The University of the State of New York

The State Education Department
State Review Officer
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No. 24-629

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

Appearances:
Gutman Vasiliou, LLP, attorneys for petitioners, by Anthoula Vasiliou, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Samantha Labossiere, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioners (the parents) appeal from a decision of an impartial hearing officer (IHO) which denied their request that respondent (the district) fund the costs of their daughter's tuition at the Manhattan Star Academy School (MSA) for the 2024-25 school year. The appeal must be dismissed.

II. Overview—Administrative Procedures

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

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

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

III. Facts and Procedural History

A CSE convened on January 23, 2024, and, finding the student continued to be eligible for special education as a student with multiple disabilities, developed an IEP with a projected implementation date of February 6, 2024 (see generally Parent Ex. B).[1] The CSE recommended that the student attend an 8:1+1 special class and participate in adapted physical education two times per week and also recommended that the student receive two 40-minute sessions per week

[1] The hearing record contains duplicative copies of the January 2024 IEP (compare Parent Ex. B, with District Ex. 3). For purposes of this decision, only the parents' exhibit will be cited to when referring to the January 2024 IEP. The IHO is reminded that it is her responsibility to exclude evidence that she determines to be irrelevant, immaterial, unreliable, or unduly repetitions (8 NYCCRR 200.5[j][3][xii][c]).

of group counseling services, two 40-minute sessions per week of individual hearing education services, two 40-minute sessions per week of individual occupational therapy (OT), one 40-minute session per week of individual physical therapy (PT), three 40-minute sessions per week of individual speech-language therapy, and a full-time individual paraprofessional behavior support, all on a 12-month basis (id. at pp. 25-26; see Dist. Ex. 4 at pp. 3-4). In terms of "management needs," among other things, the CSE recommended that the student use hearing assistive technology and/or an FM unit, however, the IEP also indicated that a particular device or service to assist students who were deaf or hard of hearing was "Not Applicable," and further indicated that the student did not require an assistive technology device (Parent Ex. B at pp. 6-7).

At the time of the CSE meeting, the student had been unilaterally placed at MSA (Parent Ex. B at pp. 1-2; see Parent Ex. A at p. 3). The January 2024 IEP included a summary of concerns expressed by the student's mother, information from the nonpublic school's progress reports, and staff comments made during the CSE meeting, as well as test results from a district-conducted October 2021 psychoeducational evaluation (Parent Ex. B at pp. 1-6; Dist. Ex. 4 at pp. 4-6; see Dist. Ex. 1). The IEP also noted that an individual listed as the "Older Sister & Translator" attended the CSE meeting, in addition to the student's mother (Parent Ex. B at p. 35).

The hearing record indicates that the district sent the parents a prior written notice and a school location letter on April 4, 2024 (District Exs. 4-5).

The parents subsequently entered into a contract with MSA on April 21, 2024 for the 12-month 2024-25 school year, spanning from July 1, 2024 until June 30, 2025, for the student to attend and receive related services from MSA (Parent Ex. E at pp. 1, 6-7, 14-15).[2] The contract indicated that MSA understood that the parents may seek public funding from the district through due process proceedings, and that the parents would remain responsible to pay any remaining costs of tuition and related services to MSA if the parents were denied all or part of public funding through a final administrative or judicial decision (id. at p. 2).

A second prior written notice and a second school location letter, each dated June 11, 2024, are also included in the record on appeal (Due Proc. Resp. at pp. 3-17). The school location letter recommends a different school location (hereinafter, "school location 2") than the one recommended in the April 2024 school location letter (compare Due Proc. Resp. at p. 9, with Dist. Ex. 5 at p. 1).

The hearing record indicates that the parents sent the CSE a letter, described as a "Ten Day Notice," dated June 17, 2024, notifying the district that they disagreed with the January 2024 IEP because they believed it did not address the student's social skills or behavioral needs, nor did it include assistive technology for the student's hearing loss (Parent Ex. D). The parents further indicated that a staff member from MSA explained at the January 2024 CSE meeting that the student needed behavioral supports and assistance from a board certified behavior analyst (BCBA), but that these recommendations were not made in the January 2024 IEP (id. at p. 1). The parents notified the district that they intended to enroll the student at MSA for the 12-month 2024-25

[2] An additional copy of the contract, translated into Spanish, is included with this exhibit (see Parent Ex. E at pp. 8-15).

school year and seek public funding and/or reimbursement for the cost of tuition, related services, and transportation (id.).

The student's mother visited the district's recommended school location 2 on June 28, 2024 (Parent Ex. I at ¶¶ 17-19). The mother reported that the district school did not offer "any ABA services," the teachers were not trained in working with students with hearing loss, and that the student would be grouped with students with other "IEP classifications" and differing grade levels (id. at ¶ 20).

