; however, the teacher also testified that the student was "never in danger and was making academic progress" (id.). As further noted by the IHO, the teacher also "disagreed with taking a 30 minute snapshot" of the student's day and then drawing the conclusion that he was "not making meaningful progress" (id.). The IHO found that the private psychologist "did not ask" the special education teacher for "any input while he conducted his observation" (id.). Finally, the IHO noted that the special education teacher testified that, other than the recommendation for a 1:1 ABA setting, "all of the other recommendations [in the March 2022 neuropsychological evaluation report] were being implemented" in the 8:1+4 special class placement, "such as using a multi-sensory approach, teaching using hands on and concrete teaching materials, information being presented slowly and repetitively with scaffolding, behavior supports, visuals, schedule breaks, and token system" (id.).

The IHO next determined that, in addition to reviewing the student's annual education report at the April 2022 CSE meeting, the special education teacher testified that she developed annual goals for the student for the 2022-23 school year in the areas of reading, mathematics, writing, and social skills (engaging and playing with peers during extended day) (see IHO Decision at pp. 48-49).

Next, the IHO indicated that the April 2022 CSE engaged in a "back and forth" with the parents concerning the "validity of the data" (IHO Decision at p. 49). More specifically, the IHO

indicated that the CSE discussed the parents' concerns with homework, sibling interactions at home, and the "door tickets" used in the classroom (*id.* at pp. 49-50). The IHO also found that the CSE discussed the parents' concerns about the "validity" of the student's progress academically, and "questioned the reading and math skills" because the student did not demonstrate those skills at home (*id.* at p. 49). According to the IHO, the parents had indicated that the student was "not able to focus and not able to read level books" sent home by his teacher (*id.*). The IHO also noted that the parents had not "agreed" with the annual goals created by the special education teacher; however, the teacher "did not make any changes to her recommended goals because she felt they were achievable goals based on how he performed that school year" (*id.*). However, the IHO indicated that "[o]ther providers did make changes to their goals based on the [p]arents concerns" (*id.*). Next, the IHO indicated that the parents shared concerns about the "after-school program," noting that they "felt that it was inappropriate for the [s]tudent to be interacting with older students and that it was not helpful" to him (*id.* at p. 50). However, the IHO also indicated that it was the "first time" the parents had raised this as a concern, and the special education teacher testified that "she was confused" by this concern, as the student was "making nice progress, and he enjoyed it" (*id.*). The IHO further noted that the special education teacher disagreed with the parents' concerns that the student "could not transition during centers," but acknowledged that he had difficulty at times, "but not all the time" (*id.*). According to the IHO, with respect to the parents' assertion at the April 2022 CSE meeting that the student "needed more 1:1 discrete trials to be successful"—which the special education "understood" as meaning that the student "would be in a 1:1 setting, him and one teacher, working on very specific skills"—the teacher disagreed, noting instead that "he was capable of leaning" in the 8:1+4 special class placement, he had "made progress," and a 1:1 setting would preclude any opportunity for the student to "work on socialization[] skills with peers" (*id.*). The IHO noted further that, based on the district supervisor's testimony, now that the CSE had been made aware of the parents' concerns, they "offered to help with those concerns" (*id.*).

In addition to the foregoing, the IHO indicated that a second district BCBA also attended the April 2022 CSE meeting and "reported on the Behavior Progress report she drafted" in March 2022 (IHO Decision at p. 50). The witness testified that she "recalled that the [p]arent thought the open-door tickets were inappropriate"; the IHO pointed to the parent's testimony, in which she stated that it was a concern at home, as the student had attempted to immediately shut a door and "almost caught the [p]arent's hand in the door" (*id.*). The IHO indicated that, according to the parents, "it was dangerous and they did not know about the door tickets until much later" (*id.* at pp. 50-51). However, according to the IHO, the BCBA witness testified that the student was "making progress, and he was learning to functionally communicate that he wanted to open the door rather than engaging in outbursts, which involved yelling, crying, and jumping up and down" (*id.* at p. 51). The IHO noted that, the BCBA's acknowledgement that, although the student continued to engage in outbursts, "there was more success than not" (*id.*).

Next, the IHO turned to the district school psychologist's testimony at the impartial hearing (*see* IHO Decision at p. 51). The IHO found that the school psychologist attended the April 2022 CSE meeting and reviewed the student's "annual counseling report" and the district's previous psychological evaluation of the student at the meeting (*id.*). The IHO indicated that the school psychologist "recalled that the [private] evaluators discussed the results of their reports and the school providers shared their annual reports" (*id.*). With respect to the annual counseling report, the IHO noted that the school psychologist reported the student made progress in counseling

toward his "social emotional goals, the curriculum, and what they work[ed] on in sessions" (*id.*). According to the IHO, the school psychologist explained the annual goals developed for the 2022-23 school year, which targeted implementation of coping strategies, because the student, at that time, "was on track to achieve his goal which involved identifying feelings and coping strategies"—thus, the next logical step was implementation of strategies (*id.* at pp. 51-52). In addition, the IHO found that, based on the CSE's discussion with the private psychologist, an additional annual goal was added to the IEP for the student to "work on cooperative play skills with a peer during counseling sessions and in the classroom" (*id.*). The IHO determined that the school psychologist testified an annual goal for play skills was added because the student "was not frequently engaged in cooperative play and they could work on initiating and maintaining play, turn taking, and displaying appropriate responses to winning [and] losing" (*id.*). The IHO further noted the school psychologist recommended that the student continue to receive individual and group counseling services, as well as a psychological consultation, which would allow the psychologist to "push into the classroom to work on generalization of coping strategies that were worked on during counseling sessions" (*id.* at p. 51). According to the IHO, the school psychologist also testified that the consultation would have allowed him to be "in the classroom twice a month to assist with and monitor the goal" (*id.* at p. 52).

With respect to the information reported by the private psychologist, the IHO found the school psychologist testified that he disagreed with the "characterization of the Behavior Modification Plan being of limited utility," as the student had made progress in his behaviors even if "he still [had] room for growth" (IHO Decision at p. 52). According to the IHO, the school psychologist also testified about his concerns during the administration of the private assessment, noting that the parents were "in the testing room with the [s]tudent," "which could [have] be[en] distracting" to the student during "1:1 testing" (*id.*). The IHO noted the school psychologist also disagreed with the private psychologist's "finding that the [s]tudent showed regression in intellectual, academic and adaptive functioning in his school setting," and pointed to "confounding factors that were different in the evaluations given to the [s]tudent, such as the [p]arent being present during testing, being in an unfamiliar setting, and not having additional built in supports to encourage engagement and focus throughout testing, such as access to tangible item between subtests to encourage appropriate focus" (*id.* at pp. 52-53). However, the IHO noted that the private psychologist was "not in attendance for the entire CSE meeting, so the [s]chool [p]sychologist was not able to share his thoughts with him" (*id.* at p. 53). With regard to the recommendation for the student to receive "intensive 1:1 teaching using ABA," the IHO noted the school psychologist disagreed with it because it "would not be appropriate for social growth and would limit the [s]tudent's ability to work on socialization goals" (*id.*).

The IHO next turned to the testimony of the district speech-language provider, who attended the April 2022 CSE meeting (*see* IHO Decision at p. 53). The IHO indicated that the provider "developed an annual progress report" to prepare for the CSE meeting, and had sent it to the parents prior to the meeting (*id.*). According to the IHO, the speech-language provider testified that she "discussed her work with the [s]tudent" at the meeting and indicated that "many of the recommendations made by the [p]arent's providers were already being done, such as working on receptive, expressive language, following directions, visualizing and verbalizing, and self-advocacy skills" (*id.*). As found by the IHO, the speech-language provider had not known that the parents were "unhappy with the extended school day program until the meeting" (*id.*). The IHO

noted the speech-language provider testified that she had seen the student in the program and "he was engaged and would play games" (id.).

The IHO then addressed the testimony by the student's OT provider, who attended the April 2022 CSE meeting (see IHO Decision at p. 53). The IHO found the OT provider testified that she "shared" the student's progress at the meeting and the annual goals the student was expected to achieve by the conclusion of the school year (id.). According to the IHO, the parents had not "see[n] the progress that the OT was seeing" and the OT provider testified that "she felt blind-sided because she thought her and the [p]arents were on the same page prior to the meeting" (id.). The IHO noted the OT provider reviewed a report at the meeting and made "recommendations for services and goals for the next year" (id.). The IHO also noted that the parents raised "concerns" about the student's inability to independently put his shoes and socks on at home; however, the OT provider testified that these skills were specifically addressed by using a daily, morning "yoga program," and, at school, the student "consistently complet[ed] the task independently, so they had moved on to zipping and buttoning his jacket and a new goal was developed" (id. at pp. 53-54). The IHO determined that annual goals for the 2022-23 school year for OT addressed "writing, copying sentences, increasing body strength, daily living skills, bilateral coordination, and motor planning" (id. at p. 54).

Finally, the IHO summarized the testimony by a third, district BCBA, who attended the April 2022 CSE meeting (see IHO Decision at p. 54). As found by the IHO, the BCBA prepared an annual progress report, which recounted "what she had seen since she began working" with the student (id.). According to the IHO, the BCBA testified that, after discussing her report at the CSE meeting, she did not "recall anyone having concerns or objections" (id.). At that time, the BCBA had "only observed the [s]tudent for a week and observed him engaging in aggressive behaviors, mouthing inedible objects, non-contextually laughing, and [an] attempt[] to elope from class" (id.). The IHO noted the BCBA testified that she had recommended completing an FBA and "requested consent from the [p]arents prior to the meeting" (id.).

Based on the evidence in the hearing record, the IHO detailed the special education program and related services recommended for the student at the April 2022 CSE meeting for the 2022-23 school year (see IHO Decision at pp. 54-55). The IHO noted that the parents disagreed with the recommendations, and wanted the CSE to "consider placement" of the student at ELIJA (id. at p. 55). The IHO further noted the district supervisor testified that the CSE did consider an "out-of-district placement but felt that the [s]tudent was making progress in the program he was in" (id.).

After making the findings of fact with respect to the April 2022 CSE meeting, the IHO then turned to the June 2022 and the August 2022 CSE meetings, and similarly recounted the testimony of several CSE members who attended the respective meetings (see IHO Decision at pp. 55-64). With respect to the June 2022 CSE meeting, the IHO indicated that it was held to "review the FBA conducted by the BCBA . . . and to recommend a formal BIP" (id. at p. 55).¹⁹ According to the IHO, at the impartial hearing, the BCBA testified that an FBA was "used to identify the

¹⁹ The IHO indicated that, in addition to both parents in attendance at the June 2022 CSE meeting, the parents' education consultant, the private speech-language pathologist, and the private psychologist also attended the meeting (see IHO Decision at p. 55).

function of a challenging behavior, figure out what [wa]s motivating that behavior, and why it [wa]s happening" (id.). The IHO found that the BCBA explained how the sources of information were used to identify the student's behaviors, the data collected to understand the function of his behaviors, and how to "best respond to those behaviors reactively and proactively" (id.). The IHO found that the BCBA further testified that the "baseline data included frequency, duration, and intensity of the behaviors," and that data had been "collected daily by classroom staff" (id. at pp. 55-56). According to the IHO, the BCBA then took the data and used it to identify the "problem behavior" (id. at p. 56). The IHO then noted that, in addition to data collection, the BCBA and the student's special education teacher both completed two assessments: the "Motivational Assessment Scale" and the "functional assessment screening tool (FAST)," which, according to the BCBA, "yielded similar results" (id.). The IHO further noted the BCBA testified that the parent completed the FAST and that, based on her observations, the BCBA indicated that the student "would benefit from consistent high rates of positive behaviors, specific praise and reinforcement, in addition to errorless learning procedures and a decrease in a (sic) verbal prompts and redirection from staff" (id.). The IHO recounted the BCBA's testimony regarding events that influenced the student's targeted behaviors, strategies to address his behaviors, how to reinforce the student's requests for breaks, "fading out those break tickets," teaching the student to independently follow a visual schedule, and how to effectively communicate with peers and adults (id. at pp. 56-57). The IHO also noted the BCBA testified that, when the FBA was completed, she reviewed it with the parents (id. at p. 57).

In addition to summarizing the district BCBA's testimony, the IHO also reviewed the special education teacher's testimony about her participation at the June 2022 CSE meeting (see IHO Decision at p. 57). Overall, the IHO determined the special education teacher reported on the student's "academic and social progress," strategies implemented, and that she observed the student's behaviors shifted into "more positive behaviors" and "decrease[d] in some other target behaviors" (id.). The IHO noted the special education teacher continued to believe that the district could support the student in an 8:1+4 special class placement and testified that the student's annual goals developed at the April 2022 CSE meeting remained appropriate (id.). The IHO also noted the teacher testified that the parents "felt [the student] needed a 1:1 ABA setting and the strategies were not enough" and, in addition, that the CSE recommended the development of a BIP (id.).