A. Due Process Complaint Notice

In a due process complaint notice dated July 1, 2024, the parents alleged that the district denied the student a free appropriate public education (FAPE) for the 2024-25 school year (Parent Ex. A). In particular, the parents alleged that they were denied the right to meaningfully participate in the January 2024 CSE meeting because the district failed to provide a Spanish interpreter, resulting in the student's older sister needing to attend and attempt to translate the meeting (id. at p. 4). The parents also contended that the CSE failed to develop appropriate annual goals for the student, in that the goals were unmeasurable, and that the CSE failed to develop short term objectives for the student despite her eligibility for alternate assessment (id.). The parents argued that the IEP failed to address the student's behavioral needs, despite the district being aware of the student's maladaptive behaviors, and despite a staff member from MSA and the student's mother expressing behavioral concerns and the need for a BCBA at the CSE meeting (id. at p. 5). The parents claimed that the student required the support of a BCBA and ABA based instruction, but the January 2024 IEP did not recommend those supports (id. at pp. 4-5). The parents further alleged that the district failed to provide and/or recommend appropriate assistive technology for the student's hearing loss, despite being aware that the student required such assistive technology (id. at p. 5). Finally, the parents asserted that the district had consistently recommended a placement in a district specialized school that could not provide the student the support she required (id. at p. 4). The parents sought, among other things, an order for the district to fund the student's tuition and expenses for the 12-month school year at MSA (id. at p. 6).[3]

B. Impartial Hearing Officer Decision

After a prehearing conference on October 16, 2024 (Tr. pp. 1-8), the parties appeared before an IHO appointed by the Office of Administrative Trials and Hearings (OATH) on September 12, 2024 (Tr. pp. 9-44). The parents requested a Spanish translator for the impartial hearing, and the student's older sister also attended the impartial hearing (Tr. pp. 3, 12-13). At the impartial hearing, the mother waived a word-for-word interpretation of the proceedings, instead asking that only questions directed at her during cross examination or by the hearing officer be translated (Tr. p. 13). The interpreter was given permission to leave the proceedings after the mother finished her testimony (Tr. pp. 24-25).

[3] The parents also sought a pendency placement in the student's then-current educational placement at MSA, the issue of pendency was resolved by agreement between the parties prior to the impartial hearing (Tr. pp. 15-16; Parent Ex. A at pp. 4, 6).

In a decision dated November 14, 2024, the IHO found that the district met its burden to establish that it offered a FAPE to the student for the 2024-25 school year (see generally IHO Decision). With respect to the parents' allegations related to Spanish translation at the January 2024 CSE meeting and their right to meaningful participation, the IHO found that the record did not contain evidence that the parents requested a translator be provided by the district, and that the January 2024 IEP documented the mother's input (id. at p. 6). The IHO also found that the IEP clearly included several "short-term goals" for four of the annual goals, and that each "short-term goal" identified a level of proficiency that the student should attain, and thus, the IEP contained required components for goals (id. at p. 14). With respect to the parents' contentions that the IEP did not adequately address the student's maladaptive behaviors and did not include a recommendation for a BCBA, the IHO noted that an IEP did not need to identify a particular methodology in order to provide a FAPE to a student, and that the lack of a BCBA did not render the IEP inadequate, as it addressed the student's behavior, and it called for an FBA and BIP for the student (id.). The IHO further determined that a neuropsychological evaluation of the student in the hearing record did not recommend a BCBA for the student, but that the behavioral goals, supports, and management needs, including the 1:1 behavioral paraprofessional, that were recommended in the IEP, were consistent with the neuropsychological evaluation's recommendations (id. at p. 10; see Parent Ex. C). The IHO also noted that MSA did not offer ABA services or a 1:1 behavioral paraprofessional (IHO Decision at p. 10). With respect to the student's hearing needs, the IHO found that the January 2024 IEP addressed those needs, as there was no evidence that the district needed to provide the student with hearing aids, and that the IEP recommended an FM unit, as well as included recommendations for the use of hearing aids and hearing education services (id. at p. 14). Regarding the parents' assertion that the school program offered to the student was inadequate, the IHO found that the January 2024 IEP taken as whole provided the student with an opportunity to make meaningful progress, and that the parents' assertions that the assigned school was inadequate because the teachers were inadequately trained was speculative (id.). Based on the foregoing, the IHO denied the parents' requested relief (id. at p. 15).

IV. Appeal for State-Level Review

The parents appeal, alleging that the IHO erred in denying their requested relief. Specifically, the parents contend that the IHO erred in shifting the burden to them regarding the need for a Spanish interpreter at the January 2024 CSE meeting. The parents further contend that the IHO erred in finding that the IEP contained appropriate goals, as 15 out of 19 annual goals did not include short-term objectives, and the annual goals themselves were vague. The parents assert that the IHO erred in finding that the IEP addressed the student's behavioral needs, as the district was required to conduct an FBA and develop a BIP, rather than merely identifying that they were needed, and there was no FBA or BIP in evidence, or listed in the district's prior written notice under evaluations. The parents allege that the CSE did not recommend any evidence-based behavioral supports whatsoever, and that MSA offered "ABA-infused" instruction. The parents further contend that, despite the IEP recommending an FM unit for the student, it did not list the device under the proper field in the document, and that "merely referring to" the assistive technology did not ensure that the district would provide it. The parents argue that there was only a singular hearing-related goal in the IEP, and that the IHO improperly shifted the burden regarding

hearing services. Next, the parents allege that the IHO improperly found that their disagreement with the assigned school was speculative given that the parent testified the public-school did not have staff trained in working with students with hearing loss. Finally, the parents contend that the documents presented by the district at the impartial hearing were inadequate to meet its burden, and that the IHO should have found the student's placement at MSA appropriate.

In an answer, the district responds to the parents' allegations and argues that the IHO's decision should be upheld in its entirety. In particular, the district contends, among other things, that the IEP included numerous references to the mother's input at the January 2024 CSE meeting, despite the lack of a formal translator, and that there is no allegation in these proceedings that the parent did not meaningfully participate. The district further asserts that the goals in the January 2024 IEP were realistic, measurable, and appropriate, and even if more short-term objectives should have been included, the lack of short-term objectives did not amount to a denial of a FAPE. Regarding the student's behaviors, the district argues that the parents' due process complaint notice did not contain any allegations regarding an FBA or a BIP, and therefore the parents' arguments on appeal should be disregarded. The district contends that the student's behavioral deficits were noted, and her behavioral needs were addressed in the IEP. The district also asserts that the CSE recommended hearing education services and hearing assistive technology, despite a particular field not being checked-off in the IEP. The district further contends that the hearing recommendations in the IEP were appropriate, and that the parents' contentions regarding the alleged inadequacy of the school placement were speculative.

V. Applicable Standards

Two purposes of the IDEA (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "'[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP'" (Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). The Supreme Court has indicated that "[t]he IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement" (Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. 386, 399 [2017]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may

cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ. of the Chappaqua Cent. Sch. Dist., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). "The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created" (Endrew F., 580 U.S. at 404). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Endrew F., 580 U.S. at 403 [holding that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"]; Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and

provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).[4]

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

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

VI. Discussion

A. CSE Process: Parent Participation

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]). In addition, the district "must take whatever action is necessary to ensure that the parent understands the proceedings of the [CSE] meeting, including arranging for an interpreter for parents [who are hearing impaired] or whose native language is other than English" (34 CFR 300.322[e]; 8 NYCRR 200.5[d][5]; see also Application of a Student with a Disability, Appeal No. 13-136).

In this case, it is undisputed that the native language of the student's mother, the parent who participated in the CSE meeting, is Spanish. The evidence in the hearing record indicates that an interpreter did not attend the January 2024 CSE meeting. Therefore, to the extent the district's failure to provide interpreter services at the January 2024 CSE meeting in the parents' native language constituted a procedural violation, it must be determined whether such procedural inadequacy significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student (20 U.S.C. §1415[f][3][E][ii]; 34 CFR

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

300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; see MB v. City Sch. Dist. of New Rochelle, 2018 WL 1609266, at *11 [S.D.N.Y. Mar. 29, 2018] [finding that the district's failure to translate all documents considered or issued by the CSEs did not deprive the student of a FAPE where the parent had the opportunity to participate in the development of the IEPs]; Y.A. v. New York City Dep't of Educ., 2016 WL 5811843, at *14 [S.D.N.Y. Sept. 21, 2016] [finding the district's "unresponsiveness to [the parent's] language barrier" deprived the parent of the opportunity to participate in the decision-making process]).

While an interpreter did not attend the January 2024 CSE meeting, the student's mother brought an adult daughter with her who translated at the CSE meeting (Parent Ex. B at p. 35).[5] Further, review of the January 2024 IEP reflects documentation of the mother's concerns related to the student's academic, social, and physical development (id. at pp. 4-5). In addition, the April 2024 prior written notice noted the mother's request for a 1:1 paraprofessional because the student "work[ed] well with a preferred adult" (Dist. Ex. 4 at p. 4). Thus, the IEP and prior written notice document the mother's active participation in the CSE meeting, and the parent has not presented any evidence to rebut this.