Next, the IHO turned to the testimony from another district BCBA who attended the June 2022 CSE meeting (see IHO Decision at p. 57). According to the IHO, the BCBA testified that she had conducted another observation of the student prior to the CSE meeting, during a "whole group lesson where he appeared attentive and sitting appropriately" (id.). The IHO found that the BCBA explained that when she entered the classroom, the student waved to greet her and was "quickly redirected" and similarly, when she was leaving the classroom, the student "requested independently to open the door, which was something they had been working on without eloping, he asked his [teaching assistant] to open the door, opened it, and then sat back down" (id.). The IHO noted that the BCBA further noted the student "no longer needed the ticket" (id.).

The IHO then indicated that, based on the district school psychologist's testimony, the June 2022 CSE reviewed a "Behavior Report from the home-based service provider and the parent training report" (IHO Decision at pp. 57-58). The IHO also noted that the private psychologist attending the meeting "continued to maintain his recommendation" (id. at p. 58).

As a result of the information presented at the June 2022 CSE meeting, the IHO found that the CSE "continued to recommend" the same special education program as recommended at the April 2022 CSE meeting, but with the addition of increased weekly home-based behavior intervention services (six hours per week) and hearing consultation services (IHO Decision at p. 58).²⁰

With respect to the August 2022 CSE meeting, the IHO indicated that it was held to "review the BIP developed" by a district BCBA (IHO Decision at p. 58).²¹ Initially, the IHO noted that the district BCBA explained in her testimony how she developed the BIP, as well as the intention of the BIP, which included strategies to decrease behaviors and strategies to increase certain behaviors (*id.* at pp. 58-59). According to the IHO, the BCBA also noted that she recommended the use of "[v]isual rules for clear expectation[s] of the classroom rules" and that the classroom used a "visual schedule" to assist with transitions (*id.* at p. 59). The IHO noted the BCBA also recommended that the student have the services of an individual teaching assistant "to work with him in close proximity over time to address and decrease challenging behaviors and increase replacement behaviors, which would be faded from him physically" (*id.*). The IHO also noted the BCBA explained that, as a "living document," the BIP could be modified based on the student's progress, or lack thereof (*id.*).

In addition, the IHO indicated that the BCBA disagreed with "discrepancies" from the education consultant's observation of the student, although the BCBA could not recall specifically whether that discussion occurred at the June or the August 2022 CSE meeting (IHO Decision at p. 59). Here, the IHO found the BCBA testified that, contrary to the education consultant's opinion, the student was "being prompted appropriately" (*id.*). The IHO also found the BCBA testified that the 8:1+4 special class placement was appropriate for the student, as he had made progress, academically, and "benefited from having peers in the classroom" (*id.* at pp. 59-60). According to the IHO, the BCBA testified the student "showed that he wanted to engage with others and they had the ability to teach him how to appropriately interact and make meaningful connections" (*id.* at p. 60).

With respect to the 8:1+4 special class placement, the IHO indicated that, based on the BCBA's testimony, it was an "ABA program based on the principles of ABA" (IHO Decision at p. 60). The IHO noted the BCBA explained that "research suggest[ed] that the use of ABA strategies within the classroom, in a group setting, [] facilitate[d] progress and success for students with autism" (*id.*). The IHO also noted that the BCBA described the "key components of an ABA program," testified that data would be collected on the targeted behaviors, and further testified that the BIP was modified at the CSE meeting to correct dates and to address the parents' concerns "regarding eloping at dismissal time" (*id.*).

²⁰ As already noted, the parents informed the district of their intentions to unilaterally place the student at ELIJA for the 2022-23 school year after the June 2022 CSE meeting (see generally Parent Ex. Y).

²¹ The IHO noted that both parents attended the August 2022 CSE meeting, as well as the parents' education consultant, the private speech-language pathologist, the private psychologist, the private psychiatrist, and two staff members from ELIJA (see IHO Decision at p. 58). At the time of the August 2022 CSE meeting, the student had been attending ELIJA since July 2022 (see Parent Ex. U).

Next, the IHO recounted testimony from the district special education teacher, a second district BCBA, the district school psychologist, the district speech-language provider, and the OT provider—all of whom attended the August 2022 CSE meeting (see IHO Decision at pp. 60-62). According to the IHO, both of the district related services providers testified about concerns they each had with the student receiving speech-language therapy, OT, and PT at ELIJA in a consultation model, as opposed to direct services (*id.* at pp. 61-62). The IHO noted that district staff recalled the parents requested placement at ELIJA for the 2022-23 school year (*id.* at pp. 61-62).

In addition, the IHO described testimony elicited from the private psychiatrist and ELIJA staff members who attended the August 2022 CSE meeting, as well as the August 2022 CSE's special education program recommendations (see IHO Decision at pp. 62-64).

After making the above findings of fact, the IHO then turned to her conclusions of law in this matter (see IHO Decision at pp. 64-74). In reaching the conclusion that the district offered the student a FAPE for the 2022-23 school year, the IHO initially noted that, based on the "evidence provided by both parties," the student "struggled with behaviors related to his [autism spectrum disorder]" during the 2020-21 and 2021-22 school years, and "those behaviors interfered with [h]is ability to access his education" (*id.* at p. 68). However, the IHO found that the district "presented, through extensive testimony, evidence that from the beginning of the [s]tudent's transition into the [d]istrict's elementary school, that they addressed his behaviors as they evolved over his two years" at the district and moreover, the district "addressed his academic, social emotional, language and motor needs" (*id.*).

Next, the IHO described the 8:1+4 special class placement, as well as the student's attendance and performance therein during the 2021-22 school year, as the hearing record reflects that the student did not attend the district's recommended special education program for the 2022-23 school year at issue (IHO Decision at p. 68). Here, the IHO noted that, at its inception for the 2020-21 school year, the district had hired an agency to develop the 8:1+4 "ABA classroom and hired BCBAs to train and work with school staff in the implementation of specialized services for the students in that class," which included the student in this matter (*id.*). The IHO found that three district BCBAs "familiar with the program" all testified that the 8:1+4 special class placement was an "ABA classroom that embedded the principles of ABA" (*id.*). As found by the IHO, the classroom was "set up in a clean, safe and organized environment" and included the use of "visual schedules in the class and on desks, visuals for clear expectations of the classroom rules, break spaces, token boards, visuals for coping strategies and communication, reinforcements, and clear, concise language was used adjusted to match each student's comprehension level" (*id.*).

With regard to ABA, the IHO found that evidence described it as the "study of behavior," and, more specifically, as an "evidence-based practice for improving socially significant behaviors in children and adults with autism" (IHO Decision at p. 68). The IHO noted that the implementation of ABA included the use of "different evidence-based practices," such as "discrete trial, shaping, modeling, reinforcement strategies, and task analysis" (*id.* at pp. 68-69). The IHO also noted that one district BCBA described "discrete trial [a]s teaching to a skill that the student d[id] not have and breaking it down to smaller steps with trials and prompts to ensure success and use errorless learning, and then reduc[ing] the prompts until independence" (*id.* at p. 69). In addition, the IHO described the "key components of an ABA program," which included the use of

"positive behavior supports, reinforcement, and first-then language"; social stories; visual supports; prompting strategies; verbal direction; break spaces; deep breathing; and environment modifications—all of which the IHO found had been used in the 8:1+4 special class placement and with the student "directly" (id.). According to the IHO, "[e]verything that [the district] developed was ABA-based with proactive strategies, reactive strategies, calm down areas, visuals for coping, communication," with a particular focus on "language building" and functional communication" (id.). To address functional communication, the IHO indicated that the classroom included the use of "visual schedules, token boards, visuals on desks, and a class-wide schedule" (id.).

Next, the IHO found that the district BCBA's "worked in the classroom programmatically as support to the classroom teacher with goals, data sheets or to address any behavior concerns within the classroom" (IHO Decision at p. 69). Based on the evidence, the IHO indicated that the BCBA's "spent most of their time in the classroom observing, training staff, making sure ABA strategies were being used, and providing overall support" (id.). The IHO also indicated that "[d]ata was collected on the [s]tudent to develop strategies for the classroom and individually, and his progress on goals were monitored during the school year" (id.).

Additionally, the IHO found that the district BCBA's "developed FBAs and BIPs" for the student to "address behaviors that appeared and were continuously developing strategies to address the changes" in his behaviors (IHO Decision at p. 70). More specifically, the IHO found that the district completed an FBA in February 2021 and a BIP in March 2021, however, at the parents' request, the district did not implement the BIP, and instead, "converted [the BIP] into a Behavior Support Strategies plan, which focused on the strategies to use from the BIP" (id.). The IHO further found that the district worked on "functionally teaching the [s]tudent to independently follow his own visual schedule with pictures or words; teaching him to cope and be flexible when change occurred in his schedule; teaching him how to effectively communicate with peers and adults; and request a break" (id.).

During the 2021-22 school year, the IHO noted that the student's behaviors "increased," and, in response, the district BCBA "began taking new ABC data" during fall 2021, which resulted in the development of a behavior management plan in January 2022 (IHO Decision at p. 70). The IHO also noted that, while the behavior management plan was "less formal than a BIP," it nevertheless "relied on data and used strategies to help decrease behaviors" (id.). In addition, the IHO found that the district continued to monitor the student's behaviors during the 2021-22 school year and continued to take data, and when the student's behaviors changed, the district conducted another FBA "due to an increase in physical aggression, verbal outbursts, mouthing inedible objects, noncontextually laughing, and an attempt to elope from the classroom" to follow staff out of the room (id.). The IHO noted that the district, thereafter, developed a BIP for the student in June 2022 (id.).

Turning to the 2022-23 school year at issue, the IHO initially found that three CSE meetings had been held, "where they reviewed the [s]tudent's progress and continued needs" from the 2021-22 school year and "considered the [p]arent's private evaluation reports and their concerns" (IHO Decision at p. 70). The IHO noted that, although the March 2022 neuropsychological evaluation report was "thorough, it really did not reveal anything the [d]istrict did not already know through their own testing and data collection" (id. at pp. 70-71). As found

by the IHO, the district "was addressing, and continued to recommend that they address, the [s]tudent's academic and behavior needs" in an 8:1+4 special class placement, "through a reading program based on the principle of Orton Gillingham and ABA," and the direct provision of related services to address his language deficits, fine motor and daily living skill deficits, and gross motor and strength deficits (id. at p. 71). Next, the IHO noted that the March 2022 neuropsychological evaluation included recommendations for an extended school year (12-month programming); an extended school day; a multisensory approach to teaching and the use of "hands-on and concrete teaching methods"; presenting information slowly and repeatedly with scaffolding as needed; modeling; visual aids; behavior supports emphasizing a proactive approach and visual schedules, scheduled breaks, a token system, and transitional activities; home-based ABA services; a reward system to "promote selected goals"; parent counseling and training; and socialization with same-age peers that promoted "increased eye gaze and interactive play" (id.). The IHO determined that the district "had been providing the [s]tudent" with all of the recommendations during the 2020-21 and 2021-22 school years, and continued to offer them to the student for the 2022-23 school year (id.). In addition, the IHO found that the CSEs developed annual goals that were "thoughtfully recommended" by the student's providers and were "adjusted or added after listening to the [p]arents' concerns and the recommendations of the private evaluators" (id.).

Although the March 2022 neuropsychological evaluation and the November 2021 psychiatric summary also included the same recommendation for a "1:1 ABA program," the IHO determined that the district witnesses "who had worked with the [s]tudent for a least a year, felt that would be too restrictive" (IHO Decision at p. 71). The IHO also determined that witnesses had testified that a "1:1 ABA program would not promote social growth or socialization," and the student had made "nice progress socially, was engaging more with peers appropriately and his play skills were improving" during the 2021-22 school year (id. at pp. 71-72). Nonetheless, the IHO indicated that the district responded to the parents' concerns and added the services of a 1:1 teaching assistant for the student to "assist with implementing of strategies and supports," and as a "consistent person to collect data on the BIP and work in tandem with the BCBAs to ensure fidelity and implementation of the plan" (id. at p. 72). With the addition of the 1:1 teaching assistant, the IHO indicated that the student could remain in the classroom with peers and "work on socialization and communication and the additional support from staff could help implement the ABA strategies" (id.).

Next, the IHO found that both the March 2022 neuropsychological evaluation and the November 2021 psychiatric summary included a recommendation for home-based ABA services (see IHO Decision at p. 72). The IHO noted, however, that the district had previously recommended home-based services during the 2021-22 school year, and continued to recommend the same services, but with an increased frequency for the 2022-23 school year due to "learning of the intensity of the behaviors in the home" (id.). In addition, the IHO found that the district recommended parent counseling and training, as well as community and family training (id.). The IHO further noted that, upon review of a private OT evaluation and the private auditory processing evaluation, the district included annual goals and services from those reports, as well as a hearing services consultation (id.).