Indeed, the hearing record is devoid of evidence demonstrating what, if anything, the parents did not understand about either the development of the January 2024 IEP, the IEP process in general, or how the absence of an interpreter significantly impeded their opportunity to participate in the decision-making process.[6] On appeal, the parents do not point to any evidence in support of this claim, other than asserting that the district had an obligation to provide an interpreter. Thus, the evidence in the hearing record supports that the parents had the opportunity to participate at the January 2024 CSE meeting, and any procedural irregularities did not significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student (20 U.S.C. §1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; see MB, 2018 WL 1609266 at *11-*12; Application of a Student with a Disability, Appeal No. 20-174). Therefore, I find no basis to disturb the IHO's finding that the lack of a translator did not significantly impede the parents' participation or deprive the student of a FAPE for the 2023-24 school year.

B. January 2024 IEP

1. Annual Goals

An IEP must include a written statement of measurable annual goals, including academic and functional goals designed to meet the student's needs that result from the student's disability to enable the student to be involved in and make progress in the general education curriculum; and meet each of the student's other educational needs that result from the student's disability (see 20

[5] In a May 2023 neuropsychological evaluation report included in the hearing record, the student's siblings' ages are listed as 21, 26, and 27 (Parent Ex. C at p. 3).

[6] The parents assert that it was not their burden to prove that they did not understand the meeting; however, as noted, the documentation of the mother's active participation in the meeting is sufficient to satisfy the district's burden, and it was incumbent upon the mother to present evidence to rebut this evidence with testimony regarding her understanding of the meeting or lack thereof, a matter exclusively within her own knowledge.

U.S.C. § 1414[d][1][A][i][II]; 34 CFR 300.320[a][2][i]; 8 NYCRR 200.4[d][2][iii]). Each annual goal shall include the evaluative criteria, evaluation procedures and schedules to be used to measure progress toward meeting the annual goal during the period beginning with placement and ending with the next scheduled review by the committee (8 NYCRR 200.4[d][2][iii][b]; see 20 U.S.C. § 1414[d][1][A][i][III]; 34 CFR 300.320[a][3]).

Here, the January 2024 IEP indicated that the student was deemed eligible for the State alternate assessment program (Parent Ex. B at p. 30). Therefore, due to the student's participation in alternate assessments, the CSE was required to create short-term instructional objectives or benchmarks for the student, which are described as "measurable intermediate steps between the student's present levels of performance and the measurable annual goal" (see 8 NYCRR 200.4[d][2][iv]; see 20 U.S.C. §1414[d][1][A][i][I][cc]; 34 CFR 300.320[a][2][ii]). State guidance describes short-term instructional objectives as the "intermediate knowledge and skills that must be learned in order for the student to reach the annual goal" ("Guide to Quality [IEP] Development and Implementation," at pp. 37-38, Office of Special Educ. [Dec. 2010], available at https://www.nysed.gov/sites/default/files/programs/special-education/guide-to-quality-iep-development-and-implementation.pdf). According to the same State guidance, short-term instructional objectives break down the skills or steps necessary for a student to accomplish an annual goal into discrete components (see "Guide to Quality [IEP] Development and Implementation," at pp. 37-38). Benchmarks are described as "major milestones that the student will demonstrate that will lead to the annual goal;" benchmarks "usually designate a target time period for a behavior to occur" and generally establish "expected performance levels that allow for regular checks of progress that coincide with the reporting periods for informing parents" of progress toward the annual goals (id.). "Short-term instructional objectives and benchmarks should be general indicators of progress, not detailed instructional plans, that provide the basis to determine how well the student is progressing toward his or her annual goal and which serve as the basis for reporting to parents" (id.).

The parents contend on appeal that the annual goals in the student's January 2024 IEP failed to ensure that the student's progress could be measurably tracked throughout the year without short-term objectives, and that the annual goals were vague and unmeasurable.

The January 2024 IEP included 19 annual goals targeting the areas of math, reading comprehension, written expression, transitions, social skills, self-advocacy, executive function, speech-language development, self-regulation, fine motor skills, bilateral coordination, motor planning, coordination, endurance, verbal comprehension, and use of a hearing amplification device (Parent Ex. B at pp. 8-25). Four of the annual goals included three short-term objectives in the areas of math (add and subtract money), reading comprehension (answer multiple choice inferential questions), writing (write one paragraph essay), and transitioning between classroom activities with verbal prompting (id. at p. 8-12). The January 2024 IEP included four social/emotional and behavioral, two speech-language, one executive function, three hearing, three OT, and two PT goals that did not include short-term objectives (id. at pp. 13-19). However, as a whole, the annual goals in the January 2024 IEP had defined criteria, identified the method by which progress would be measured, and identified a schedule for progress monitoring (id. at pp. 8-25).