Overall, the IHO concluded that, based on the evidence in the hearing record, the student made progress in the 8:1+4 special class placement during the 2021-22 school year "with all the modification and supports provided" to him (IHO Decision at p. 73). For example, the IHO noted

that the student improved by "two reading levels from a B to independent level D," and improved from "recognizing letters sounds and letters to writing CVC words" (id.). The IHO also found that the student "increased" his sight words, he could "answer basic WH questions during and after reading and was successful with comprehension" (id.). Although the student's "writing progress was variable," the IHO indicated that he could "form all letters of the alphabet with a visual model and independently copy words and sentences when presented in front of him" (id.). In the area of mathematics, the IHO found that the student could "count to 100 by 1s, 5s, and 10s; he could identify numbers to 100 and write the[m] with a visual model; and he demonstrated progress with drawing pictures to subtract numbers within[] ten" (id.).

In addition to the foregoing, the IHO found that, although the student exhibited behavior needs, he was also "fun" and "loving to be around and willing to learn" (IHO Decision at p. 73). The IHO also found that the student could "sit during group lessons and 1:1 with the teacher"; he successfully used coping strategies by reminding himself to "take a deep breath and began recognizing what to do to self-regulate"; and he "did well with the visual schedule," which helped him with transitions by knowing "what to expect" (id.). The IHO found the student also improved his behavior when "preferred people left the classroom," he was making progress in the classroom, and he benefitted from having peers in the classroom (id.). The IHO noted that the student "wanted to engage with others, and [the district] had the ability to teach him how to appropriately interact and make meaningful connections" in the LRE (id. at pp. 73-74). In addition, the IHO indicated that the district introduced "new strategies and interventions" when the student's behaviors changed (id. at p. 74).

Based on the foregoing, the IHO concluded that the district's recommended special education program for the 2022-23 school year was "reasonably calculated to enable the [s]tudent to make progress appropriate in light of his circumstances" (IHO Decision at p. 74). The IHO found that the district's recommendations were based on "data collected, the [s]tudent's progress and his continued academic, behavior, social emotional, language and motor needs" (id.). Moreover, the IHO concluded that the district's program "implemented principles of ABA supervised by BCBAs who worked mostly in the classroom" with the special education teacher, the teaching assistants, the school psychologist, and the related services providers (id.). And finally, the IHO found that the district responded to the changes in the student's behaviors, adjusted teaching and strategies, and added services to address the parents' concerns when they "came up" (id.).

While finding that the district offered the student a FAPE in the LRE for the 2022-23 school year, the IHO went on to address in the alternative whether ELIJA was an appropriate unilateral placement and whether equitable considerations weighed in favor of the parents' requested relief (see IHO Decision at pp. 76-82). The IHO concluded that ELIJA was not appropriate, noting that it did not provide the student with the "appropriate supports and services that he required in order to make meaningful progress in all of his areas of need: academic, social/emotional, language, and physical" during the 2022-23 school year (id. at p. 82). With regard to equitable considerations, the IHO found that, although the parents "participated in all aspects of the special education process," they did not always communicate their concerns" to the district during the 2021-22 school year; however, when the parents did raise concerns, the IHO indicated that the district "made changes and increased services to address those concerns" (id.). Consequently, the IHO found that equitable considerations did not weigh in the parents' favor, and the IHO denied the

parents' request to be reimbursed for the costs of the student's tuition at ELIJA for the 2022-23 school year (id. at pp., 82-83).

As relief, the IHO ordered that the district "calculate and provide the [s]tudent with the home behavior intervention services missed during the 2021/22 school year, as recommended in the [s]tudent's March 2021 IEP" (IHO Decision at p. 83).²²

IV. Appeal for State-Level Review

The parents appeal, alleging that the IHO erred by finding that the district offered the student a FAPE in the LRE for the 2022-23 school year. More specifically, the parents assert that the IHO's decision was conclusory and insufficiently reasoned, the IHO erred on the facts and the law, the IHO improperly concluded that the student had made progress, and the IHO failed to reconcile conflicting evidence and testimony. Next, the parents argue that the IHO erred by failing to address the following issues: peer grouping in the proposed classroom, the lack of data collection in the proposed program (i.e., that the district program was not a true ABA program), the failure to teach skills to mastery or independence, predetermination of the student's program by failing to consider other placement options (i.e., denial of parent participation), and the failure to address the student's speech needs. In addition, the parents contend that the IHO ignored evidence that the student required 1:1 ABA instruction and excused the district's failure to recommend a 1:1 ABA program with BCBA supervision for the student, as well as the district's failure to recommend direct ABA support or supervision for the student and for school personnel on his behalf. Next, the parents argue that all of the professionals familiar with the student agreed that the student required a 1:1 ABA program with BCBA supervision. The parents also argue that the IHO failed to find that the district's FBA and BIP were not appropriate and were filled with errors. In addition, the parents contend that the district and the IHO both failed to consider relevant evaluative information about the student in the development of his IEP, noting further that the IHO improperly relied on district staff opinions rather than discussing or citing evidence of the student's history of regression.

The parents also allege that the IHO erred by finding that ELIJA was not an appropriate unilateral placement for the student and that equitable considerations did not weigh in favor of their requested relief.

As relief, the parents seek to reverse the IHO's findings that the district offered the student a FAPE in the LRE for the 2022-23 school year, that ELIJA was not an appropriate unilateral placement, and that equitable considerations weighed in the district's favor. The parents seek an award of tuition reimbursement for the costs of the student's attendance at ELIJA for the 2022-23 school year.

²² On appeal, neither party challenges the IHO's order directing the district to calculate and provide the student with the home-based behavior intervention services not delivered to the student during the 2021-22 school year (see generally Req. for Rev.; Answer; Reply). Accordingly, this portion of the IHO's decision and order has become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]).

In its answer, the district responds to the parents' allegations and generally argues to uphold the IHO's decision 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 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]).²³

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).

²³ 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 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. 2021-22 School Year

While the district's special education program recommendations for the 2021-22 school year are not at issue, a review thereof provides a relevant backdrop for, and facilitates the discussion regarding whether the district's decision to offer a similar program to the student for the 2022-23 school year was reasonably calculated to enable the student to make progress appropriate in light of his circumstances, or in other words, whether the district offered the student a FAPE in the LRE for the 2022-23 school year.

At the impartial hearing, the district presented several witnesses to testify on its behalf, including the special education teacher (classroom teacher or teacher) who taught in the student's 8:1+4 special class placements for both the 2020-21 and 2021-22 school years (see Tr. pp. 544-45, 556, 569).²⁴ Initially, she described the 8:1+4 special class placement as a "special ed[ucation] class" with eight students, one teacher, and four teaching assistants (Tr. p. 545). The classroom teacher testified that a teaching assistant—or "TA"—helped to "support what ha[d] previously been taught" and did not "teach new material" (id.). She further noted that the teaching assistants helped to "maintain certain academics, as well as help with behaviors" (id.). The teacher testified that her responsibilities as a classroom teacher included attending CSE meetings for the students in her classroom, "report[ing] on" progress in the areas of academics, behavior, and social development, and reviewing the student's "current" annual goals and, in an annual review, go over the annual goals for the next school year (Tr. p. 561).

With respect to ABA, the classroom teacher explained her familiarity with the concept, noting that it "focuse[d] on how to best help the students with their behavior," and using "a lot of positive wording for behavior" (Tr. pp. 561-62). The teacher also described her understanding of "discrete trials"—which included an emphasis on data collection and that discrete trials were a "component" of ABA—and how it was distinguished from "just good instruction" (Tr. pp. 562-64). She testified that, while she may not have attended any "super formal training" in ABA while working at the district, she had "meetings with [district] BCBAs within [her] classroom to go over ABA strategies for the classroom" (Tr. pp. 563-65). The teacher also testified that, in her classroom, all of the students had IEPs and annual goals and even if she was not doing "all discrete trials," she worked "one-to-one with students and ke[pt] data on those students to meet their needs" (Tr. p. 565).

Turning to the 2020-21 school year, the classroom teacher testified that she met the student prior to the first day of school at a "meet-and-greet with the entire class and the staff" in the 8:1+4

²⁴ The special education teacher held a Master's degree in literacy, in addition to five teaching certifications (see Tr. p. 547).

special class placement (Tr. p. 569).²⁵ She explained that, although the 8:1+4 program was "ungraded," a student's progression from year-to-year was based on that student's own individual progress, rather than on assessments given to other kindergarten students or on grade-level assessments for their age (Tr. pp. 569-70). The teacher also testified that the classroom did not "follow the kindergarten curriculum with fidelity," but instead, she pulled components of the curriculum "based on the [particular] student's readiness to learn that material" (Tr. p. 570).

With regard to the student in this matter, the teacher testified that, prior to the start of the school year, she looked at his IEP, made some notations from preschool, reviewed his annual goals, and made "data sheets for his goals" (Tr. pp. 572-73). She also spoke with the parent prior to the start of the school year (see Tr. p. 572). When the student entered school, she described him as "sweet" and "very willing to learn"; she also testified that the student knew his numbers up to at least 10, he knew his shapes and colors, and he knew his letters (Tr. p. 574). The teacher further testified that the student "thrived" on routine, he had "variable" attention, and his behavior was "pretty good," although he had "some outbursts here and there, but [was] very manageable" (Tr. pp. 574-75). She noted that the student had a "token board at that time" with an "individual schedule" on his desk to help with his behavior (Tr. pp. 575-77). Generally, the student's behavior could be triggered by an "unexpected change in his schedule," so she spoke to him about any changes ahead of time, which eased the transition (Tr. pp. 577-78). She also testified that the student's triggers were "seemingly more external" (Tr. p. 579). For example, she testified that when "something randomly" arose during the school day, the student could have a "hard time with that," so either she or a teaching assistant would sit with the student to help him regulate by taking deep breaths or drinking water and talking the student through his emotions (Tr. p. 578). With respect to "outbursts," the student would jump up and down, cry, or push his hand against his mouth; according to the teacher, these outbursts varied in frequency and she could not provide an exact number of those occurrences during the 2020-21 school year (Tr. pp. 578-79).

Turning to the 2021-22 school year—i.e., "first grade"—the teacher testified that the student was "willing to learn" and was "making nice academic progress but his behavior did intensify a little bit" (Tr. p. 579). During the 2021-22 school year, the teacher explained that the triggers for the student's behaviors "were more internal," so the student could be working and then "he would seemingly randomly kind of jump up and get upset" (Tr. p. 580). Strategies to address these episodes included the use of "two different break space areas," one of which was a "calming space" that had "feelings posters" (Tr. pp. 580-81). In addition, the teacher testified that they worked on "social stories" with the student, as well as "emotional regulation" (Tr. p. 581). For emotional regulation, the classroom had posters in four different colors to help the student visualize what he was feeling, such as angry or sad; the posters also had strategies to help the student if he was feeling sad or angry (Tr. pp. 581-82). Effective strategies for the student included counting, tightly squeezing a hand, using a sensory toy to squeeze or pull, taking walks, and deep breathing (see Tr. pp. 582, 587). According to the teacher, the student experienced more emotional dysregulation—meaning that the student was upset about something that could be worked through—than behavioral issues, which the teacher described as "doing something to gain attention" or to "avoid a task" (Tr. pp. 587-88).

²⁵ In addition to herself, the meet-and-greet included the district special education supervisor (CSE chairperson), five teaching assistants, a speech-language therapist, and a behavior consultant (see Tr. pp. 571-72).

Next, the classroom teacher described a typical day in her class during the 2021-22 school year (see Tr. pp. 588-608). Upon arrival, the student would independently unpack his belongings; put his folders, Chrome Book, and backpack in his cubby; and sit down for "morning work" (Tr. p. 588). The teacher testified that, generally, the student arrived at school "happy" and "ready to learn" (Tr. p. 589). She explained that "morning work" allowed students to practice and maintain an already mastered skill, such as personal information (i.e., address, telephone number) (Tr. pp. 589-91). During morning work, the teaching assistants in the classroom primarily provided refocusing and redirection to the students (see Tr. p. 591). After morning work, the class engaged in a yoga program "designed specifically for students with special needs"; next, the class engaged in "Foundations," which the teacher explained as a "phonics program" and which she understood as the "beginning of the Wilson Reading Program;" and after Foundations, the class had a snack and then participated in "literacy centers" (Tr. pp. 592, 855-56). Following literacy centers, the students had lunch and recess, then, after returning to the classroom, the students had a "sensory break," participated in mathematics, science or social studies, play time, and then a "special" (i.e., art, gym, music, library, or art) (id.).