In this instance, the January 2024 IEP's failure to include short-term objectives for the related services goals was a procedural error. However, even where deficiencies are identified in the annual goals contained in an IEP, inadequate goals in and of themselves are often unlikely to rise to the level of a denial of FAPE. Courts have explained 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 (see J.B. v. New York City Dep't of Educ., 242 F. Supp. 3d 186, 199 [E.D.N.Y. 2017]). In addition, courts generally have been reluctant to find a denial of a FAPE on the basis of an IEP failing to sufficiently specify how a student's progress toward his or her annual goals will be measured when the goals address the student's areas of need (D.A.B. v, New York City Dep't of Educ., 973 F. Supp. 2d 344, 359-61 [S.D.N.Y. 2013]; A.D. v. New York City Dep't of Educ., 2013 WL 1155570, at *10-*11 [S.D.N.Y. Mar. 19, 2013]; J.L. v. City Sch. Dist. of New York, 2013 WL 625064, at *13 [S.D.N.Y. Feb. 20, 2013]; P.K. v. New York City Dep't of Educ. (Region 4), 819 F. Supp. 2d 90, 109 [S.D.N.Y. 2011], aff'd, 526 Fed. App'x 135 [2d Cir. May 21, 2013]).

Here, the annual goals aligned with the student's areas of need and were sufficiently measurable, and clearly defined. Accordingly, the hearing record does not support a finding that the lack of short-term objectives in all of the goals in the January 2024 IEP rose to the level of a denial of a FAPE to the student.

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

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 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]).

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

Here, it is unclear whether the district conducted an FBA or developed and implemented a BIP, as the January 2024 IEP indicates that an FBA was conducted, and a BIP was implemented,

however, there is no FBA report or BIP in the hearing record (see Parent Ex. B at pp. 6, 34). In any event, I note that the January 2024 IEP identified that the student used negative talk, pulled peers' hair, and screamed if a peer bothered her (id. at p. 4). The student was reported to leave her seat, hit, kick, throw objects, and become nonverbal when frustrated (id. at pp. 2, 4). The January 2024 IEP present levels of performance identified techniques to support the student's behavior including pairing nonpreferred activities with preferred activities, providing choices, minimizing attention to minimally disruptive behavior, playful redirection, and prompting (id. at pp. 5-6). The management needs section of the January 2024 IEP identified strategies to address the student's behavior including the use of visual schedules, if/then charts, and verbal praise to increase motivation, access to a "quiet zone" in the classroom for the student to take a break and reduce disruption to the learning of others, shortened tasks, and small group instruction (id. at pp. 5-6). The strategies discussed in the IEP are specific and individualized to meet the student's behavioral challenges.

Furthermore, there were multiple goals identified in the January 2024 IEP to address the student's interfering behavior, including goals that targeted her ability to transition between activities, transition from task to task, improve play skills through participation, take turns, and follow directions and rules, complete non-preferred tasks by requesting assistance, identify her feelings and coping strategies, and improve self-regulation and frustration tolerance when presented with challenging or nonpreferred activities by using strategies from a sensory toolbox (Parent Ex. B at pp. 3-15, 18-19). In addition, under "student needs relating to special factors," the IEP indicated that the student needed strategies, including positive behavior interventions, supports, and other strategies to address behaviors that impeded the student's learning or that of others (id. at p. 6). Finally, the IEP recommended that the student receive support from a one-to-one paraprofessional throughout the day to address the student's behavior (id. at p. 26; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *5, *8 [finding that, even in the absence of both an FBA and a BIP, provision of a 1:1 paraprofessional can render an IEP adequate where there is evidence that the 1:1 paraprofessional would provide "significant benefits . . . in addressing the problematic behaviors"], quoting T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 419 [2d Cir. 2009]).

While no FBA or BIP documents were submitted into evidence, the January 2024 IEP reflected the student's behavioral needs, strategies to address those needs, and goals to measure progress toward improving her behavior (Parent Ex. B at pp. 5-6, 11-15, 18-19).[7]

Related to the student's behaviors, the parents allege that the IHO erred in finding that the IEP did not need to identify a particular methodology in order to offer a FAPE, arguing that CSE should have recommended ABA methodology. Generally, an IEP is not required to specify the methodologies used with a student and the precise teaching methodologies to be used by a student's teacher are usually a matter to be left to the teacher's discretion—absent evidence that a specific

[7] To the extent the district planned in the future to conduct an FBA and develop a BIP, the parent argues that the FBA was required to be conducted in advance of the CSE meeting; however, it has been held that "in some instances, delaying an FBA until a child commences the recommended educational environment is not considered a serious procedural violation that constitutes a denial of FAPE" (Bd. of Educ. of Wappingers Cent. Sch. Dist. v. M.N., 2017 WL 4641219, at *11 [S.D.N.Y. Oct. 13, 2017]), citing Cabouli v. Chappaqua Cent. Sch. Dist., 202 F. App'x 519, 522 [2d Cir. Oct. 27, 2006]).