With respect to "Foundations," the teacher testified that it was a progressive program that included learning each letter, how to form or write each letter, learning the sound each letter made, and learning words that began with that letter (Tr. p. 593). She also explained that, after students mastered those skills, "students go into what we call[ed] tapping out words, which wa[s] essentially sounding out words," beginning with "CVC words," or "consonant, vowel, consonant words" and progressed from that point (id.). She also testified that Foundations would initially be delivered as full group instruction, and then would be continued in "either small group or individual work based on student needs" (Tr. p. 594). During literacy center or "center time," small group or individual work took place in the following five centers: reading (with the teacher), sight words, writing, free reading, and phonics (all with teaching assistants) (Tr. pp. 594-95). In the reading group, the teacher worked on "instructing students on their instructional reading level," reading strategies, and comprehension questions (Tr. p. 595). Generally, the small groups had "between one to two students," and the groups were formed based on the students' levels, for example, all the students in a reading group were "all reading on the same reading level" (Tr. pp. 595-96). The teacher testified that, at the start of the 2021-22 school year, the student in this matter was reading at a level "B," and by the end of the school year, he was reading at a level "D," which she noted was the "second highest reader in [her] class" (Tr. pp. 596-97).²⁶ The student in this case was also the "second highest in the class" with respect to his "sight word command academically" (Tr. pp. 597-98). In writing, the teacher explained that, although the student was "not quite ready to formulate his own sentences," he worked on that skill with a teaching assistant (Tr. pp. 598-99). According to the teacher, writing was challenging for the student, as his "OT skills made it kind of difficult for him but the effort was there" (Tr. p. 599). Finally, the phonics center "really reenforce[d] what was being taught in Foundations" (Tr. p. 600).

The teacher also testified that the student was an "active learner" when he was emotionally regulated, and he could sit and follow along during "whole group, small group or one-to-one

²⁶ At the impartial hearing, the special education teacher explained that to "receive an independent" reading level, the student was required to read the words, decode the words, and answer comprehension questions, and "based on the formula" provided by Fountas and Pinnell, she could derive the independent or instructional level of reading (Tr. p. 661).

lessons (Tr. p. 729). The teacher testified that the student's ability to successfully transition "through all the centers" varied, and noted that she used a timer in the classroom to notify students when to switch centers (Tr. p. 600). The teacher also noted that if the student did not completely "finish something" at a center, he could become upset; the teacher explained, however, that "those were times when [staff] talk[ed] him through it" (*id.*). She also testified that, when the student was "emotionally regulated and ready to learn, he did really well in the centers," he participated, and he could "answer the questions or play the game, read the stories" (Tr. p. 601).

Next, the classroom teacher described recess and lunch during the 2021-22 school year (*see* Tr. p. 601-02). At lunch, the teacher explained that the student ate at a table for his own class, but was "mixed in with other kids the same age" (i.e., other first grade regular education students) in the cafeteria (Tr. pp. 601-02). According to the teacher, the student "did not seem to have any issues being in the same space as anyone else" (Tr. p. 602).

Turning to mathematics instruction during the 2021-22 school year, the classroom teacher testified that it occurred initially as a "whole group," and she modified the regular education curriculum based on the student's individual needs (Tr. pp. 605-06). After whole group instruction, the teacher would "break it down to small group or one-to-one instruction to work" on whatever skill was taught (Tr. p. 606). The teacher testified that, when the student was "emotionally regulated and ready to learn, [he] would sit and ask questions," or he would work on the board to finish his work (*id.*). The classroom teacher described mathematics as an area of strength for the student, and characterized his performance as "right in the average" range among his classmates, being stronger in some areas and weaker in others (Tr. p. 669). Following mathematics instruction, students engaged in "play time," which provided an opportunity to work on social skills (Tr. pp. 606-07).

With regard to progress, the classroom teacher testified that, academically, the student improved his reading level by "two levels," and he had improved in writing from "recognizing letter sounds and letters to now writing those CVC words," "as well as some words with digraphs" (i.e., "SH, CH, TH, WH and CK") (Tr. p. 609). The classroom teacher testified that she used a "Fountas and Pinnell" reading assessment to measure the student's progress in reading, and she described how the assessment was administered to students (Tr. pp. 609-11). She also testified that she administered the Fountas & Pinnell assessment to the student in March 2022, just prior to his annual review in April 2022 (Tr. p. 611). In addition, the teacher noted that the Fountas & Pinnell assessment had been administered to students at the start of the school year; however, she also noted that, having taught the same students in the prior school year, she "really already knew where they were functioning at reading-wise" (*id.*).

With respect to the student's annual goals for the 2021-22 school year, the classroom teacher specifically worked with him on his three annual goals in reading and one of his annual goals in the area of social/emotional and behavioral needs (*see* Tr. pp. 615-18; Dist. Ex. 3 at pp. 9-11). She testified that she took data on these annual goals on a weekly schedule, and worked one-on-one with students on "trial days" (Tr. pp. 618-19). For example, for the student's first annual goal in reading, the classroom teacher explained that, on a trial day, she worked with him individually and the student read a story and answered questions (*see* Tr. p. 619; Dist. Ex. 3 at p. 9). She noted that if the student responded correctly, she would "mark a check"; however, if the student responded incorrectly, she would "mark an X" (Tr. p. 619). For the first annual goal in

reading, the teacher ran "three trials" over four weeks or "[o]ne trial once a week" (*id.*). At the impartial hearing, the teacher confirmed that she was responsible for the progress monitoring represented in district exhibit 70 except for page 11 (*see* Tr. p. 620, 622; Dist. Ex. 70 at pp. 1-10, 12-62). The teacher testified that district exhibit 70 represented the data sheets she created to track the student's progress on his annual goals during the 2021-22 school year, and she then explained how she took the data reflected therein (*see* Tr. pp. 623-57). In addition, the teacher testified that the student achieved all of his annual goals that she worked on with the student by the conclusion of the 2021-22 school year (*see* Tr. pp. 657-58). She also testified that she used the information from the student's data sheets to "create his [annual] goals for the following school year" (Tr. p. 658; *see* Dist. Ex. 25 at p. 4).

With respect to the student's behavior during the 2021-22 school year, the classroom teacher testified that, "there came a time where [the student] got really upset anytime adults left the room" (Tr. pp. 689-90). To help the student in dealing with these transitions, the teacher created "door tickets" with Velcro on them (Tr. p. 690). For example, when an adult was leaving the classroom, in order to use the door tickets, the student was required to first ask if he could walk that person out the door, and when told he could do so, the student would get a "door ticket," walk the person to the door, and then affix the door ticket to the Velcro strip and return to his seat (*id.*). According to the teacher, the door tickets provided the student with a "little more control" in these situations, rather than becoming emotionally dysregulated or getting upset (Tr. pp. 690, 692). The teacher also testified that the student was successful with this intervention (*see* Tr. p. 692). She testified that she had discussed the use of the door tickets with the parents, who initially had no issues with it; however, she recalled that at "one of the later CSE meetings," the parents raised it as a "concern" and, specifically, indicated that the door tickets were "making him more obsessed about the door instead of helping him not to have to go to the door" (Tr. p. 693). Contrary to the parents' concern, the teacher believed that the door tickets were successful in the classroom because it helped the student remain on task while adults entered and left the classroom all day long (*see* Tr. p. 694).

In addition to the foregoing evidence, the hearing record, as previously noted, included copies of the student's final report card and final progress report on his annual goals for the 2021-22 school year (*see generally* Parent Ex. O; Dist. Ex. 28). According to the June 2022 progress report, the student achieved approximately 26 out of a total of 32 annual goals by the conclusion of the 2021-22 school year (*see* Dist. Ex. 28 at pp. 2-9). Overall, a review of the evidence in the hearing record supports a finding that the student made progress during the 2021-22 school year in an 8:1+4 special class placement, together with supports of related services, supplementary aids and services and program modifications and accommodations, an extended school day, and 12-month programming.

B. 2022-23 School Year: April, June, and August 2022 CSE Process

Turning to the school year at issue, the evidence in the hearing record demonstrates that CSEs convened in April, June, and August 2022 to develop the student's IEP for the 2022-23 school year (*see* Parent Exs. C at p. 1; F at p. 1; G at p. 1). Without pointing to specific CSE meetings, the parents argue that the IHO failed to address their claims regarding parent participation and predetermination of the student's special education program for the 2022-23 school year. More specifically, the parents contend that the IHO erred by failing to analyze or

consider the district's failure to consider placement options for the student, other than the 8:1+4 special class placement.²⁷ In their memorandum of law, the parents argue that the April 2022 CSE ignored the recommendation made by their education consultant to send packets to State-approved "ABA programs" for the student. As a result, the parents argue that the district's predetermination of the student's special education program deprived them of an opportunity to meaningfully participate in the development of the student's IEP.

The district denies the parents' allegations, arguing that CSE members collaboratively developed the student's special education program recommendations for the 2022-23 school year at the CSE meetings.

1. Parent Participation and Predetermination

The IDEA sets forth procedural safeguards that include providing parents an opportunity "to participate in meetings with respect to the identification, evaluation, and educational placement of the child" (20 U.S.C. §1415[b][1]). Federal and State regulations governing parental participation require that school districts take steps to ensure that parents are present at their child's IEP meetings or are afforded the opportunity to participate (34 CFR 300.322; 8 NYCRR 200.5[d]). Although school districts must provide an opportunity for parents to participate in the development of their child's IEP, mere parental disagreement with a school district's proposed IEP and placement recommendation does not amount to a denial of meaningful participation (see E.H. v. Bd. of Educ., 361 Fed. App'x 156, 160 [2d Cir. 2009]; E.F. v. New York City Dep't of Educ., 2013 WL 4495676, at *17 [E.D.N.Y. Aug. 19, 2013] [holding that "as long as the parents are listened to," the right to participate in the development of the IEP is not impeded, "even if the [district] ultimately decides not to follow the parents' suggestions"]; DiRocco v. Bd. of Educ., 2013 WL 25959, at *18-*20 [S.D.N.Y. Jan. 2, 2013]; P.K. v. Bedford Cent. Sch. Dist., 569 F. Supp. 2d 371, 383 [S.D.N.Y. 2008] ["[a] professional disagreement is not an IDEA violation"]; Sch. For Language and Commc'n Development v. New York State Dep't of Educ., 2006 WL 2792754, at *7 [E.D.N.Y. Sept. 26, 2006] [finding that "[m]eaningful participation does not require deferral to parent choice"]).

Consistent with the parents' argument, the education consultant testified that, at the April 2022 CSE meeting, she asked the CSE to "consider [s]tate approved placements that provide[d] ABA," and to "send out packets" to those placements as her program recommendation for the student (Tr. pp. 3977-78). The education consultant also testified that when she made that recommendation to the April 2022 CSE, she was aware that ELIJA was not a State-approved placement where the district could send packets (see Tr. p. 3979). She did not, however, specifically ask the CSE to send a packet to ELIJA (id.).

However, the parent also testified at the impartial hearing. The parent testified that, during the 2021-22 school year, she and her husband "talked about all the things that [they] were seeing at home" with the student with the CSE (Tr. p. 4231). According to the parent, "[i]t was severely downplayed," and as she and her husband reported about the student at the CSE meeting, a district BCBA commented that she "wasn't aware" of what had been occurring and "would have worked

²⁷ Generally speaking, the parents' arguments more accurately relate to appropriateness of the district's placement recommendation, which will be addressed below.

on it with the parents" if she had known (Tr. pp. 4231-32). The parent also testified that she and her husband "brought up all of [their] concerns" with the CSE (Tr. p. 4232).

When asked specifically about the April 2022 CSE meeting, the parent testified that she "discussed [her] concerns with what [they] were seeing at home with [the student], his behaviors" (Tr. p. 4234). The parent testified that the parents' education consultant also described the student's behaviors at home at the meeting, and it was noted that the student had been exhibiting behaviors at school, as well, and the school was working on his behaviors with a new "behavior modification plan" that had been completed in January 2022 (Tr. p. 4235). The parent testified that, based on the information presented at the CSE meeting, either she or her husband openly disagreed with the information at that time (see Tr. pp. 4235-36). The parent also testified that the psychologist who completed the student's March 2022 neuropsychological evaluation "presented his findings" at the CSE meeting, and questioned the district's description of the student's improvement in his reading level based on his own testing results (Tr. p. 4237). In addition, the parent testified that the education consultant asked questions at the CSE meeting about how often the BCBA's were in the student's classroom, and it was difficult to "get a real answer on that question" (id.). The parent indicated that a district BCBA responded, but noted that it "change[d] all the time" so it was "hard" to provide them with a "solid answer" (id.). For example, the BCBA told the CSE that she could be in the classroom every day and sometimes she would not be in the classroom all week (see Tr. pp. 4237-38). The parent further testified that the CSE discussed whether the student's classroom was "an ABA program," and district staff indicated that the classroom used "principles of ABA in the program" (Tr. p. 4238). According to the parent, the parents' education consultant openly disagreed at the CSE meeting, stating that the classroom was "not a real ABA program" but was "eclectic" (Tr. pp. 4238-39).

Next, the parent testified that the April 2022 CSE engaged in "some discussion about" the March 2022 neuropsychological evaluation report (Tr. p. 4239). The parent indicated that the psychologist told the CSE that, when compared to the student's previous evaluation in October 2020, the student had "regressed" (id.). The psychologist also discussed his observation of the student in the classroom, and specifically, the student's behavior, and his opinion that the "alarms" used for the students to switch stations made the student "more agitated" (see Tr. p. 4240). The psychologist described the student as a "behavioral outlier" when compared to the other students in the classroom (Tr. p. 4241).