methodology is necessary (Rowley, 458 U.S. at 204; R.B. v. New York City Dep't of Educ., 589 Fed. App'x 572, 575-76 [2d Cir. Oct. 29, 2014]; A.S. v. New York City Dep't of Educ., 573 Fed. App'x 63, 66 [2d Cir. July 29, 2014]; K.L. v. New York City Dep't of Educ., 530 Fed. App'x 81, 86 [2d Cir. July 24, 2013]; R.E., 694 F.3d at 192-94; M.H., 685 F.3d at 257). As long as any methodologies referenced in a student's IEP are "appropriate to the [student's] needs," the omission of a particular methodology is not necessarily a procedural violation (R.B., 589 Fed. App'x at 576 [upholding an IEP when there was no evidence that the student "could not make progress with another methodology"], citing 34 CFR 300.39[a][3] and R.E., 694 F.3d at 192-94). Indeed, a CSE should take care to avoid restricting school district teachers and providers to using only the specific methodologies listed in a student's IEP unless the CSE believes such a restriction is necessary in order to provide the student a FAPE. However, when the use of a specific methodology is required for a student to receive an educational benefit, the student's IEP should so indicate (see, e.g., R.E., 694 F.3d at 194 [finding an IEP substantively inadequate where there was "clear consensus" that a student required a particular methodology, but where the "plan proposed in [the student's] IEP" offered "no guarantee" of the use of this methodology]). If the evaluative materials before the CSE recommend a particular methodology, there are no other evaluative materials before the CSE that suggest otherwise, and the school district does not conduct any evaluations "to call into question the opinions and recommendations contained in the evaluative materials," then, according to the Second Circuit, there is a "clear consensus" that requires that the methodology be placed on the IEP notwithstanding the testimonial opinion of a school district's CSE member (i.e. school psychologist) to rely on a broader approach by leaving the methodological question to the discretion of the teacher implementing the IEP (A.M. v. New York City Dep't of Educ., 845 F.3d 523, 544-45 [2d Cir. 2017]).

The parent points to recommendations in a May 2023 private neuropsychological evaluation report to support her position that the IEP should have recommended ABA methodology (see Parent Ex. C). However, it is not clear from the hearing record that the neuropsychological evaluation was provided to the district for consideration at the January 2024 CSE meeting. Even if the evaluation had been available to the CSE, however, it did not indicate that ABA methodology was necessary for the student but instead, without elaboration, recommended instruction "infused with ABA principles" (id. at p. 10).

The IEP noted the parents' view that the student require[d] a school that is similar to [MSA] where she would need," among other features, "a BCBA" (Parent Ex. B at p. 34). The IEP and hearing coordinator from MSA testified that ABA was not a "service" provided at MSA, but that the methodology was embedded into the program by having a BCBA train staff on different ABA methods to incorporate into classroom instruction (Tr. pp. 29-30; Parent Ex. H ¶ 7). In addition, the MSA hearing coordinator testified that the student needed wait time, positive encouragement and reinforcement, the use of timers, ignoring of negative behaviors and reinforcement of positive behaviors which are "ABA-based" interventions (Tr. pp. 33-34).

While the January 2024 IEP did not specify that the student should receive ABA methodology, it included several of the supports similar to the "ABA-based" interventions identified by the MSA hearing coordinator such as pairing nonpreferred with preferred tasks, visual schedules, if/then charts, and verbal praise to increase motivation (Parent Ex. B at pp. 5-6).

Overall, there is no basis in the hearing record to disturb the IHO's finding that the January 2024 IEP was reasonably calculated to enable the student to receive educational benefit with respect to the student's behavioral needs, notwithstanding the lack of an FBA or BIP in the record and the lack of a recommendation for ABA methodology.

3. Special Factors: Assistive Technology & Hearing Services

The parents contend on appeal that the January 2024 IEP did not address the student's hearing needs with respect to assistive technology due to the district not checking off "yes" that the student needed an assistive technology device and/or service under "Student Needs Relating to Special Factors" (see Parent Ex. B at pp. 5-6) The parents further assert that the student's need for assistive technology related to her hearing loss is not listed under "Assistive Technology Devices and/or Services."

For a student who is deaf or hard of hearing, the CSE must consider "the communication needs of the student" and "opportunities for direct communication with peers and professional personnel in the student's language and communication mode, academic level, and full range of needs, including opportunities for direct instruction in the student's language and communication mode" (8 NYCRR 200.4[d][3][iv]; see 20 U.S.C. § 1414[d][3][B][iv]; 34 CFR 300.324[a][2][iv]).

Another special factor that a CSE must consider is whether "requires assistive technology devices and services, including whether the use of school-purchased assistive technology devices is required to be used in the student's home or in other settings in order for the student to receive a [FAPE]" (8 NYCRR 200.4[d][3][v]; see 20 U.S.C. § 1414[d][3][B][v]; 34 CFR 300.324[a][2][v]; see also Educ. Law § 4401[2][a]). Federal and State regulations describe an assistive technology device as "any item, piece of equipment, or product system, whether acquired commercially off the shelf, modified, or customized, that is used to increase, maintain, or improve the functional capabilities of a child with a disability" and assistive technology service as "any service that directly assists a child with a disability in the selection, acquisition, or use of an assistive technology device" (34 CFR 300.5, 300.6; 8 NYCRR 200.1[e]; [f]). Furthermore, State regulations consider assistive technology services to be a related service defined as a "developmental, corrective, and other supportive services as are required to assist a student with a disability" (8 NYCRR 200.1[qq]).[8] The failure to recommend specific assistive technology

[8] Examples of the term assistive technology service include:

> (1) the evaluation of the needs of a student with a disability, including a functional evaluation of the student in the student's customary environment;
>
> (2) purchasing, leasing, or otherwise providing for the acquisition of assistive technology devices by students with disabilities;
>
> (3) selecting, designing, fitting, customizing, adapting, applying, maintaining, repairing, or replacing assistive technology devices;
>
> (4) coordinating and using other therapies, interventions, or services with assistive technology devices, such as those associated with existing education and rehabilitation plans and programs;
>
> (5) training or technical assistance for a student with a disability or, if appropriate,

devices and services rises to the level of a denial of a FAPE only if such devices and services are required for the student to access his educational program (see, e.g., Application of the Bd. of Educ., Appeal No. 13-214; Application of a Student with a Disability, Appeal No. 11-121).

Additionally, 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]).

The January 2024 IEP indicated that the student had a diagnosis of hearing loss and documented information from the parent that the student wore a hearing aid at home (Parent Ex. B at pp. 4-5). Review of the January 2024 IEP shows that CSE identified the student's need for "hearing assistive technology/FM unit to improve the loudness of voice sound over background noise" in the management needs section of the IEP (id. at pp. 5-6). Furthermore, the CSE recommended that the student receive two sessions per week of individual hearing education services and included goals related to the student's willingness to wear a hearing amplification device during therapy sessions and ability to demonstrate comprehension in noisy environments (id. at pp. 7, 22-24, 26). Although the January 2024 IEP did not indicate the student's need for device or service in consideration of the student's language and communication needs or the student's need for assistive technology in the special factors section of the IEP, or in the assistive technology devices and/or services section of the IEP, the IEP otherwise noted the student's need for an FM unit and moreover reflected the CSE's recommendation that the student receive individual hearing education services and related annual goals.

While the student's hearing-related service and assistive technology needs were not set forth in the particular portion of the IEP dedicated to that purpose, they were nonetheless noted and recommended in the IEP. Under these circumstances, the omission of the recommendations from the particular section of the IEP does not amount to a denial of a FAPE. To hold otherwise "would exalt form over substance" (M.H. v. New York City Dep't of Educ., 2011 WL 609880, at *11 [S.D.N.Y. Feb. 16, 2011] [finding an IEP appropriate, notwithstanding that a recommendation was omitted from the IEP because of a clerical error, where the recommendation appeared in the CSE meeting minutes and was reflected in the conduct of the parties]; see Mason v. Carranza, 2023 WL 6201407, at *13 [E.D.N.Y. Sept. 22, 2023], reconsideration denied, 2024 WL 3624058 [E.D.N.Y. Aug. 1, 2024]). Accordingly, there is no basis to disturb the IHO's finding that the IEP was adequate with respect to addressing the student's hearing needs.

> that student's family; and
>
> (6) training or other technical assistance for professionals (including individuals providing education or rehabilitation services), employers, or other individuals who provide services to, employ, or are otherwise substantially involved in the major life functions of that student

(8 NYCRR 200.1[f]).