The parent also testified that, at the April 2022 CSE meeting, the education consultant asked the district for copies of the student's data because she had not observed anyone in the classroom taking data (see Tr. p. 4241). The parent further testified that the psychiatrist who completed an evaluation of the student also discussed her report at the April 2022 CSE meeting, and she also voiced her opinion that the 8:1+4 special class placement was not a "real ABA program" (see Tr. p. 4244). The parent also testified that the CSE discussed the annual goals proposed for the 2022-23 school year, and according to the parent, although the student had already met some of the annual goals, some were continued so the student could "maintain that skill" (Tr. pp. 4244-45). However, the parent testified that, in her opinion, the repeated annual goals were "more of a benefit" for the classroom teacher than for the student (Tr. p. 4245). The parent testified that, at the end of the April 2022 CSE meeting, the CSE recommended that the student remain in the 8:1+4 special class placement (id.). The parent also testified that they "had asked them to

consider . . . an ABA one-to-one placement," but the CSE indicated that "they could [no]t make that decision" (id.).

During cross-examination, the parent testified that, although she had concerns about the student's toileting, his ability to drink from a water bottle, and his ability to ride in the car, she never raised those as concerns at the April 2022 CSE meeting (see Tr. pp. 4326-28). She confirmed, however, that when she informed the CSE about her concerns with the student's behaviors, the CSE increased the student's home-based ABA services (see Tr. p. 4328). Subsequent testimony reflects that the parent did not raise the aforementioned concerns with a CSE because, according to the parent, she had already discussed the issues with either the classroom teacher or the "parent trainer" (Tr. pp. 4388-90).

With respect to the June 2022 CSE meeting, the parent testified that the CSE was held to review the FBA that had been completed (see Tr. pp. 4245-46). According to the parent, the CSE discussed the data and it was noted that "some discrepancies" existed with some dates (Tr. p. 4246). The parent then described the discussions that took place at the June 2022 CSE meeting, which included input from the parents' education consultant, the psychologist who completed the student's February 2022 neuropsychological evaluation, and a district BCBA (who had "proposed a one-to-one" aide at the April 2022 CSE meeting) about the special education program being recommended for the student (Tr. pp. 4246-49). The parent testified that the June 2022 CSE recommended additional home-based ABA services for the student, together with the 8:1+4 special class placement, and she noted that the parents agreed to consider the recommended program because they were not "a hundred percent sure what [they] were doing" (Tr. p. 4249). The parent also testified that the parents asked the CSE to consider placing the student at ELIJA, but the CSE indicated it would not consider such placement because it was "not a State approved school" (Tr. p. 4250).

Next, the parent testified about the August 2022 CSE meeting, which she described as "another very, very long meeting" (Tr. pp. 4250-51). According to the parent, each of the CSE meetings had been "four hours or longer" (Tr. p. 4251). The parent testified that the August 2022 CSE meeting "felt very repetitive" because "everything that [had] already been discussed at the other two meetings, the progress reports, the evaluations, [were] now discuss[ed] again" (id.). In addition, the parent noted that the August 2022 CSE also discussed the letter sent to the district about the parents intentions to unilaterally place the student at ELIJA (id.). The parent testified that the August 2022 CSE discussed the student's BIP that had been developed, and an ELIJA staff member who attended the meeting presented a report about how the student had been performing in the two weeks that he had already been attending ELIJA (see Tr. pp. 4251-54). In addition, the parent testified about her own input at the meeting, as well as input from the psychologist who performed the February 2022 neuropsychological evaluation, and the psychiatrist who evaluated the student (id.). According to the parent, after the August 2022 CSE recommended the 8:1+4 special class placement, they asked the CSE to consider placing the student at ELIJA, and the CSE responded, "no" (Tr. p. 4254; see Tr. p. 4258). The parent further testified that the parents' education consultant voiced concerns about the 8:1+4 special class placement at the meeting, as well as the ELIJA participant, and the psychiatrist also disagreed with the recommendation (Tr. p. 4254). The parent also testified that, prior to leaving the CSE meeting early, the psychologist also voiced concerns with the 8:1+4 special class placement and had indicated that the student required

a one-to-one ABA program and that ELIJA was a "good placement" for the student (Tr. pp. 4254-55).

During cross-examination, the parent testified that, at the time of the June 2022 CSE meeting, they were "committed" to the student attending ELIJA, unless "something else happened" (Tr. p. 4310). The parent explained that, based on the enrollment contract with ELIJA, they had until August 1, 2022 to terminate the contract if the district had offered "another placement" (Tr. p. 4306). When asked what placement would have been "acceptable" to them, the parent responded, a "State approved placement" (*id.*). When asked if they had requested that the CSE place the student in a State-approved ABA program, the parent responded, "[i]t was [no]t offered" and then stated that they had "asked for an ABA program and the school did [no]t want to give us one" (Tr. pp. 4310-11). The parent clarified that they "only asked for ELIJA because the other schools [she] had inquired about did [no]t have any spots" (Tr. p. 4312). The parent also testified that, based on conversations with their education consultant, she understood that the district was prohibited by law to recommend "a non[-]State approved program" through the CSE (Tr. pp. 4312-13). She also understood that the CSE could agree that the student required a one-to-one ABA program and then "they would send the packets," but that did not happen in this matter (Tr. pp. 4313-14).

Based on the foregoing, the evidence in the hearing record does not lead me to the conclusion that the parents were denied an opportunity to participate in the decision-making process at the April, June, or August 2022 CSE meetings; instead, the evidence demonstrates that the parents actively participated at each CSE meeting and had the support and participation of the various individuals who had evaluated the student or were working with the parents to make educational decisions about his programming.

As to predetermination, the consideration of possible recommendations for a student prior to a CSE meeting is not prohibited as long as the CSE understands that changes may occur at the CSE meeting (*T.P.*, 554 F.3d at 253; *A.P.* 2015 WL 4597545, at *8-*9; *see* 34 CFR 300.501[b][1], [3]; 8 NYCRR 200.5[d][1], [2]). The key factor with regard to predetermination is whether the district has "an open mind as to the content of [the student's] IEP" (*T.P.*, 554 F.3d at 253; *see D.D.-S.*, 2011 WL 3919040, at *10-*11; *R.R. v. Scarsdale Union Free Sch. Dist.*, 615 F. Supp. 2d 283, 294 [E.D.N.Y. 2009], *aff'd*, 366 Fed. App'x 239 [2d Cir. Feb. 18, 2010]). Districts may "prepare reports and come with pre[-]formed opinions regarding the best course of action for the child as long as they are willing to listen to the parents and parents have the opportunity to make objections and suggestions" (*DiRocco v. Bd. of Educ. of Beacon City Sch. Dist.*, 2013 WL 25959, at *18 [S.D.N.Y. Jan. 2, 2013] [alternation in the original], quoting *M.M. v. New York City Dept. of Educ. Region 9 (Dist. 2)*, 583 F. Supp. 2d 498, 506; [S.D.N.Y. 2008]; *see B.K. v. New York City Dep't of Educ.*, 12 F. Supp. 3d 343, 358-59 [E.D.N.Y. 2014] [holding that "active and meaningful" parent participation undermines a claim of predetermination]).

Given the parents' active participation in each of the three CSE meetings held to develop the student's IEP for the 2022-23 school year, any claim of predetermination is necessarily undermined. In addition, the hearing record is devoid of evidence demonstrating that any of the CSEs possessed preformed opinions regarding the student's special education program or placement in the 8:1+4 special class, and the parents do not point to any evidence of such. To the extent that the parent testified that the CSEs would not consider placing the student at ELIJA as a

non-State approved nonpublic school, it is well settled that while a school district may be required to reimburse parents for the costs of a student's tuition at a non-State approved nonpublic school as a remedy for the district's failure to offer the student a FAPE, a school district may not be compelled to place a student in a non-State approved nonpublic school in order to provide the student with a FAPE (see Z.H. v. New York City Dep't of Educ., 2015 WL 3414965 at *4-*6 [S.D.N.Y. May 28, 2015] [noting the State's "comprehensive regime" for approving nonpublic schools for student placement by a school district]). As a result, the parents' arguments must be dismissed.

2. Consideration of Evaluative Information

The parents contend that the IHO failed to "consider the relevant evaluative information" and "improperly relied on the opinions of [d]istrict staff" with regard to the development of the student's IEP and special education program recommendations for the 2022-23 school year. In support of these contentions, the parents cite generally to the December 2021 psychiatric summary report and the March 2022 neuropsychological evaluation report. Within the memorandum of law, the parents more specifically argue that the district failed to "adhere" to the recommendations for "1:1 ABA instruction," which, according to the parents, was "'universally emphasized'" by the evaluators. The parents contend that the district's failure to recommend a 1:1 ABA program contradicted the clear consensus of the evaluative information and thus, denied the student a FAPE.

Regulations require that 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]).

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]).

Consistent with the parents' contentions, two of the privately-obtained evaluations of the student, notably, the December 2021 psychiatric summary and the March 2022 neuropsychological evaluation report, included recommendations for the student to receive a 1:1 ABA program (see Parent Exs. J at p. 3; L at p. 13).²⁸ However, while the opinions of these two evaluators may have formed a consensus of opinion between and among themselves, the evidence in the hearing record demonstrates that the December 2021 psychiatric summary and the March 2022 neuropsychological evaluation report were only two of the resources available to the CSE to develop the student's IEP for the 2022-23 school year. For example, the evidence reflects that, in addition to the parents' privately-obtained evaluations, the April 2022 CSE relied upon and had the following additional evaluative information available: an October 2020 speech-language reevaluation report, an October 2020 psychological reevaluation report, a November 2020 educational reevaluation report, a November 2021 OT evaluation report, a January 2022 behavioral support plan, a March 2022 speech-language annual review report, a March 2022 OT annual review report, a March 2022 counseling progress summary report, a March 2022 report card, a March 2022 parent counseling and training progress report, a March 2022 behavior intervention progress report (home-based services), a March 2022 annual review report, a March 2022 annual review progress report, a March 2022 PT annual review report, a March 2022 progress report, a March 2022 annual education report, and verbal reporting from the parents and staff (see Parent Exs. C at pp. 3-4; D at p. 2; see generally Dist. Exs. 12-15; 19-25; 29-31; 33).

Notwithstanding the voluminous amount of evaluative information relied on by the April 2022 CSE to initially develop the student's IEP for the 2022-23 school year, a review of this evidence demonstrates that only the December 2021 psychiatric summary report and the March 2022 neuropsychological evaluation report included a recommendation for a 1:1 ABA program for the student, in addition, perhaps, to similar recommendations voiced by the parents, themselves, and the parents' education consultant at the CSE meetings (compare Parent Ex. J at p. 3, and Parent Ex. L at p. 13, with Dist. Exs. 12-15; 19-25; 29-31; 33).²⁹ As previously described, the student's then-current classroom teacher—who attended all three CSE meetings—testified at the impartial hearing with respect to the progress the student made while attending an 8:1+4 special class placement during the 2021-22 school year, and a review of the related services reports relied on to develop the student's IEP for the 2022-23 school year also reflected that the student made progress with those services (see generally Dist. Exs. 19-21; 24). Moreover, the hearing record

²⁸ The CSE chairperson noted in the April 2022 CSE meeting minutes that the private speech-language pathologist, who attended the meeting, recommended that the student needed "1:1 in small group with ABA instruction" (Dist. Ex. 88 at pp. 1, 3). However, a review of the December 2021 auditory processing evaluation report does not include or reference any recommendation for ABA services (compare Parent Ex. K at pp. 6-7, with Dist. Ex. 88 at p. 3).

²⁹ Evidence in the hearing record reflects that the same following individuals attended the April 2022, June 2022, and August 2022 CSE meetings: the CSE chairperson (district supervisor), school psychologist, the student's then-current classroom teacher, speech-language therapist, occupational therapist, physical therapist, parent trainer, behavioral consultant, hearing specialist, general education teacher, behavioral consultant (agency), the parents' private evaluators (psychologist and psychiatrist), the parents' education consultant, and both parents (compare Parent Ex. C at p. 2, with Parent Ex. F at p. 2, and Parent Ex. G at p. 2).

demonstrates that the June 2022 and August 2022 CSEs convened to consider additional evaluative information, that is, the FBA and BIP completed by the district, as well as information provided by the student's nonpublic school (see Parent Exs. F at p. 3; G at p. 3).