C. Assigned Public School Site

Generally, the sufficiency of the program offered by the district must be determined on the basis of the IEP itself (R.E., 694 F.3d at 186-88). The Second Circuit has explained that "[s]peculation that the school district will not adequately adhere to the IEP is not an appropriate basis for unilateral placement" (id. at 195; see E.H. v. New York City Dep't of Educ., 611 Fed. App'x 728, 731 [2d Cir. May 8, 2015]; R.B. v. New York City Dep't of Educ., 603 Fed. App'x 36, 40 [2d Cir. Mar. 19, 2015] ["declining to entertain the parents' speculation that the 'bricks-and-mortar' institution to which their son was assigned would have been unable to implement his IEP"], quoting T.Y., 584 F.3d at 419; R.B. v. New York City Dep't of Educ., 589 Fed. App'x 572, 576 [2d Cir. Oct. 29, 2014]). However, a district's assignment of a student to a particular public school site must be made in conformance with the CSE's educational placement recommendation, and the district is not permitted to deviate from the provisions set forth in the IEP (M.O. v. New York City Dep't of Educ., 793 F.3d 236, 244 [2d Cir. 2015]; R.E., 694 F.3d at 191-92; T.Y., 584 F.3d at 419-20; see C.F. v. New York City Dep't of Educ., 746 F.3d 68, 79 [2d Cir. 2014] [holding that while parents are entitled to participate in the decision-making process with regard to the type of educational placement their child will attend, the IDEA does not confer rights on parents with regard to the selection of a school site]). The Second Circuit has held that claims regarding an assigned school's ability to implement an IEP may not be speculative when they consist of "prospective challenges to [the assigned school's] capacity to provide the services mandated by the IEP" (M.O., 793 F.3d at 245; see Y.F. v. New York City Dep't of Educ., 659 Fed. App'x 3, 6 [2d Cir. Aug. 24, 2016]; J.C. v. New York City Dep't of Educ., 643 Fed. App'x 31, 33 [2d Cir. 2016]; B.P. v. New York City Dep't of Educ., 634 Fed. App'x 845, 847-49 [2d Cir. 2015]). Such challenges must be "tethered" to actual mandates in the student's IEP (see Y.F., 659 Fed. App'x at 5). Additionally, the Second Circuit indicated that such challenges are only appropriate, if they are evaluated prospectively (as of the time the parent made the placement decision) and if they were based on more than "mere speculation" that the school would not adequately adhere to the IEP despite its ability to do so (M.O., 793 F.3d at 244). In order for such challenges to be based on more than speculation, a parent must allege that the school is "factually incapable" of implementing the IEP (see Z.C. v. New York City Dep't of Educ., 2016 WL 7410783, at *9 [S.D.N.Y. Nov. 28, 2016]; L.B. v. New York City Dept. of Educ., 2016 WL 5404654, at *25 [S.D.N.Y. Sept. 27, 2016]; G.S. v. New York City Dep't of Educ., 2016 WL 5107039, at *15 [S.D.N.Y. Sept. 19, 2016]; M.T. v. New York City Dep't of Educ., 2016 WL 1267794, at *14 [S.D.N.Y. Mar. 29, 2016]). Such challenges must be based on something more than the parent's speculative "personal belief" that the assigned public school site was not appropriate (K.F., 2016 WL 3981370, at *13; Q.W.H. v. New York City Dep't of Educ., 2016 WL 916422, at *9 [S.D.N.Y. Mar. 7, 2016]; N.K. v. New York City Dep't of Educ., 2016 WL 590234, at *7 [S.D.N.Y. Feb. 11, 2016]).

The parent contends on appeal that, as the mother testified that she learned during her visit to school location 2 in June 2024 that the assigned school's teachers were not trained in working with students with hearing loss, the IHO erred in finding that the parents' disagreement with the school placement was speculative (see Parent Ex. I at ¶ 20). The parent contends that the lack of staff training in hearing loss meant that the school was unable to implement the student's hearing services in the January 2024 IEP.

To the extent the parent asserts that the student's teachers were not adequately qualified to address his needs, the IDEA requires that services must be provided by appropriately certified or licensed personnel (8 NYCRR 200.6[b][1]). A state has broad discretion in establishing and enforcing the training and certification standards under which students with disabilities are to be provided with a FAPE; however, courts have recognized that the proper inquiry when challenging the district's provision of special education services by properly trained staff is "whether the staff is able to implement the IEP" (S.H. v. Eastchester Union Free Sch. Dist., 2011 WL 6108523, at *12 [S.D.N.Y. Dec. 8, 2011]; see L.K. v. Dep't of Educ., 2011 WL 127063, at *11 [E.D.N.Y. Jan. 13, 2011]). The inquiry addresses whether the personnel are able to implement the IEP, not whether they have specific training in teaching students with the student's disabilities (Ganje v. Depew Union Free Sch. Dist., 2012 WL 5473491, at *11 [W.D.N.Y. Sept. 26, 2012], adopted at 2012 WL 5473485 [W.D.N.Y. Nov. 9, 2012]).

While the student's mother alleged in her testimony that the district's teachers themselves were not currently trained in working with students with hearing loss, there is no indication in the record that this equated to the assigned school being unable to implement hearing services for the student in line with the January 2024 CSE's recommendations.. Thus, I find no reason to disturb the IHO's findings that the parents' disagreement with the district school placement was speculative.

VII. Conclusion

In sum, I find no basis to disturb the IHO's findings that the district met its burden, through the documents it entered into the record during the impartial hearing, in establishing that it offered the student with a FAPE for the 2024-25 school year.

I have considered the parties' remaining contentions and find the necessary inquiry at an end.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
April 24, 2025

SARAH L. HARRINGTON
STATE REVIEW OFFICER