To the extent that the parents assert that the IHO improperly relied on the opinions of district staff with respect to the development of the student's IEP, generally, district staff may be afforded some deference over the views of private experts (see Lessard v. Wilton-Lyndeborough Coop. Sch. Dist., 592 F.3d 267, 270 [1st Cir. 2010] [noting that "the underlying judgment" of those having primary responsibility for formulating a student's IEP "is given considerable weight"]; J.E. & C.E. v. Chappaqua Cent. Sch. Dist., 2016 WL 3636677, at *16 [S.D.N.Y. June 28, 2016], aff'd, 2017 WL 2569701 [2d Cir. June 14, 2017], citing E.S. v. Katonah-Lewisboro Sch. Dist., 742 F. Supp. 2d 417, 436 [S.D.N.Y. 2010] ["The mere fact that a separately hired expert has recommended different programming does nothing to change [the] deference to the district and its trained educators"], aff'd, 487 Fed. App'x 619 [2d Cir. July 6, 2012]; Z.D. v. Niskayuna Cent. Sch. Dist., 2009 WL 1748794, at *6 [N.D.N.Y. June 19, 2009] [explaining that deference is frequently given to the school district over the opinion of outside experts]).

Overall, the evidence in the hearing record demonstrates that the April 2022 CSE, as well as the subsequent CSEs convened in June and August 2022, considered the parents' and the private evaluators views but had information before it demonstrating that the student was advancing from grade to grade and making academic progress in the 8:1+4 special class placement in a district public school. The CSE was not obligated to adopt the recommendations of the private evaluator in this instance (J.C.S. v. Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, at *11 [S.D.N.Y. Aug. 5, 2013] [holding that "the law does not require an IEP to adopt the particular recommendation of an expert; it only requires that that recommendation be considered in developing the IEP"]; Watson v. Kingston Sch. Dist., 325 F. Supp. 2d 141, 145 [N.D.N.Y. 2004] [holding that a CSE's recommendation is not necessarily rendered inappropriate by "[t]he mere fact that a separately hired expert has recommended different programming"]). This is particularly so given that the district staff who contributed to the IEP development had been working directly with the student and that, in addition to considering what supports and services the student needed in order to receive educational benefits, the district was mandated to consider placing the student with his nondisabled peers in light of the IDEA's LRE requirements. Thus, to the extent that the parents assert that the CSEs improperly ignored the recommendation for a 1:1 ABA program, the evidence in the hearing record does not lead me to conclude that the CSE's failure to adopt 1:1 ABA programming in the manner preferred by the private experts resulted in a denial of a FAPE to the student.

C. June 2022 IEP

Initially, the June 2022 IEP is the operative IEP to be reviewed in connection with determining whether the district offered the student a FAPE for the 2022-23 school year, as that is the IEP that was in effect when the parents made their initial decision to place the student at ELIJA for the 2022-23 school year (see Bd. of Educ. of Yorktown Cent. Sch. Dist., 990 F.3d at 173; R.E., 694 F.3d at 187-88).

1. Special Factors: Interfering Behaviors (FBA/BIP)

The parents argue that the IHO failed to find that the district's FBA and BIP were "rife with errors" and that the district failed to develop appropriate behavior supports for the student. In addition, the parents assert that the BIP was not developed until August 2022, after the start of the school year.

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 regulations define 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

include[s], 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 regulations, an FBA shall be based on multiple sources of data and must be based on more than the student's history of presenting problem behaviors (8 NYCRR 200.22[a][2]). An FBA must also include a baseline setting forth the "frequency, duration, intensity and/or latency across activities, settings, people and times of the day," so that a BIP (if required) may be developed "that addresses antecedent behaviors, reinforcing consequences of the behavior, recommendations for teaching alternative skills or behaviors and an assessment of student preferences for reinforcement" (8 NYCRR 200.22[a][3]).

Although State regulations call for the procedure of using an FBA when developing a BIP, the Second Circuit has explained 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). 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 (id.).

With regard to the FBA, the parents argue in the request for review that the baseline data was "inaccurately collected" and "no appropriate definitions were established for [the student's]

behaviors." Yet, when expanding upon these assertions in the memorandum of law, the parents indicate that "meaningful data collection" took place in April through early May 2022, however, it was inaccurately reported in the FBA (Parent Mem. of Law at pp. 19-20). The example used by the parents relates to baseline data in the FBA indicating that the student experienced a "high of 7 incidents of physical aggression a day" for a specified time period, which allegedly contradicted the "raw behavior data" indicating that the student had experienced "15 incidents of grabbing" on one particular day within that same time period (id. at p. 20). According to the parents, "grabbing" fell within the "defined behavior of physical aggression on the FBA" (id.). Next, the parents argue that the FBA had a "different definition of 'outbursts' than the data collection sheets," which, according to the parents, made it impossible to directly compare the "two results" (id.).

The district generally denies the parents' allegations with regard to the FBA, and notes that, even if the FBA included errors, such errors were "de minimis at best."

Here, the evidence in the hearing record demonstrates that the district implemented behavioral supports for the student, tracked data on the student's behavior, and responded to increases in maladaptive behaviors by taking more focused data, completing an FBA, and developing a BIP during the 2021-22 school year, and in preparation for the 2022-23 school year at issue.

Initially, the evidence demonstrates that the district completed both an FBA and a BIP for the student in January 2021 (see Tr. 2057, 2060-61; see generally Dist. Exs. 59-60). At the impartial hearing, the district supervisor testified, however, that the student's January 2021 BIP was not implemented during the 2021-22 school year at the parents' request, and was instead changed to a behavior support strategies plan (Tr. at pp. 2061-62; see generally Dist. Exs. 60-61).³⁰

A district BCBA (BCBA 1) testified at the impartial hearing, and explained that while the behavior support strategies plan differed from a BIP in that it did not have target behaviors to increase or decrease or specific goals, she otherwise confirmed that it was similar to a BIP in that the behavior support strategies plan was developed based on the student's January 2021 FBA and ABA principles (see Tr. pp. 1215-17). BCBA 1 testified that the behavior support strategies plan was implemented during the 2021-22 school year, noting further that, "after the first two weeks" of the 2021-22 school year, the "team" met and reviewed the behavior support strategies plan in order to implement the plan (Tr. pp. 1215-16). BCBA 1 testified that she trained the classroom staff on how to implement the behavior support strategies plan and provided ongoing training when she was in the classroom by "working with them utilizing the token economy and the various strategies" (Tr. p. 1218). The evidence in the hearing record also shows that the district began collecting daily data on September 20, 2021, and as staff continued to collect data, BCBA 1 would gather the information at the end of the week and graph the data the following week (see Tr. pp. 1219-22; 1230; Dist. Exs. 69; 71). BCBA 1 explained the data collected with respect to the student's behaviors, noting that in September 2021, there were minimal instances of vocalizations, leaving the designated work area, and verbal protesting, and an increase in yelling and crying toward the end of the month (see Tr. p. 1228; Dist. Ex. 69 at p. 1). In October 2021, BCBA 1 indicated that there were "variable" instances of the student yelling and crying, and a period with

³⁰ The supervisor also testified that the January 2021 BIP was "developed in the school year of 2020-2021 for the upcoming school year of 2021" (Tr. pp. 2060-61).

no instances of leaving the designated work area (see Tr. pp. 1229-30; Dist. Ex. 69 at p. 1). However, in November 2021, BCBA 1 testified that there were "higher but variable instances" of yelling and crying, no instances of threatening vocalizations, but more occurrences of leaving the designated work area (Tr. p. 1231; Dist. Ex. 69 at p. 2). In December 2021, based on the graphed data from November 2021, BCBA 1 testified that she decided to take "ABC data" to determine the function of the student's behavior in order to update the behavior plan with new strategies (Tr. pp. 1231-32; see Dist. Ex. 69 at p. 2).

BCBA 1 further testified that she reviewed the antecedent-behavior-consequence (ABC) data taken in December 2021 and during the first week of January 2022, and thereafter, prepared a "[b]ehavior [m]odification [p]lan (January 2022 behavior modification plan) (see Tr. pp. 1233-34; see generally Dist. Ex. 33). A review of the January 2022 behavior modification plan shows that it identified target behaviors to increase, including in-seat behavior, functional communication skills, and the ability to tolerate others leaving the classroom (see Dist. Ex. 33 at p. 1). The behavior modification plan also identified behaviors to decrease, including outbursts and grabbing others (id.). The behavior modification plan included classroom wide strategies, positive behavioral strategies, individualized strategies, and reactive strategies (id. at pp. 2-3). At the impartial hearing, a second district BCBA (BCBA 2) also testified, and she indicated that data collection under the behavior modification plan began on January 24, 2022 (see Tr. p. 1241; Dist. Ex. 69 at p. 3).³¹

According to BCBA 1, the student exhibited low rates of the targeted behaviors in January 2022, with three days of higher rates exhibited in early February, and then returned to exhibiting low rates overall for February 2022 (see Tr. pp. 1242-43; see Dist. Ex. 69 at p. 3). According to BCBA 1, March 2022 followed a similar pattern with three days of higher rates of outbursts, but other days that included lower instances of both outbursts and grabbing (see Tr. p. 1243; Dist. Ex. 69 at p. 4). With respect to April 2022, BCBA 1 noted that the student had been absent for a week and had one week of school vacation, so "consistency [wa]s difficult"; in addition, BCBA 1 testified that the student exhibited "very high rates of behavior" on two dates, "three or four dates" of behaviors that fell somewhere in the "middle in terms of rates," and there were no "super low rates of behaviors" as previously seen (Tr. p. 1247; see Dist. Ex. 69 at p. 4). She testified that in May 2022, the student did not exhibit any "frequency of behavior higher than seven," and there were a "couple of days where there were no instances" of grabbing, and his outbursts "kind of hung around five occurrences" (Tr. p. 1248). In addition to the daily behavior data collection forms, BCBA 1 testified that she completed "mandate forms," which were her notes on the student's mandated behavioral consultations (Tr. pp. 1263-64; see generally Dist. Ex. 72). According to BCBA 1, these notes helped identify specific behaviors and topics for training and were additional notes and information used to assist in the classroom (see Tr. pp. 1265-84; see generally Dist. Ex. 72).³²

³¹ Evidence in the hearing record reflects that BCBA 2 began working in the district on March 21, 2022, and she was assigned to the student's 8:1+4 special class (see Tr. p. 968).

³² The evidence in the hearing record shows that the district school psychologist also addressed the student's behavior during individual and group counseling sessions, and the psychologist provided the student with behavior and crisis support in the student's classroom "approximately twice a week" (Tr. pp. 159-60, 186, 196;

BCBA 1 also testified that, once the student's behaviors began to spike in March 2022, she and BCBA 2 decided it was necessary to request an "additional FBA," noting further that, "although there was a new b[ehavior] mod[ification plan] in place," the student was exhibiting "occasional high instances" of behaviors, "as well as just overall instances of problem behavior that occurred" (Tr. pp. 1244-45).³³ According to BCBA 1, the FBA included "additional assessments that help[ed] determine the function of the behavior," therefore, the FBA was a "formal assessment rather than just taking ABC data" (Tr. pp. 1245-46). She also testified that BCBA 2 completed the student's FBA (see Tr. p. 1246).

Evidence in the hearing record demonstrates that the parents provided consent for the student's FBA on March 30, 2022, and the FBA was completed on or about May 11, 2022 (May 2022 FBA) (see generally Parent Exs. M; Dist. Ex. 49). A review of the May 2022 FBA shows that it identified the student's targeted behaviors as verbal outbursts, physical aggressions, and eloping (see Parent Ex. M at p. 2). According to the May 2022 FBA, baseline data was "collected via ABC [and] frequency data and direct observation" by BCBA 2 (id.). The FBA further reflects that both BCBA 2 and the classroom teacher completed the "Motivational Assessment Scale" and the classroom teacher and parents both completed the "Functional Assessment Screening Tool" (id.).

As noted in the May 2022 FBA, the hypothesized function of the student's verbal and physical aggression was to escape a situation or gain access to adult attention or a preferred item (see Parent Ex. M at pp. 3-4). The one incident of elopement that occurred during the data collection period was reportedly due to a preferred staff member leaving the classroom (id. at p. 4). At the impartial hearing, BCBA 2 testified that the May 2022 FBA included recommended programs to teach functionally equivalent behaviors, which included functional communication training, teaching the student to independently follow his schedule, teaching the student to communicate effectively with peers and adults, and teaching the student to engage in appropriate leisure activities (see Tr. 1053-60; Parent Ex. M at p. 5). BCBA 2 also developed a BIP, dated June 30, 2022 (June 2022 BIP) based on the information obtained from the May 2022 FBA (see generally Parent Ex. N).

Turning to the parents' arguments, a review of the district's raw data for the week of April 25 through April 29, 2022 used to develop the May 2022 FBA reflects that, consistent with the parents' position, the student exhibited 15 incidents of grabbing others, as compared to the 7 incidents that were reported in the May 2022 FBA as the highest daily frequency (compare Dist. Ex. 71 at p. 21, with Parent Ex. N at p. 2). However, regardless of whether this discrepancy constitutes either a recording error or an overall error in documenting the number of grabbing incidents that occurred on that particular date, such discrepancy does not invalidate the May 2022 FBA. This is especially true where, as here, the FBA identified the behavior to be targeted consistent with State regulations (see 8 NYCRR 200.1[r]). Additionally, a review of the May 2022 FBA reflects its overall compliance with State regulations, as it includes the identification of the problem behaviors, the definition of the behaviors in concrete terms, the identification of the

see generally Dist. Exs. 56-58).

³³ For clarity, there are instances in the hearing record where the student's behavior modification plan was referred to as a "b-mod" plan (see, e.g., Tr. p. 1245).

contextual factors that contribute to the behaviors, and the hypotheses regarding the general conditions under which a behavior usually occurs and probable consequences that serve to maintain it (8 NYCRR 200.1[r]).

Next, a review of the May 2022 FBA reflects that, consistent with the parents' assertion, the targeted behavior identified as verbal outbursts in the May 2022 FBA was defined as "yelling or crying for more than [three] seconds, protesting, or threat[en]ing vocalizations 'I want to hit him,'" but within the raw data collection document, the definition of outbursts included instances of the student "crying [or] yelling, jumping up and down with high intensity and leaving the designated work area" (compare Dist. Ex. 71 at p. 21, with Parent Ex. N at p. 2). At first glance, the different definitions of outbursts as the targeted behavior appears more troubling than the discrepancy noted above, as it makes it difficult to discern whether those responsible for observing and documenting the student's outbursts recorded incidents based on the behavior as defined in the May 2022 FBA or as defined in the raw data collection document. However, evidence in the hearing record demonstrates that, based on previous data collection, the district had already determined that the student engaged in verbal outbursts, i.e., crying or yelling, simultaneously with the physical behavior, i.e., jumping up and down with high intensity or leaving the designated work area, such that the behaviors co-occurred and "never happened separately" (Tr. pp. 1233-36; see Dist. Exs. 33 at p. 1; 71 at p. 2). For example, BCBA 1 testified that, when taking the previous data, there were "no individual instance[s] of him just sitting there crying" (Tr. p. 1236). In addition, the data collection document reflects the same information, noting that "[p]hysical [o]utbursts [we]re always associated with [v]erbal [o]utbursts; however, [v]erbal [o]utbursts may occur in isolation" (Dist. Ex. 71 at p. 9).³⁴

Next, a review of the data collection document reflects that the district documented six distinct behaviors from September 2021 through November 2021: yelling or crying for greater than five seconds, threatening vocalizations, verbal protesting (yelling no or refusal), putting his face or mouth up against another person in an intense manner, grabbing or hitting or kicking, and leaving his designated work area (see Dist. Ex. 71 pp. 1-9). Thereafter, beginning in January 2022,

³⁴ The hearing record shows that from September 2021 to December 2021 data on the student's behavior was collected based on the operational definitions in the February 2021 FBA and undated behavior support strategies document (Tr. p. 1224; Parent Ex. N; see Dist. Exs. 33; 61). The operational definitions included verbal outbursts—crying, yelling, protesting/threatening vocalizations, or perseverating on topics with or without clear environmental stimuli/antecedent for longer than five minutes—and physical outbursts—including jumping up and down with high intensity, leaving the designated work area, grabbing, hitting, kicking, or putting his face/mouth up against another person in an intense manner (Dist. Exs. 59 at p. 3; 71 at pp. 1-9). BCBA 1 testified that although verbal outbursts were a single category in the January 2021 FBA, she "wanted to make sure that [they] were ... tracking each behavior independently because [she] [was not] sure that they were going to co-occur," so she separated crying, yelling, protesting and threatening vocalizations out "in order to individually track them and get better data" (Tr. pp. 1224-25). BCBA 1 testified that based on the graphed data from November 2021, she decided to collect antecedent-behavior-consequence (ABC) data to "help determine the function in order to update the [behavior modification plan] with new strategies (Tr. p. 1232). ABC data was collected from December 1, 2021 through January 7, 2022 (Dist. Ex. 69 at pp 2-3). In January 2022, BCBA 1 developed a new behavior modification plan based on the ABC data (Tr. p. 1232; see Dist. Ex. 33). According to BCBA1, the behavior modification plan now had only two target behaviors because the ABC data showed that the "definition of the outbursts was occurring at the same time ... they never happened separately" (Tr. p. 1236, 1239). The new target behaviors to decrease were outbursts, now described as "any instance of [the student] crying/yelling, jumping up and down with high intensity, and leaving the designated work area," and grabbing others—any instance of the student "seeking out a peer or adult and holding onto them with his hands while wrapping his arms around them in a forceful manner" (Dist. Ex. 33 p. 2).

the district reduced the data collection to two behaviors: outbursts and grabbing others (id. at p. 10).

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 "[t]he [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]).

A 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).

Here, the parents argue that it was impossible to develop an effective BIP based on the faulty FBA; the BIP was not provided to them until August 2022; and the interventions in the BIP were the same as previously used with the student during the 2021-22 school year that had failed to address his maladaptive behaviors.

As explained above, and contrary to the parents' contentions, the discrepancies in the May 2022 FBA do not rise to such a level so as to render the FBA "faulty" or as an inappropriate basis upon which to develop the student's June 2022 BIP. Therefore, the parents' argument on this point must be dismissed.

Next, contrary to the parents' contentions, evidence in the hearing record reveals that the June 2022 BIP was completed prior to the start of the 12-month school year—as it was dated June 30, 2022—however, the BIP was not reviewed with the parents until the August 2022 CSE meeting, after the parents had already unilaterally placed the student at ELIJA and after the student had already begun attending ELIJA for the 2022-23 school year (see Parent Ex. N at p. 1; see also Parent Exs. G at pp. 3; Y at pp. 1-2).

With respect to the parents' allegation that the June 2022 BIP included interventions previously used without success to address the student's behaviors, the weight of the evidence in the hearing record reflects that, during the 2021-22 school year, the student exhibited cyclical behaviors that, as already explained, the district addressed through continuous behavior monitoring and tracking, behavior modification plans and strategies, and by conducting the May 2022 FBA and developing the June 2022 BIP. The weight of the evidence further demonstrates that, although the district may not have extinguished the student's behaviors, the student nevertheless made progress on his annual goals throughout the 2021-22 school year such that any repetition of interventions proposed to address his ongoing behaviors during the 2022-23 school year within the June 2022 BIP was reasonable, given the success the student achieved with the same or similar interventions in the previous school year.

2. Educational Placement

On appeal, the parents raise several concerns related to the district's recommendation of an 8:1+4 special class placement for the student for the 2022-23 school year, however, the majority of those claims focus on the district's failure to recommend a 1:1 ABA program for the student, the student's alleged lack of progress in the 8:1+4 special class placement or alternatively, the student's regression during the 2021-22 school year, whether the 8:1+4 special class placement was a true ABA program, and the district's failure to consider other program options for the student, including a 1:1 ABA program. The parents also contend that the 8:1+4 special class placement was not the student's LRE because the student would not have received any benefit from placement in a mainstream school, and relatedly, the student was not properly grouped with similar peers in the 8:1+4 special class placement because the student was "completely disengaged from the other students."

As already noted, the parents, the education consultant, and two private evaluators recommended that the student attend a 1:1 ABA program and asked the respective CSEs to consider placing the student at ELIJA for the 2022-23 school year based on their collective belief that the student had regressed during the 2021-22 school year in the 8:1+4 special class placement and failed to make progress.

Evidence in the hearing record also demonstrates that, when presented with these opinions and recommendations, the CSEs considered the recommendation for a 1:1 ABA program but rejected the same because, contrary to the parents' belief, the student had made progress in the 8:1+4 special class placement during the 2021-22 school year and the CSEs could not place the student at ELIJA, as it was not the student's LRE and because ELIJA was not a State-approved nonpublic school.

It is well settled that a student's progress under a prior IEP is a relevant area of inquiry for purposes of determining whether an IEP has been appropriately developed, particularly if the parents express concern with respect to the student's rate of progress (see H.C. v. Katonah-Lewisboro Union Free Sch. Dist., 528 Fed. App'x 64, 66-67 [2d Cir. 2013]; Adrianne D. v. Lakeland Cent. Sch. Dist., 686 F. Supp. 2d 361, 368 [S.D.N.Y. 2010]; M.C. v. Rye Neck Union Free Sch. Dist., 2008 WL 4449338, *14-*16 [S.D.N.Y. Sept. 29, 2008]; see also "Guide to Quality Individualized Education Program (IEP) Development and Implementation," Office of Special Educ. Mem. [Revised Sept. 2023], available at

<https://www.nysed.gov/sites/default/files/programs/special-education/guide-to-quality-iep-development-and-implementation.pdf>). The fact that a student has not made progress under a particular IEP does not automatically render that IEP inappropriate, nor does the fact that an IEP offered in a subsequent school year which is the same or similar to a prior IEP render it inappropriate, provided it is based upon consideration of the student's current needs at the time the IEP is formulated (see Thompson R2–J Sch. Dist. v. Luke P., 540 F.3d 1143, 1153-54 [10th Cir. 2008]; Carlisle Area Sch. Dist. v. Scott P., 62 F.3d 520, 530 [3d Cir. 1995]; S.H. v. Eastchester Union Free Sch. Dist., 2011 WL 6108523, at *10 [S.D.N.Y. Dec. 8, 2011]; D. D-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at *12 [E.D.N.Y. Sept. 2, 2011], *aff'd*, 506 Fed. App'x 80 [2d Cir. 2012]; J.G. v. Kiryas Joel Union Free Sch. Dist., 777 F. Supp. 2d 606, 650 [S.D.N.Y. 2011]). Conversely, "if a student had failed to make any progress under an IEP in one year, courts have been "hard pressed" to understand how the subsequent year's IEP could be appropriate if it was simply a copy of the IEP which failed to produce any gains in a prior year (Carlisle Area Sch. Dist., 62 F.3d at 534 [noting, however, that the two IEPs at issue in the case were not identical]; N.G. v. E.L. Haynes Pub. Charter Sch., 2021 WL 3507557, at *9 [D.D.C. July 30, 2021]; James D. v. Bd. of Educ. of Aptakisis-Tripp Cmty. Consol. Sch. Dist. No. 102, 642 F. Supp. 2d 804, 827 [N.D. Ill. 2009]).

As summarized above, the evidence in the hearing record leads me to the conclusion that the student made progress in his 8:1+4 special class placement and special education program during the 2021-22 school year—which included related services, an extended school day, and home-based services—and therefore, the April, June, and August 2022 CSEs' recommendation of a similar, if not the same, special education program for the 2022-23 school year was reasonably calculated to enable the student to make progress appropriate in light of his circumstances.

In describing the 8:1+4 special class placement at the impartial hearing, the district supervisor testified that the class generally had up to eight students, one teacher, and four teaching assistants, but depending upon the students' needs, the class could have additional teaching assistants (see Tr. pp. 2047-48). According to the director, the "8:1+4 program" was "ungraded," and thus, "really focused on what the students require[d] to make progress" with individualized goals and specific needs (Tr. p. 2048). Within the program, students often received small group instruction and "different management systems to support not only academic and goal improvement but also behavior" (*id.*). The supervisor also testified that, to support students' behavior in the 8:1+4 program, the district employed BCBAs who "work[ed] programmatically to support the program in addition to any IEP mandates" (Tr. pp. 2048-49). According to the district supervisor, in March 2022, the district assigned a second BCBA to work programmatically with the 8:1+4 special class placements (see Tr. pp. 2049-50).

The district supervisor further testified that the BCBAs assigned to the 8:1+4 program "visit[ed] the classroom and provide[d] observations," they "observe[d] the student in the environment," and they "consult[ed] with the teacher and the staff, provide[d] any recommendations on how to follow through with a behavior modification plan or behavior strategies, a [BIP]" (Tr. pp. 2048-49). According to the supervisor, the BCBAs' role in the 8:1+4 program was to "utilize data as evidence to formulate behavior plans whether they [we]re [BIP]s, behavior modification plans or even just to implement behavior strategies for all students," and to "provide training for the staff" (Tr. p. 2051). Additionally, BCBAs visited the classroom, observed, and "model[ed] for the staff to demonstrate how they c[ould] implement strategies" (*id.*).

With respect to ABA, the supervisor described it as a "research-based, evidence-based principle" based on observing the "function of a student's behavior and then providing strategies" to increase appropriate behavior and decrease inappropriate behavior, noting further that ABA required "ongoing observations and data collection in order to make those decisions" (Tr. pp. 2051-52). The supervisor testified that the BCBA's assigned to the 8:1+4 program used ABA by conducting "all the observations," collecting data, and formulating plans; in addition, ABA strategies were "integrated through the whole class and also within the behavior plans," including positive reinforcement, token boards, coping strategies that implemented visuals, and functionally equivalent replacement behaviors (Tr. p. 2052). For example, at the impartial hearing, BCBA 1 testified that she when was assigned to the 8:1+4 special classes "programmatically as support," she worked in the classroom—which she referred to as an "ABA-based classroom"—to support the "teacher with any goals or any data sheets or just any overall behavioral concerns within the classroom" (Tr. p. 1204). She also testified that, during the 2021-22 school year, she was in the student's classroom "almost daily," "typically either observing, training the staff on data collection or programs and just an overall support to assist with the [students] and the staff in the classroom" (Tr. pp. 1204-05). BCBA 1 testified that, as part of her job, she provided a group training to the staff in the student's classroom during the 2021-22 school year focusing on the reinforcement and functions of behavior," which reviewed the "types of re[i]nforcement [and] the types of functions of behavior" as "some basic principles of ABA" that she thought were important (Tr. pp. 1206-07; see generally Dist. Ex. 74). BCBA 1 also provided training within the student's classroom during the 2021-22 school year with respect to "overall behavioral strategies for the classroom," which were based on ABA principles (Tr. pp. 1209-10; see generally Dist. Ex. 75).

With respect to the parents' assertion that the 8:1+4 special class placement not a true ABA model, but rather, was an eclectic classroom approach that incorporated methodologies that were not appropriate for the student, the IHO disagreed and found in the decision that the district BCBA's familiar with the program testified that the 8:1+4 special class placement was an ABA classroom that embedded the principles of ABA (see IHO Decision at p. 68). Notably, BCBA 2 described ABA as an "evidence-based practice for improving socially significant behaviors" in students with autism, and included discrete trail training, shaping, modeling, reinforcement strategies, and task analysis (Tr. pp. 982-83). BCBA 2 testified that, when referring to the student's behavior modification plan that was implemented in the 8:1+4 special class placement, the plan included ABA strategies, such as "all of the positive behavioral strategies" and most of the "basic strategies," while further noting that the "[s]chool environment [wa]s clean, [with] limited distractions," and that there was "[s]upervision at all times" (Tr. p. 1023; see Dist. Ex. 33 at p. 2). She also testified that ABA strategies included the use of "[c]lear and concise language" as well as the use of "positive language rather than negative language" (Tr. p. 1023). BCBA 2 explained that the student's behavior modification plan included additional ABA strategies, such as social stories, visual supports, prompting, and using "first then language" (Tr. pp. 1025-29; Dist. Ex. 33 at p. 3). Overall, BCBA 2 testified that the key components of an ABA program included the use of positive behavior supports, which, in this matter, were reflected in the student's behavior modification plan and classroom-wide strategies, as well as the use of reinforcement and the "contingent-based first then language" (Tr. pp. 1108).

Both BCBA 1 and BCBA 2 acknowledged at the impartial hearing that, while not a strict ABA classroom, they viewed the 8:1+4 special class placement was an ABA program because it was based on the principles of ABA (see Tr. pp. 1105-07, 1204). In addition, the owner of the

agency (agency owner) that the district contracted with for BCBAs—a BCBA herself—testified that the BCBAs assigned to the 8:1+4 program consulted in the classroom, trained staff on the principles of ABA, worked with staff to implement class-wide strategies and behavior support plans, collected, analyzed and reviewed data, conducted functional behavioral assessments, created BIPs, and provided programmatic and mandated support depending on student needs (see Tr. pp. 1900, 1907, 1909-10). The agency owner testified that the BCBAs assisted with the creation of the district's 8:1+4 program by meeting with teachers, designing the classrooms, creating visuals, setting up break spaces, creating an "overall environment where [students] could thrive and be successful," and by helping to "develop the classroom based on what you would recommend and things that you would do that [we]re consistent within . . . the ABA model" (Tr. pp. 1911-12). More specifically, when asked what ABA-based strategies were built into the 8:1+4 program, the agency owner testified that "everything that they were doing was ABA based," including "proactives, reactives, . . . , having calm-down areas, having visuals for coping, communication, really focusing on language building, [and providing] opportunities for [students] to express what they need[ed] in the moment," because the "functional communication piece [wa]s huge" and a "big part" of what behavior analysts did (Tr. p. 1912). According to the agency owner, supports for communication included visual schedules, break cards, and token boards, and the BCBAs planned the placement of desks in the classrooms, where visuals were placed on desks, what the class-wide schedule would look like, opportunities for movement breaks, and allowing students different ways to express their knowledge (see Tr. pp. 1912-13). In addition, the BCBAs incorporated ABA-based "reinforcement strategies into everything," which allowed students "to meet with success" and to begin shaping behavior (Tr. pp. 1913-14). The agency owner additionally testified that ABA was not a "one shoe fits all approach," and the BCBAs set up the classrooms to be successful, but then "took time with each of the students to make sure that they had a plan that was also supporting what they needed" (Tr. pp. 1914-15).

While the parents assert that the 8:1+4 program recommendation was not appropriate for the student, the evidence in the hearing record shows that district staff attending the CSE meetings believed that the 8:1+4 special class placement was appropriate because it constituted the student's LRE and had allowed the student to make meaningful progress in all areas during the 2021-22 school year (see Tr. pp. 834, 1957, 2122-23). For example, the evidence reflects that, academically in reading, when the student was administered the "Fountas and Pinnell Reading Benchmark Assessment" in or around March 2022, he read "Level D books at an independent level," with 98 percent accuracy, a 1:4 self-correction ratio, and at an "approaching proficiency" level in reading comprehension (Dist. Ex. 25 at p. 1). The student was also described as the second highest reader in the class, and he showed a strong grasp of sight words and reading comprehension (see Tr. pp. 596-98, 661-62; Dist. Ex. 25 at p. 1). As a comparison, the student was reading at an "independent [] level A" and was "reading at an instructional A/B level" approximately one year earlier when a CSE developed his IEP for the 2021-22 school year in March 2021 (Parent Ex. B at p. 4). In addition, by March 2022, the student had improved his "sight word recognition" and could "identify at least 60 sight words in isolation," and he could "generalize these words when he [wa]s reading books" (Dist. Ex. 25 at p. 1). Similarly, the evidence reflects that the student made progress in writing and mathematics while attending the district's 8:1+4 special class placement during the 2021-22 school year (id. at p. 2).

Next, the evidence in the hearing record reflects that, with regard to "Study Skills," the student knew and followed classroom rules and procedures throughout the school day; he knew

the daily schedule and expectations during each lesson or activity; and he performed classroom activities with adult support for refocusing, redirection, and emotional regulation (Dist. Ex. 25 at p. 2). The student transitioned within the classroom, as well as to and from therapy rooms, and he adapted to changes in the schedule when explained to him ahead of time (id.). Additionally, the student was described as being "very well liked by adults and peers," and it was reported that the student knew the names of the students and adults in the classroom, he "enjoy[ed] greeting his peers and teachers" entering the classroom, and "walked them out of the room when they le[ft]" (id. at p. 3). However, it was also noted that the student could become "upset when someone le[ft] the classroom," and he "benefit[ed] from using 'door tickets' throughout the school day," which provided the student with the "opportunity to walk a teacher out of the classroom, therefore increasing his success with the transition" (id.).

With regard to schoolwork, the evidence indicates that the student "sometimes rushe[d] through" it, but he benefitted from "teacher support to slow down in order to accurately complete his work" (Dist. Ex. 25 at p. 3). The student's "motivation" was described as "variable throughout the school day," and thus, he worked "best when he [wa]s given specific parameters for earning a break" (i.e., first-then statements) (id.). Behaviorally, the student could become "upset" which often manifested as "crying, verbally protesting, and jumping"; he also demonstrated physical behaviors such as "trying to grab others, putting his mouth against others, and light swatting" (id.). According to the evidence, the student benefitted from "taking deep breaths to help regulate his emotions" (id.). The student could "identify his feelings and emotions, as well as coping strategies," and benefitted from "teacher support to help him proactively use his strategies" (id.).³⁵

With respect to LRE considerations, the evidence in the hearing record reflects that the CSEs considered the parents' concerns, as well as the reports and recommendations offered by the private evaluators for a 1:1 ABA program. However, having determined that the 8:1+4 special class placement, together with related services, home-based services, and supplementary aids and services and program modifications, would meet the student's needs in the LRE, the district was not obligated to consider a placement with a smaller class size as the parents have suggested (see, e.g., B.K., 12 F. Supp. 3d at 359 [indicating that "once the CSE determined that a 6:1:1 placement was appropriate for [the student], it was under no obligation to consider more restrictive programs"]; E.F., 2013 WL 4495676, at *15 [explaining that "under the law, once [the district] determined . . . the [LRE] in which [the student] could be educated, it was not obligated to consider a more restrictive environment"; A.D. v. New York City Dep't of Educ., 2013 WL 1155570, at *8 [S.D.N.Y. Mar. 19, 2013] [finding that "[o]nce the CSE determined that [the public school setting] would be appropriate for the [s]tudent, it had identified the [LRE] that could meet the [s]tudent's

³⁵ At the impartial hearing, the district school psychologist responsible for delivering the student's counseling services during the 2021-22 school year testified that, by February 2022, the student could "consistently identify deep breathing as a self-regulation or coping strategy," and by the end of the 2021-22 school year, the student could "consistently identify deep breathing along with taking a break as two self regulation or coping strategies"; as a result the student had achieved the corresponding annual goal in his March 2021 IEP (Tr. pp. 105-06, 149-50, 157-58; Parent Ex. B at p. 11; see Dist. Exs. 28 at p. 6; 66 at p. 3-4). The school psychologist also testified that the student "responded well to coregulation strategies, particularly from [preferred] adults," meaning that the adult would practice the same coping strategy with the student, such as taking deep breaths together (Tr. p. 125). The final progress report for IEP goals for the 2021-22 school year shows that the student achieved all of his social/emotional annual goals (see Dist. Exs. 28 at p. 6; 66 at pp. 3-4).

needs and did not need to inquire into more restrictive options "; T.G. v. New York City Dep't of Educ., 973 F. Supp. 2d 320, 341-42 [S.D.N.Y. 2010]).

3. Related Services

The parents argue that the IHO failed to address the district's failure to appropriately address the student's speech-language needs. More specifically, the parents assert that the district failed to identify the student's primary need in this area, which the parents describe as prominent scripting and echolalia. The district denies the parents' assertions, noting that the IHO found that the district addressed the student's speech-language needs. In addition, the district asserts that it disputes ever observing the student engage in echolalia and, notwithstanding claims made by ELIJA, ELIJA never took data on this behavior or formulated a plan to address it.

An IEP must include a statement of the related services recommended for a student based on such student's specific needs (8 NYCRR 200.6[e]; see 20 U.S.C. § 1414[d][1][A][i][IV]; 34 CFR 300.320[a][4]). "Related services" is defined by the IDEA as "such developmental, corrective, and other supportive services . . . as may be required to assist a child with a disability to benefit from special education" (20 U.S.C. § 1401[26][A]; see 34 CFR 300.34[a]; 8 NYCRR 200.1[qq]).

Initially, I note that, although the parents privately-obtained the December 2021 auditory processing evaluation that was conducted by a speech-language pathologist, the resulting evaluation report did not include any description of the student engaging in either echolalia or scripting to the extent that the student required additional services or annual goals to address these purported needs (see generally Parent Ex. K). In addition, while the private psychologist noted, within the December 2021 neuropsychological evaluation, that the student engaged in echolalia, he found the manifestation of this behavior to be consistent with an autism spectrum disorder, and overall, recommended speech-language therapy to address the student's expressive, receptive, and pragmatics language needs, but did not include any more specific interventions or annual goals to address the echolalia (id. at pp. 1, 7, 12-13).

Additionally, neither the district's October 2020 speech-language reevaluation nor the district's March 2022 speech-language progress report documented concerns specifically related to echolalia or scripting (see generally Dist. Exs. 12; 19).

Here, it is undisputed that the student demonstrated speech-language needs, and it is further undisputed that the student's IEP for the 2022-23 school year included a recommendation for speech-language therapy services, as well as annual goals to address his identified needs (see Parent Exs. C at pp. 8-9, 13, 16; F at pp. 9, 13-14, 16; G at pp. 9-10, 13-14, 16-17). Generally speaking, although the student's IEP for the 2022-23 school year did not include any annual goals targeting the echolalia and scripting reported by ELIJA at the August 2022 CSE meeting, other supports in the IEP were designed to support the student's speech-language needs (see J.B. v. New York City Dep't of Educ., 242 F. Supp. 3d 186, 199 [E.D.N.Y. 2017] [explaining that an IEP need not identify annual goals as the only vehicle for addressing each and every need in order to conclude that the IEP offered the student a FAPE]).

VII. Conclusion

Having determined that the evidence in the hearing record establishes that, consistent with the IHO's determination, the district offered the student a FAPE in the LRE for the 2022-23 school year, the necessary inquiry is at an end and there is no need to reach the issues of whether ELIJA was an appropriate unilateral placement or whether equitable considerations support an award of tuition reimbursement (Burlington, 471 U.S. at 370; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 66 [2d Cir. 2000]).

THE APPEAL IS DISMISSED.

**Dated: Albany, New York
June 20, 2025**

**JUSTYN P. BATES
STATE REVIEW OFFICER**